

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

[Coram: Egonda-Ntende, Barishaki Cheborion, Mutangula Kibeedi, JJA]

CRIMINAL APPEAL No. 541 of 2015

(Arising from High Court Criminal Session No. 033 of 2012 at Mukono)

BETWEEN

Mwebaze Ivan=====Appellant

AND

Uganda=====Respondent

*(An appeal from the judgement of the High Court of Uganda (Mukasa, J),
delivered on 24th February 2014 at Mukono)*

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted and convicted of the offence of aggravated defilement contrary to sections 129 (3) and 4 (a) of the Penal Code Act. The particulars of the offence were that the appellant on the 7th day of September 2011 at Bujiji village in Mukono district unlawfully had sexual intercourse with Nanziri Justine a girl aged 9 years knowingly that he was HIV positive. The learned trial Judge sentenced the appellant to 32 years' imprisonment. Dissatisfied, the appellant has appealed against the sentence on the following single ground:

'That the Learned trial judge erred in law and fact when sentenced the Appellant to a harsh sentence of 32 years imprisonment which was manifestly excessive thus occasioning a miscarriage of justice.'

[2] The respondent opposed the appeal.

Analysis

- [3] At the hearing the appellant was represented by Ms. Faith Lachyiva and the respondent by Mr. Oola Sam, Senior Assistant Director of Public Prosecutions in the Office of the Director, Public Prosecutions. Both counsel filed written submissions.
- [4] Counsel for the appellant submitted that the sentence imposed against the appellant was harsh and requested this court to re-evaluate the mitigating factors and aggravating factors and give the appellant a lenient sentence. Counsel for the appellant implored this court to consider and follow its precedents where the sentences of aggravated defilement have been reduced on appeal to this court on the ground of being excessive. Counsel for the appellant relied on Ngobya v Uganda [2018] UGCA 48 where the appellant was indicted and convicted of aggravated defilement and sentenced to 37 years' imprisonment and this court reduced the sentence to 15 years imprisonment. Counsel for the appellant submitted that the Supreme Court in Aharikundira v Uganda [2018] UGSC stated that courts have to take into the need for uniformity and consistence in sentencing.
- [5] Counsel for the appellant prayed that this court allows the appeal, vary the harsh sentence handed down to the appellant, take into account the authorities relied upon and impose an appropriate sentence for the appellant.
- [6] In reply, counsel for the respondent submitted that the principles under which an appellate court can interfere with a sentence imposed by the trial court are set out in Rwabugande v Uganda [2017] UGSC 8. Counsel for the respondent argued that this court does not alter a sentence on the mere ground that if it had tried the appellant, it might have imposed a different sentence. Counsel was of the view that it is a basic principle of sentencing that the sentence imposed must fit the offence as well as the offender and that the aggravating factors have to be weighed against the mitigating factors. Counsel for the respondent argued that the trial court considered all the material factors before imposing the sentence.
- [7] Counsel for the respondent further submitted that much as courts are enjoined to consider previous sentences passed in similar offences committed under

similar circumstances, the manner in which the offence was committed must be put into consideration and that it is not enough to merely consider the age of the victim and the convict. Counsel for the respondent was of the view that court must guard against sentencing being a mere academic or mechanical exercise.

- [8] Counsel for the respondent concluded by submitting that the sentence of 32 years against the appellant is appropriate in the circumstances, counsel prayed that the sentence be upheld and the appeal be dismissed.

Analysis

- [9] This Court will only interfere with a sentence imposed by a trial Court only where the sentence is illegal, or founded upon a wrong principle of the law. It will equally interfere with a sentence, where the trial Court has not considered a material factor in the case; or has imposed a sentence which is harsh and manifestly excessive in the circumstances. See Bashir Ssali v Uganda [2005] UGSC 21, Ninsiima Gilbert v Uganda [2014] UGCA 65, Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 143 of 2001 (unreported) and Livingstone Kakooza v Uganda [1994] UGSC 17.
- [10] The facts of this case are that the appellant rented a room at the back of the same house where the victim's family resided in Bujiji village Mukono district. The victim was Nanziri Justine aged 9 years. On 7th September 2011 at around 9:00 am, the victim was at her home with her siblings when the appellant called her. Her parents were away. When the victim went to the appellant, he led her by her hand to his single room, laid her on the mattress and defiled her while holding onto her mouth so that she could not scream. The victim's father found the appellant in the process of the act and raised an alarm leading to the arrest of the appellant. Upon medical examination, the appellant was found to be HIV positive.
- [11] The appellant's mitigation factors were that he was 29 years old and capable of reform. The appellant had been on remand for 2 years and 5 months. He was repentant and remorseful and had elderly parents who depended on him. He prayed for a lenient sentence of 15 years' imprisonment. The aggravating

factors were that the appellant had abused the family's friendship. The victim was only 9 years at the time of the offence. The offence was rampant in the area. The appellant was HIV positive.

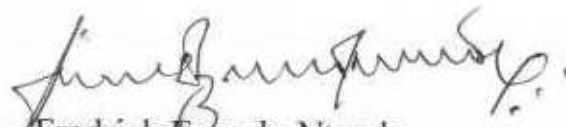
- [12] We also note that there is need for parity in sentencing. In Ederema Tomasi v Uganda [2019] UGCA 203, the appellant was convicted of aggravated defilement contrary to sections 129 (3), (4) (b) and (c) of the Penal Code Act and sentenced to 25 years' imprisonment. The appellant was HIV positive and the victim had tested HIV positive at the time of the trial. On appeal, this court reduced the sentence to 18 years' imprisonment.
- [13] In Olara v Uganda [2013] UGCA 30, the appellant was convicted of the offence of aggravated defilement contrary to sections 129 (3) and 4 (a) and (b) the Penal Code Act and sentenced to 16 years' imprisonment. In this case, the victim was 8 years old, the appellant was 31 years old and HIV positive. While upholding the sentence of the trial court, this court was of the view that on those considerations alone the sentence could have been even higher.
- [14] In Dratia v Uganda [2016] UGCA 31, the sentence of 20 years' imprisonment was substituted with 18 years' imprisonment. The appellant had been convicted of aggravated defilement contrary to Section 129 (3) and (4) of the Penal Code Act. The considerations were that the appellant was a guardian to the victim who was between the age of 12 to 13. The appellant was 33 years old, and HIV positive.
- [15] In Kisembo v Uganda [2014] UGCA 53, the appellant was convicted of the offence of aggravated defilement contrary to sections 129 (3) & (4) (a) & (b) of the Penal Code Act and sentenced to life imprisonment. The appellant was HIV positive and the victim was 4 years old. On appeal, the sentence was substituted with 18 years' imprisonment.
- [16] In Asega Vs Uganda [2016] UGCA 24, the appellant was convicted on two counts of aggravated defilement contrary to Section 129 (3) and (4) (a) and (b) of the Penal Code Act. He was sentenced to 30 years' imprisonment in respect of each count, the sentences to run concurrently. The appellant had defiled two minors aged 9 years and 6 years. On appeal to this court, the sentence of 30 years' imprisonment was upheld.

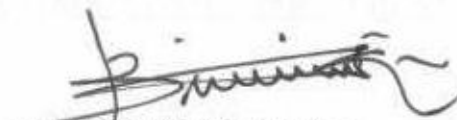
[17] We are satisfied that sentence imposed against the appellant was harsh and excessive. The appeal against sentence succeeds.


Decision

[18] We find that under the circumstances of this case, a term of imprisonment of 17 years would meet the ends of justice. We deduct the period of 2 years and 5 months the appellants spent in pre-trial detention. We accordingly sentence the appellant to 14 years 7 months to be served from 24th February 2014, the date of conviction.

Dated, signed and delivered at Mbale this 15th day of September 2020.


Fredrick Egonda-Ntende
Justice of Appeal


Barishaki Cheborion
Justice of Appeal


Muzamiru Mutangula Kibeedi
Justice of Appeal