

**THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA  
SITTING AT MBALE**

**(Coram: Egonda Ntende, Cheborion Barishaki, Muzamiru Kibeedi, JJA)**

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**CRIMINAL APPEAL NO.524 OF 2016**

**KAYONGO SADAM ::: APPELLANT**

**VERSUS**

10 **UGANDA ::: RESPONDENT**

*[Arising from the decision of the High Court of Uganda (Hon. Lady Justice Mutonyi Margaret) sitting at Mukono dated 20/12/2016 in Criminal Case No.211 of 2016]*

**JUDGMENT OF THE COURT**

15 The appellant was indicted before the High Court for the offence of Aggravated Defilement contrary to Sections 129 (3) & (4) (a) of the Penal Code Act. The particulars of the offence stated that the appellant on the 05<sup>th</sup> of June 2015 at Kiteredde Village, in Mukono District, performed a sexual act with Babirye Victor, a girl aged 6 years.

20 The appellant pleaded guilty to the offence and was sentenced to 20 years' imprisonment in accordance with the Plea Bargain Agreement (PBA) that he had entered into with the Prosecution.

With leave of court, the appellant now appeals to this court against sentence only on the following ground:

25 1. That the Learned Trial Judge erred in law when she sentenced the Appellant to Twenty (20) years of imprisonment which sentence was manifestly harsh and excessive.

### Representations.

30 At the hearing of the appeal, Mr. Nanguru Eddie appeared for the appellant while Ms. Joanita Tumwikirize from the Office of the Director of Public Prosecutions appeared for the respondent.

Both parties filed written submissions which they adopted when the appeal came up for hearing.

### 35 Appellant's Arguments.

Counsel argued that the Learned Trial Judge convicted the Appellant and sentenced him to 20 years' imprisonment on his own plea of guilty which sentence was manifestly harsh and excessive.

40 Counsel submitted that the trial judge admitted the PBA on the terms presented without considering the mitigating factors to wit: the appellant was a first time offender, he was remorseful, had pleaded guilty to save the courts time and resources and was 45 years of age.

45 Counsel argued that if the above mitigating factors had been considered by the trial judge they would have warranted the grant of a more lenient sentence.

Counsel quoted the cases of **Agaba Job Vs Uganda, Court of Appeal Criminal Appeal No. 230 of 2003** where this court upheld a sentence of ten years imprisonment of the appellant who had pleaded guilty to the offence of aggravated defilement of a six year old girl, and **Abot Richard Vs Uganda, Court of Appeal Criminal Appeal No.190 of 2004** where this court upheld

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a sentence of eight years' imprisonment for the appellant who had been convicted of aggravated defilement of a 13 year old girl but had spent three years on remand before sentence.

55 Counsel concluded by inviting this court to consider the mitigating factors in light of the sentencing guidelines and the sentencing practice of this court in offences of a similar nature and the fact that the appellant had spent 5 years in custody.

60 Counsel prayed that this court does allow the appeal, set aside and/or quash the custodial term and issue a considerable sentence in the interest of justice and fairness.

#### **Respondent's Arguments.**

65 Counsel for the respondent opposed the appeal. Counsel submitted that the sentence of 20 years' imprisonment for the offence of Aggravated Defilement of a 6-year-old girl was not in any way harsh or excessive. That the appellant in the instant case had voluntarily pleaded guilty to the offence charged and agreed to be sentenced to the present term of imprisonment pursuant to the PBA.

70 Counsel further submitted that the PBA was not one sided but that all necessary parties involved were in agreement and signed it, and that if the appellant did not consider the sentence of 20 years excessive at the time, it is quite contradictory that he now thinks it to be excessive and harsh.

Furthermore, Counsel submitted that page 12 of the Record of Proceedings is evidence that the Honourable trial Judge took note of the mitigating factors that the appellant did not waste courts time and was remorseful, and after

75 considering them, she endorsed the sentence of 20 years to be appropriate as decided by the appellant and his counsel.

Counsel prayed that the sentence be upheld and the appeal dismissed.

### **Consideration of the Appeal.**

80 The fundamental issue raised by this appeal is whether the appellant, after being convicted and sentenced by the trial court to a term that he had agreed upon with the prosecution under the PBA, can lawfully turn around and challenge or otherwise complain by way of appeal that the sentence is manifestly harsh and excessive.

85 The law that governs the rights and procedures of the plea bargain process is the Judicature (Plea Bargain) Rules, 2016 (S.I. No. 43 of 2016). Rule 12 (1)(g) thereof imposes an obligation on the court when recording a PBA to inform the accused person of his or her rights and to satisfy itself that the accused understands *inter alia*:

90 *"...that by entering into a PBA, he or she is waiving the right to appeal except as to the legality or severity of sentence or if the judge sentences the accused outside the agreement."*

Said differently, the PBA is not a bar to an appeal against a sentence passed by court pursuant to the PBA provided the appeal is restricted to three areas only, namely:

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- Legality of the sentence, or
  - Severity of the sentence, or
  - A sentence outside the PBA.

The instant appeal is against the severity of the sentence. The duty of this court when considering appeals against sentences only is now settled. As far  
100 as is relevant to the instant case, this court stated in Muwonge Fulgensio Vs Uganda, Court of Appeal Criminal Appeal No. 586 of 2104 thus:

105 *".. that even in appeals against sentence only, this court must reappraise the material before it and make up its mind on whether the sentence in question can be sustained. The discretion to pass an appropriate sentence lies with the trial Court with the appellate Courts playing only an assessment role to ensure that the sentence imposed complies with certain well-set legal requirements."*

The complaint of the appellant is that the sentence of 20 years' imprisonment was manifestly harsh and excessive as the trial judge did not  
110 consider the mitigating factors, the sentencing guidelines and the sentencing practice of this court in offences of a similar nature, and the fact that the appellant had spent 5 years in custody.

The respondent's counsel disagreed.

As far as the mitigating factors complained about are concerned, there is no  
115 basis to fault the trial court. Pages 11 & 12 of the Record of Proceedings of the trial court **indicates that** the mitigating factors considered by parties while bargaining the PBA which was eventually endorsed by the trial court were that the appellant is "a first offender, pleaded guilty under the plea bargain arrangement hence saving court's time and resources in conducting  
120 a full trial. [Appellant also] demonstrated honesty and remorse for crime committed and [was] willing to serve sentence".

So by endorsing the PBA "as is" implicitly the trial court had considered the mitigating factors that had been raised by the parties at the trial stage.

125 However, the appellant has a valid point in respect of the non consideration  
of the time the appellant had spent on remand and the non-compliance with  
the principles of uniformity and consistence in sentencing. These are  
questions of law and even where parties have entered into a PBA, the Court  
of law does not transform into a rubber stamp. It maintains its role to ensure  
130 that the law is complied with, failing which the appellate court is entitled to  
interfere with a sentence mutually agreed upon by the parties and endorsed  
by the trial court. This is pursuant to Rule 12 (1)(g) of the Judicature (Plea  
Bargain) Rules, 2016.

The consideration of the period spent by a convict in lawful custody is a  
Constitutional requirement enshrined in Article 23 (8) of the Constitution of the  
135 Republic of Uganda as follows:

*"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."*

140 Failure of the trial court to take into account the period spent on remand by  
the appellant rendered the sentence illegal and this by itself is sufficient  
ground for the appellate to interfere with the sentence of the trial court (See  
Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of  
2014, Umar Sebidde Vs Uganda, Supreme Court Criminal Appeal No 22 of  
145 2002 and Kaddu Kavulu Lawrence Vs Uganda, Supreme Court Criminal  
Appeal No 72 of 2018.)

As far as the principle of "consistency" and "parity" of sentences is  
concerned, it is has now attained statutory basis under Sentencing Principle  
No. 6 (C) of the Constitution (Sentencing Guidelines for Courts of Judicature)

150 Practice Directions, 2013 - Legal Notice No. 8 of 2013 which is couched in  
the following terms:

155 *"Every court shall when sentencing an offender take into account ...  
the need for consistence with appropriate sentencing levels and other  
means of dealing with offenders in respect of similar offences  
committed in similar circumstances."*

In Abale Muzamil Vs Uganda, Court of Appeal Criminal Appeal No.0039 of  
2014, the appellant, a neighbor, was tried and convicted by the High Court  
for the offence of aggravated defilement of a girl aged 9 years and  
sentenced to 19 years' imprisonment.

160 In Tigo Stephen Vs Uganda, Supreme Court Criminal Appeal No.08 of 2009,  
the appellant was convicted of the offence of aggravated defilement of his  
granddaughter aged 6 years and sentenced to 20 years' imprisonment.

In Candia Akim Vs Uganda, CACA No.0181 of 2009, where the Appellant  
was a step-father of the 8-year-old victim, this Court confirmed a sentence  
165 of 17 years' imprisonment for the offence of Aggravated Defilement.

**In Kavuma Edward Vs Uganda, Court of Appeal Criminal Appeal No.  
37 of 2014** a paternal uncle aged 28 years was sentenced to 18 years'  
imprisonment for the offence of Aggravated Defilement of a 7 year old girl.

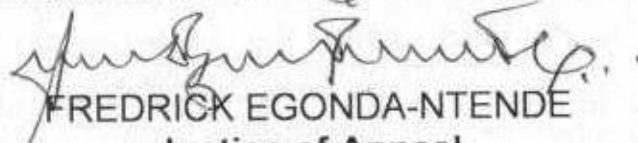
From the above decided cases, the sentence range for the offence of  
170 aggravated defilement of a girl in the age range of 6 years appears to  
range from 17 to 20 years after a full trial. The appellant in the instant  
case who was convicted on his own Plea of guilty ought to have been  
given credit on that account through reduction of his sentence. To that  
extent, the appellant has a valid complaint about the sentence being  
175 manifestly harsh and excessive.

Accordingly, we set aside the sentence of the lower court. And in exercise of the powers conferred upon this court under Section 11 of the Judicature Act, Cap 13 and, after taking into account both the aggravating and mitigating factors set out in the PBA and, in line with the principle of parity  
180 in sentencing, hereby order as follows:

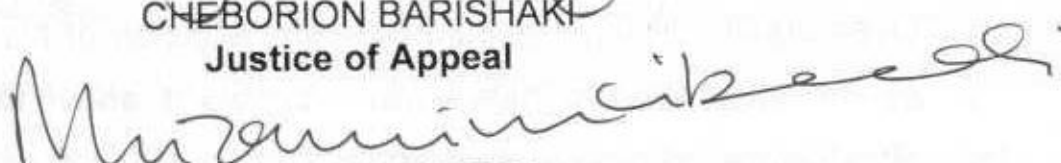
1. The sentence of 20 years imprisonment is hereby reduced to 14 years imprisonment to take into account credit for the appellant having pleaded guilty to the offence, which we put at 6 years in the circumstances of this case.
- 185 2. From the 14 years, we deduct the period of 1 year 6 months and 20 days that the Appellant spent on pre-trial detention.
3. We therefore sentence the Appellant to a term of 12 years 5 months and 10 days' imprisonment to be served from the 20<sup>th</sup> day of December 2016, the date of conviction.

190 We so Order.

Signed and Delivered at Mbale this ... 15<sup>th</sup> ... day of September 2020

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FREDRICK EGONDA-NTENDE  
Justice of Appeal

  
CHEBORION BARISHAKI  
Justice of Appeal

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MUZAMIRU KIBEEDI  
Justice of Appeal