THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORTPORTAL

Coram: *KAKURU, MADRAMA, MULYAGONJA, JJA*

CRIMINAL APPEAL NO.075 OF 2014

HAKORAIMARI BENSON::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of Hon. Mr. Dan Akiiki Kiiza, J dated 3rd March, 2014 in Criminal Session Case No. 133/2012)

Introduction

This is an appeal against the decision of the High Court sitting at Fort Portal in which the appellant was convicted of the offence of Aggravated Defilement contrary to section 129 (3) & (4) (a) of the Penal Code Act and sentenced to 20 years' imprisonment, on 3rd March, 2014.

Background

The facts giving rise to the appeal, as stated in the summary of evidence filed by the prosecution, which were admitted by the appellant, were that on 25th July, 2012, the appellant's wife left him at their home in Kekubo Trading Centre, Kamwenge District. Her daughter, the victim who was aged 11 years old, stayed at home with the appellant who was not her biological father. We shall refer to the victim in this judgment as NAM in order to protect her identity.

After the mother left, the appellant took the victim to a nearby tree plantation and forcefully had sexual intercourse with her. Immediately thereafter, the victim reported the incident to Nzabakurikiza Paul, the

Town Mayor, who in turn informed the victim's mother about it in the presence of the appellant.

The victim was examined and found to have signs of penetration and a ruptured hymen. She also had injuries around her private parts consistent with forceful sexual intercourse. The appellant was examined and found to be in a normal mental state. He was indicted for Aggravated Defilement.

At the trial the appellant pleaded guilty as charged. The trial Judge accordingly convicted and sentenced him to 20 years' imprisonment. Being aggrieved with the sentence, the appellant filed this appeal premised on the 3 grounds of appeal below:

1. The learned trial Judge erred in law and in fact when he convicted the appellant without reading and explaining the indictment to him and this occasioned a miscarriage of justice.

2. That the learned trial Judge erred in law and in fact when he failed to follow the procedure of plea taking and this occasioned serious injustice to the appellant.

3. That the sentence given to the appellant by the learned trial Judge was illegal as it contravened Article 23(8) of the Constitution and it was ambiguous or in the alternative the sentence was harsh and manifestly excessive in the circumstances.

Representation

At the hearing of the appeal, the appellant was represented by learned counsel Mr. Richard Bwiruka, on State Brief, while the respondent was represented by learned counsel Mr. Kulu Idambi John Boniface,

Assistant Directorate of Public Prosecution. The appellant was not present in court due to restrictions imposed by the Ministry of Health to limit the spread of Covid-19 during the pandemic. However, he was able to follow the proceedings in court via video link from Fort Portal Main Prison.

Counsel for the appellant sought and was granted leave under Section 132(1) (b) to appeal against sentence only. He thus abandoned grounds 1 and 2 of appeal. Counsel for both parties filed written submissions prior to the hearing but they were granted leave to address the court briefly on the appeal.

Submissions of Counsel

Mr. Bwiruka, counsel for the appellant submitted that the sentence of 20 years meted out to the appellant is harsh and excessive in the circumstances. He cited the decision of this court in **Kyotera Anthony v Uganda, Court of Appeal Criminal Appeal No. 71 of 2014,** where the court considered a number of cases in which the range of sentences was between 12 and 15 years.

It was his further submission that the appellant pleaded guilty as charged and he was remorseful. That because he was a young man who can reform the court should impose a sentence of 10 years.

In reply, counsel for the respondent, Mr. Kulu first opposed the appeal arguing that the sentence of 20 years' imprisonment is legal and it should be upheld, in view of the circumstances under which the offence was committed. When he was faced with the fact that the appellant did not waste court's time because he pleaded guilty; he conceded to the reduction in sentence. He suggested that a sentence of 10 years would meet the ends of justice.

Resolution of the appeal

The duty of this court as a first appellate court is to review and re-evaluate the evidence before the trial court and reach its own conclusion taking into account that it did not have the opportunity to hear and see the witnesses testify. **Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions, SI 13-10; Kifamunte Henry v Uganda SCCA No.10/1997**

We have carefully read the submissions of counsel for both parties, the record of the trial court, including the proceedings on the record in respect of sentencing and the authorities in support of the arguments.

We are mindful of the principles upon which this court can interfere with the sentencing discretion of the trial judge as they were re-stated in **Kiwalabye Bernard v Uganda, Supreme Court Criminal Appeal No. 143 of 2003,** as follows:

> *"The appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."*

We are further mindful that this court may invoke the provisions of section 11 of the Judicature Act in the event it is established that the sentence complained about was indeed harsh and excessive in the circumstances, and impose a sentence of its own. In order to establish whether the sentence was harsh or manifestly excessive as the

appellant contends, we must re-evaluate the sentencing proceedings to establish its basis.

In handing down the sentence the trial judge stated as follows:

> *"The accused is a young man who pleaded guilty and requested for less time. He is a father and has a family and he is on remand. He is (sic) said to be a young man of 26 years when he was arrested and remanded. The offence committed may lead to a penalty of maximum death (sic). Accused by law should be treated by a harsh and hard penalty. The young child had to be protected. The victim has a fiduciary relationship with her (sic). So society should take him as the father of the victim and shall protect her from any such abuses as his own flesh and blood. The accused decided to turn her into a sexual partner and ravaged (sic) her. The medical report (PE2) and the victim was very weak. She was found with venereal disease. We still deserve a deterrent sentence. Putting everything into accommodation (sic) sentence reduced (sic) to 20 years, including 12 (read 1 ½) years on remand."*

We observe that the typist or transcriber made several errors in preparing this ruling. However, we get the gist of the reasons for the sentence and make our finding that though the trial judge considered both the aggravating and mitigating factors, he imposed a sentence that was apparently harsh and excessive. He also stated that it was his intention to do so.

We also find that the trial judge did not take the principles of proportionality and consistency in sentencing into account while passing sentence. Accordingly, we find merit in the appeal which we hereby allow. We hereby set aside the sentence imposed upon the appellant by the learned trial judge.

We now proceed to impose a sentence of our own. While considering an appropriate sentence, we shall take into account the mitigating and aggravating factors in this case. Further, we shall consider the principles of sentencing including proportionality and consistency in sentencing.

We have considered sentences for the same offence handed down by this court and the Supreme Court in order to establish the appropriate sentence for the appellant starting with the decision in **Kyotera Anthony v. Uganda, Court of Appeal Criminal Appeal No. 71 of 2014**. In that case, the appellant who was 20 years old defiled a girl who was 6 years old. He was convicted and sentenced to 28 years in prison. This court set aside the sentence and substituted it with a sentence of 10 years and 10 months.

In **Nkurunziza Julius v. Uganda, Court of Appeal Criminal Appeal No. 12 of 2009**, it was held that a plea of guilt soon after the charges are read to the accused mitigates sentence. It should therefore have been considered by the trial judge to weigh against the stiff sentence that he imposed upon a young man of 24 years.

The principle of rehabilitation in sentencing was re-stated by this court in the case of **German Benjamin v. Uganda, Court of Appeal Criminal Appeal No. 142 of 2010**. In that case the court considered that the appellant who was 35 years old but defiled a child of 5 years pleaded guilty and was remorseful. This court substituted the sentence of 20 years in prison to 15 years' imprisonment.

In **Lukwago Henry v Uganda; Court of Appeal Criminal Appeal No 0036 of 2010) [2014] UGCA 34 (16 July 2014)**, the appellant was convicted of the offence of aggravated defilement and the victim was 13

years old. This court upheld a sentence of 13 years imposed on the appellant.

In **Ogarm Iddi v Uganda; Court of Appeal Criminal Appeal No. 0182 of 2009,** in which the decision was handed down in 2016, the victim was 13 years old and this court upheld a sentence of 15 years' imprisonment for the offence of aggravated defilement.

And in **Ninsiima Gilbert v Uganda; Court of Appeal Criminal Appeal No. 0180 of 2010,** the appellant was charged with and convicted for the offence of aggravated defilement. The victim was 8 years old and the trial court sentenced the convict to 30 years' imprisonment. On appeal, this court reduced the sentence to 15 years' imprisonment.

The decisions of this court show that the range of sentences for aggravated defilement range from 10 years to 15 years with the exception of one case in which a steep sentence was passed where the victim was the 2½ years old granddaughter of the appellant who was all of 65 years old. This court in **Kagoro Deo v Uganda; Criminal Appeal No 82 OF 2011** handed down a sentence of 22 years' imprisonment in June 2019.

The appellant was a first offender and a young man of 24 years. He readily pleaded guilty to the offence. Nonetheless, the offence is a serious one that attracts the death penalty as the maximum sentence. He was in a fiduciary relationship with the victim.

Given the aggravating and mitigating factors that were stated in this case, and the sentencing range that has been established for same offences committed in similar circumstances, we consider a term of 10 years to be an appropriate sentence for the appellant who pleaded guilty immediately after the indictment was read to him. Taking into

consideration that prior to his conviction he spent 1 year 10 months in lawful custody, we now sentence him to 8 years and 2 months' imprisonment to run from the date of his conviction, the 3rd of March 2014.

It is so ordered.

Dated at Fort Portal this .....10th December November 2020.

Kenneth Kakuru
JUSTICE OF APPEAL

Christopher Madrama
JUSTICE OF APPEAL

Irene Mulyagonja
JUSTICE OF APPEAL