THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT

GULU

Criminal Appeal No. 237 of 2014

(Appeal from the Judgment of High Court at Lira (Rubby Opio Aweri, J) dated 23.05.2013 in Criminal Case No. 086 of 2011)

Ouni John :: Appellant

versus

Uganda ::Respondent

Coram: Hon. Justice Kenneth Kakuru, JA
Hon. Justice Percy Night Tuhaise, JA
Hon. Justice Remmy Kasule, Ag. JA

JUDGMENT OF THE COURT

Introduction:

The appellant was convicted of aggravated defilement contrary to **Section 129(3)** and **(4)(a)** and **(c)** of the **Penal Code Act** and ~~was~~

sentenced to 20 years imprisonment by the **High Court of Uganda** at Lira, (Rubby Opio Aweri, J, as he then was) on 23.05.2013.

The victim, Akullu Harriet aged 13 years was a biological daughter of the appellant. Due to misunderstandings with the mother, the appellant had sent her away from the matrimonial home, leaving her daughter, the victim, together with the other siblings staying with the appellant their father, at home.

On 15.10.2010 well past 10.00 p.m. the appellant returned home from a drinking spree. The victim and her other siblings were already asleep in their hut. The victim, the eldest of the children, woke up and served the appellant with food. After he had finished eating, she removed the plates took them to where they are stored and then she prepared to go back to sleep. The appellant forcefully grabbed her, threw her on the bed and forcefully had sexual intercourse with her.

The victim cried for help and managed to ran away from the appellant to her grandparents to whom she reported what the appellant had done to her. The matter was reported to the clan Chief who happened also to be the area parish chief.

On 16.10.2010 the victim's grandfather reported the matter to Ogur Police post. The appellant was arrested and the victim taken to the Health Centre III where she was medically examined on 18.10.2010 and was found to have been sexually assaulted three days ago. The appellant was arraigned before Court and he denied the offence. A full trial ensued resulting in his conviction and sentence.

The sole ground of appeal in the amended Memorandum of Appeal dated 04.12.2019 is:

> *"The learned trial Judge erred in law and fact when he imposed a manifestly harsh and excessive sentence of 20 years imprisonment in the circumstance, thereby occasioning a miscarriage of justice."*

At the hearing, the appellant was represented by learned Counsel Shamim Amolo, on State brief, while Assistant Director of Public Prosecutions Rukundo Martin was for the respondent.

This Court, with no objection from the respondent, granted leave to the appellant to proceed with the appeal against sentence alone.

For the applicant, it was submitted that the sentence of 20 years imprisonment passed against the appellant was harsh and excessive, given the mitigating factors in favour of the appellant which were that, he was a first offender who committed the offence in circumstances of drunkenness when he was not in absolute control of himself. Counsel prayed the Court to reduce the sentence to 15 years imprisonment.

Learned Counsel for the respondent opposed the appeal and invited this Court not to interfere with the sentence imposed by the trial Court because the same had been imposed after the trial Judge had properly considered all the mitigating and aggravating factors of the case, particularly the fact that the appellant, aged 38 years, had defiled his own biological primary school going daughter, aged only 13 years.

This Court, in resolving this appeal, has carefully considered the record of appeal, the submissions of both Counsel and the relevant Court authorities cited.

As the first appellate Court, it is our duty to re-appraise the evidence adduced at trial as a whole and come up with our own inferences and decision there on, in this case, as much as that evidence relates to sentence, the subject of this appeal: See: **Rule 30(1) of the Judicature (Court of Appeal Rules) Directions.** See also: Court of Appeal Criminal Appeal No. 0401 of 2014: **Mbogo Rajab vs Uganda.**

As to sentence, an appellate Court, which we are in this case, will not normally interfere with the discretion of the sentencing Judge at trial, unless the sentence is illegal or unless the Court is satisfied that the sentence imposed by the trial Judge is manifestly excessive or so low as to amount to a miscarriage of justice. What is an appropriate sentence should also reflect proportionality in terms of the gravity of the offence in relation to similar offences as well as consistency so that cases of a similar nature will more or less receive similar sentences: See: **Court of Appeal Criminal Appeal No. 82 of 2011: Kagoro Deo vs Uganda**.

The learned trial Judge in sentencing the appellant after hearing from Counsel for the prosecution and for the accused as well as the accused himself in his alloctus, took into account the fact that the appellant was a first offender, relatively young at 38 years old and thus capable of reforming into a better citizen, the fact that he had children to support who were now suffering with the appellant's mother who was taking care of them, their mother the

wife of the appellant having been chased away from home by the appellant. The learned trial Judge had also taken into account the period appellant had spent into lawful custody from 29.05.2013 when he was convicted, being almost 2 years and 7 months.

The learned Judge, however, also considered the aggravating facts of the appellant defiling his own biological daughter, to whom he was under obligation to give protection and guidance, given her very young age of being 13 years old and when she was primary school going. Indeed, having separated with his wife, the mother of the victim, it was the victim wo was now looking after the appellant by opening the door for him to enter the house and by cooking, preparing and giving him food on returning from his drinking sprees.

This court will consider a number of decisions having similar facts for the sake of determining whether or not the sentence the subject of this appeal is consistent and proportional to sentences made in past decisions.

In **Tigo Stephen vs Uganda, Supreme Court Criminal Appeal No. 08 of 2009**, the victim aged 6 years was defiled by the husband of her grandmother with whom the victim was living. The Supreme Court upheld the sentence of 20 years imprisonment as appropriate.

Kagoro Deo vs Uganda (Supra) was also a case of aggravated defilement where the appellant aged 63 years was convicted of having performed a sexual act with his own granddaughter aged 2½ years. The Court of Appeal found a sentence of 22 years to be

appropriate, from which it deducted a 2 year remand period, leaving the appellant to serve a sentence of 18 years.

A sentence of 19 years imprisonment for aggravated defilement was left undisturbed by the Court of Appeal in **Criminal Appeal No. 0039 of 2014: Abale Muzamil vs Uganda,** where the victim aged 9 years, who was at the house of her guardian was defiled by the appellant, a neighbour to the guardian, on 26.09.2011 at Drabijo village, Yumbe District.

In **Oumo Ben alias Ofwono vs Uganda, Supreme Court Criminal Appeal No. 20 of 2016,** the appellant aged 27 years was a biological father of the victim aged 3½ years. On 21.10.2006 at 4.00 a.m. the appellant, on being denied sexual intercourse by his wife, the mother of the victim, because she (the wife) was going to church, defiled the victim, his own daughter, who was sleeping next to him in the same bed where the mother of the victim also was sleeping. The appellant was tried for the offence of aggravated defilement, was convicted and sentenced to 26 years imprisonment. Both the Court of Appeal and the Supreme Court upheld the sentence as appropriate holding that the appellant in defiling her biological daughter had violated Article 31(4) of the Constitution that makes it a right and duty of parents to care for and bring up their children and also Section 6(1) of the Children's Act, Cap. 59, that imposes upon every parent parental responsibility including protection of his or her child.

Having considered the sentences imposed in the above Court authorities whose facts, both mitigating and aggravating, have some resemblance to those of the appellant in this appeal, even

though no two cases are similar in all respects, this Court comes to the conclusion that the sentence of 20 years imposed upon the appellant was neither excessive nor harsh and took into account the period the appellant spent on remand. It was consistent and in uniformity with sentences passed by Courts in cases having resemblance to the case of the appellant. The sentence was also not illegal.

In the result we find no merit in this appeal and the same is dismissed. The appellant is to serve the sentence of 20 years imposed upon him from the date of his conviction of 13.05.2013.

We so order.

Dated at Gulu this 10th day of Jan 2019.

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Kenneth Kakuru
Justice of Appeal

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Percy Night Tuhaise
Justice of Appeal

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Remmy Kasule
Ag. Justice of Appeal