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**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT JINJA**

*[Coram: Richard Buteera, DCJ; Cheborion Barishaki, JA and Hellen Obura, JA]*

**CRIMINAL APPEAL NO. 174 OF 2010**

10 **OTHIENO JOHN:.....APPELLANT**

**VERSUS**

**UGANDA:.....RESPONDENT**

*(Arising from the Judgment of Elizabeth Ibanda Nahamya, J in High Court Criminal case No.0021 of 2010, dated the 9<sup>th</sup> day of August 2010)*

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**JUDGMENT OF THE COURT**

**Introduction**

20 The appellant, Othieno John, was indicted with the offence of Aggravated Defilement contrary to **Section 129(3), (4) (b) of the Penal Code Amendment Act No.8 of 2007**. He was convicted and sentenced to imprisonment for 29 years by Elizabeth Ibanda Nahamya, J.

**Background**

25 On the 11<sup>th</sup> day of April 2009, in Polota Village in Jinja District, the appellant performed a sexual act with a one Nassuna Mariam a girl aged 14 years old. The appellant was HIV positive at the time the offence was committed.

The prosecution’s case was that in the night of 11<sup>th</sup> April 2009 at around 4.00am, the victim was sleeping in a room with her sister and she suddenly woke up and realised  
30 that the appellant was having sexual intercourse with her. The appellant held her mouth and covered her face with a piece of cloth. After having sexual intercourse with the victim, the appellant attempted to run away, however, the victim got hold of his trousers as she made an alarm. The appellant escaped from her grip and eventually managed to open the door and ran away. Njeho Geoffrey (PW4), a brother to the victim, who was  
35 sleeping next door, run after him. During the chase, the appellant dropped his T-shirt

5 and PW4 picked it up. A few minutes later, the appellant returned looking for his T-shirt whereupon PW4 chased and arrested him. Thereafter, PW4 took the appellant to Police. The appellant was charged, tried and convicted of the offence of Aggravated Defilement. He was sentenced to 29 years imprisonment. The appellant was aggrieved by both conviction and sentence. He appealed to this Court on the following grounds:

- 10       **1. That the learned trial Judge erred in law and fact when she found that a sexual act had been performed against the victim Nassuna Mariam by the appellant.**
- 2. The learned trial Judge erred in law and fact when she failed to evaluate the entire evidence on file causing a miscarriage of justice to the appellant.**
- 15       **3. The learned trial Judge erred in law and fact when she sentenced the appellant to a term of imprisonment of 29 years which is harsh and excessive in the circumstances.**

### **Legal Representation**

20 At the hearing, the appellant was represented by Mr. Kyoziira David Samuel on State brief while the respondent was represented by Ms. Nabasa Caroline Hope, Senior Assistant Director of Public Prosecutions. Due to the COVID-19 pandemic restrictions, the appellant was not physically present in Court but attended the proceedings via video link using Zoom technology from Jinja Prison.

25 During the hearing, counsel for the appellant applied to Court to withdraw grounds 1 and 2 on conviction and only retain ground 3 on sentence. Counsel sought leave of Court to appeal on sentence only. Counsel also sought leave of Court to file an amended Memorandum of Appeal and amended written submissions. All the Applications made by counsel for the appellant were granted by Court.

30 The appeal therefore proceeded with ground 3 only.

Both counsel filed and adopted their written submissions.

5 **Submissions of counsel on ground 3**

Counsel for the appellant argued that the trial Judge erred in law and fact when she sentenced the appellant to a term of imprisonment of 29 years which is harsh and excessive in the circumstances. He relied on the case of *Kiwalabye Benard vs Uganda, Supreme Court Criminal Appeal No.143 of 2001*.

10 Counsel prayed that the Court finds that the sentence was excessive and harsh in the circumstances and sets it aside.

Counsel for the respondent submitted that the appellant failed to demonstrate the “harshness and excessiveness” of the sentence. She relied on the case of *Aharikundira Yustina vs Uganda, Court of Appeal Criminal Appeal No. 104 of 2009*, to emphasise  
15 that interfering with sentence is not a matter of emotions but rather one of law.

Counsel argued that since the offence of aggravated defilement attracts a maximum sentence of death, a sentence of 29 years imprisonment is at a low end considering the circumstances of this case. She contended that the violation of the victim left her traumatised.

20 She argued that the aggravating factors in the instant case outweigh the mitigating factors and prayed that Court increases the appellant’s sentence.

Counsel prayed that the appeal be dismissed.

**Consideration by the Court**

25 The appeal is in respect of sentence only. We therefore have to consider whether, as an appellate Court, we should interfere with the sentence of 29 years imprisonment imposed on the appellant by the learned trial Judge.

It is well settled law that the appellate Court is not to interfere with a sentence imposed by the trial Court which has exercised its discretion on sentence unless the sentence is  
30 illegal or where the appellate Court is satisfied that in the exercise of its discretion the



5 trial Court ignored to consider an important matter or circumstances which ought to be considered when passing the sentence or the sentence was manifestly excessive or so low as to amount to an injustice. See: *Livingstone Kakooza vs. Uganda, Supreme Court Criminal Appeal No.17 of 1993 [unreported]*; *Jackson Zita vs. Uganda, Supreme Court Criminal Appeal No.19 of 1995*; *Kiwalabye Bernard vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001 [unreported]* and *R v. Mohammedi Jamal (1948) 15 E.A.C.A 126*.

The maximum sentence to which the appellant in this case was liable after conviction for aggravated defilement is death. The learned trial Judge during sentencing held as follows:

15 *“The offence of Aggravated Defilement is very grave and it is becoming very recurrent. The future of many young girls has been destroyed by irresponsible and evil minded men.*

*A person convicted of this offence is be liable to suffer death.*

20 *I have carefully addressed my mind to the submissions made by the prosecution in aggravation of the sentence. The learned State Attorney, Ms. Vicky Nabisenke submitted that the offence of aggravated defilement was becoming rampant in Uganda particularly in Jinja District. That a deterrent sentence was necessary was necessary. She prayed court to also consider the circumstances under which the offence was committed and how the convictee planned to defile the victim and worked out ways of intruding her privacy.*

25 *Further that court should consider the fact that the convictee was HIV positive and thus exposed the victim to the danger of contracting HIV. Ms. Nabisenke argued that this has exposed the victim to psychological torture to the effect that she is afraid of taking another HIV test.*

30 *I have also carefully considered learned defence counsel’s submissions in mitigation of the sentence that the convictee is a first offender, has been on remand since 11<sup>th</sup> April 2009 and that the period the convictee has spent on remand should be considered. Counsel Moses Kiyemba argued that the convictee being HIV positive requires medical care and attention which is not available in prison.*

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5 *Mr. Kiyemba, submitted further that there was no evidence that the convict had infected the victim with HIV. He stated the convict is remorseful and apologises for having committed the offence. The convict himself pleaded for a lenient sentence and stated that he needs to go back home and care for his people. Furthermore, he told Court that he has learnt a lot during the time he*  
10 *has been on remand.*

*The Constitution of Uganda is very clear on the right to privacy of a person and the home. It is one of the fundamental rights and other human rights and freedoms available to any Ugandan. It is intolerable for the convict to have intruded the privacy of the victim's room. A person's house or place of abode*  
15 *must be free of insecurity. The convict must have behaved in a civil manner rather than stealthy entering the room of the victim. Society would benefit from his absence so that young girls do not live in fear of their lives. If the convict is released now, it will not only affect their health growth young girls but it will also affect their ability to concentrate on their studies.*

20 *The victim should be accorded a chance to deal with the psychological torture in peace and forge ahead with her studies.*

*In light of the submissions of the prosecution, the defence counsel and the accused himself, I hereby sentence you OHIENO JOHN to a term of imprisonment for 29 years. The time spent on remand has been considered."*  
25 *Sic.*

From the above portion of the trial Judge's findings on sentence, it is clear that the trial Judge carefully considered both the appellant's aggravating and mitigating factors as well as the period the appellant spent on remand while sentencing.

This Court has had occasion to handle a similar matter in *Criminal Appeal No.869 of*  
30 *2014, Bacwa Benon vs Uganda*, where an appellant with HIV defiled a 10 year old girl and was sentenced to life imprisonment. Court relied on a similar Supreme Court decision of *Bonyo Abdul vs Uganda, Criminal Appeal No.07 of 2011*, where the Court upheld a sentence of Life imprisonment for aggravated defilement as confirmed by the Court of Appeal. Having found no reason to interfere with the sentence of life  
35 imprisonment as passed by the trial Judge, the learned Justices of the Court of Appeal in Bacwa Bennon (supra) upheld the sentence of life imprisonment.

5 In *Musajjawaza Vincent vs Uganda, Court of Appeal Criminal Appeal No.366 of 2014*, the appellant defiled his biological daughter and was convicted of aggravated defilement and sentenced to Life imprisonment. The Court of Appeal set aside the sentence of Life imprisonment and substituted it with a 27 years' imprisonment term.

The authorities above cited demonstrate that the sentence of 29 years imprisonment  
10 imposed on the appellant is neither harsh nor excessive considering the circumstances of this case.

We agree with counsel for the respondent that the appellant failed to demonstrate how the said sentence was harsh and excessive. We associate ourselves with the case of *Aharikundira Yustina vs Uganda, Court of Appeal Criminal Appeal No. 104 of 2009*,  
15 where the Court of Appeal held:

***“In other words, interfering with sentence is not a matter of emotions but rather one of law. Unless it can be proved that the trial Judge flouted any of the principles in sentencing, then it does not matter whether the members of this court would have given a different sentence if they had been the ones trying the appellant. See Ogalo s/o Owoura Vs R [1954] 24 BACA 270.”***  
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In the instant case, the sentence of 29 years imprisonment imposed on the appellant by the learned trial Judge was not illegal nor based on wrong principles and neither was it manifestly excessive considering the circumstances of this case. We therefore find no reason to interfere with the sentence. Therefore ground 3 fails.

25 In the result, the appeal is dismissed. The Judgment of the trial Court is upheld.

Dated at Jinja this 24th day of Sept 2021

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**RICHARD BUTEERA**  
DEPUTY CHIEF JUSTICE

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**CHEBORION BARISHAKI**  
JUSTICE OF APPEAL

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**HELLEN OBURA**  
JUSTICE OF APPEAL

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