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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO.58 OF 2015

*(Appeal from the decision of the High Court of Uganda at Masaka before
Hon. Justice Rugadya Atwoki dated 30th January, 2015)*

10 **KATO ISMA alias MULONGO:::APPELLANT**

VERSUS

UGANDA:::RESPONDENT

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE STEPHEN MUSOTA, JA

15 **HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA**

JUDGMENT OF COURT

This is an appeal from the decision of the High Court sitting at Masaka in High Court Criminal Case No.066 of 2012 delivered on the 30th day of January, 2015 by Rugadya Atwoki, J in which the appellant was convicted of the offence
20 of aggravated defilement contrary to section 129(3) (4) of the Penal Code Act and sentenced to 40 years imprisonment.

The facts of the appeal as accepted by the learned trial Judge were that one Kyalimpa Monica was living with her husband who is the appellant herein and

5 two children including Kyomugasho Halima, the victim aged 10 years. On the
fateful night, Kyalimpa was concluding selling food in her restaurant when her
husband suggested that since it was raining, the children had to return to the
house and sleep. That he also wanted to sleep and so he would give them
company. The husband moved home with the children.

10 Later, the husband returned and they went to a karaoke show nearby. They
returned home late in the night and all seemed well. A few days later, Kyalimpa
lost a relative and her husband took her to attend the burial. The children also
came to their grandmother's place which was near the place of burial.

While there, the grandmother noticed that Kyomugasho was crying. Upon being
15 asked what the matter was, she revealed that her father Kato Isma, the
appellant had sexual intercourse with her. The grandmother immediately
informed her daughter who joined them and Kyomugasho narrated what
transpired. She told the mother that she feared to reveal to her while they were
at home where Kato was also living because Kato Isma threatened to kill her
20 should she ever mention the incident to anyone.

The matter was reported to police and the appellant was arrested and
examined on police form 24 and found to be 38 years old and of sound mind.
The victim was examined on Police Form 3 and found to be 10 years old with a
raptured hymen. The appellant was convicted and sentenced to 40 years
25 imprisonment.

5 Being dissatisfied with the decision of the High Court, the appellant with leave of this Court appealed against sentence only. The ground of appeal was that;

“The Learned trial Judge erred in law and in fact when he sentenced the appellant to 40 years imprisonment which was harsh and manifestly excessive.”

10 At the hearing of the appeal, Mr. Andrew Tusingwire appeared for the appellant while the respondent was represented by Mr. Baine Stanley Moses, Chief State Attorney holding brief for Ms. Namatovu, Assistant DPP.

Both counsel had filed written submissions which they adopted at the hearing.

Counsel for the appellant submitted that the sentence of 40 years
15 imprisonment was harsh and excessive considering the fact that the appellant was a first offender, young, had been on remand for 3 years and 1 month and he had three children to take care of. In counsel’s view, the learned trial Judge ought to have considered all the mitigating factors before imposing a harsh and excessive sentence of 40 years imprisonment.

20 Counsel invited this Court to exercise its power under section 132(1) (d) of the Trial on Indictment Act to vary or reverse the sentence to 10 years imprisonment. Counsel cited ***Birungi Moses V Uganda, Criminal Appeal No.177 of 2014***, where this Court reduced the appellant’s sentence from 30 years to 12 years, ***Kisembo Patrick V Uganda, Criminal Appeal No.411 of***
25 ***2014***, where the appellant had defiled a 4 year old girl and was sentenced to

5 life imprisonment, on appeal, this Court reduced the sentence to 18 years imprisonment.

Counsel for the respondent opposed the appeal and contended that during allocutus, mitigating factors were raised on behalf of the appellant and counsel for the appellant had not proved that the learned trial Judge did not consider
10 any of the mitigating factors and had not demonstrated that the sentence was illegal so as to justify any interference with it.

Counsel further submitted that considering the circumstances of this case, the sentence of 40 years was neither harsh nor excessive because the appellant defiled his own daughter who was only 10 years old and threatened to kill her if
15 she reported the incident. That the nature of injuries sustained by the victim as shown in the victim's medical report which were consistent with forceful sexual intercourse aggravated the sentence and prayed that this Court upholds it.

We have considered the submissions of counsel, and perused the Court record
20 as well as the authorities cited to us.

As a first appellate Court, our duty is to re-evaluate the evidence at trial and come up with our own decision on all matters of law and fact. See Rule 30 (1) of the Rules of this Court and ***Bogere Moses V Uganda, Supreme Court Criminal Appeal No.001 of 1997.***

5 The principles upon which an appellate Court should interfere with the sentence imposed by the trial Court were considered in ***Kiwalabye Bernard V Uganda, Supreme Court Criminal Appeal No.143 of 2001*** where Court observed;

10 *“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 the 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*
15 *where the sentence imposed is wrong in principle.”*

In sentencing the appellant, the learned trial Judge stated as follows;

“Aggravating factors

Age of victim- 10 years

Breach of trust

20 *Accused- father/ guardian*

Threat to kill

Rampant cases

Mitigating factors

5 *Remand – 3 years and 1 month*

Prayer for leniency

Responsibilities of accused in looking after family

Act of accused still young- 42 years.

Prayer by state is 40 years.

10 *After consideration of all above, the sentence of 43 years is reduced by the
3 years on remand. I sentence the accused to 40 years.”*

We note that the maximum sentence for aggravated defilement is death. We agree with the learned trial Judge that the offence committed was grave and amounted to breach of trust since the appellant was the victim’s father/
15 guardian. However, there were mitigating factors which were in the appellant’s favor for example the appellant was a first offender. The appellant himself informed Court that he was a father to 3 children, he had been on remand for 3 years and 1 month and prayed for leniency. We are of the view that the learned trial judge took into account the appellant’s mitigating factors.

20 We are conscious of the need for Courts to maintain consistency in sentencing. In ***Livingstone Sewanyana V Uganda, Supreme Court Criminal Appeal No.019 of 2006***, the appellant defiled his biological daughter several times. He was convicted and sentenced to 18 years imprisonment. This sentence was confirmed by both the Court of Appeal and the Supreme Court.

5 In **Owinji William V Uganda, Criminal Appeal No.106 of 2013**, the appellant defiled a 12 year old girl and was sentenced to 45 years, on appeal this Court reduced the sentence to 15 years imprisonment.

We find that the sentence of 40 years' imprisonment imposed upon the appellant by the learned trial Judge was harsh and manifestly excessive. It is
10 accordingly set aside.

Section 11 of the Judicature Act Cap 13 grants this Court the same powers as that of the trial Court. The said section states thus;

*"For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in
15 the Court from the exercise of the original jurisdiction of which the appeal originally emanated."*

We therefore invoke the above powers to resentence the appellant. We find that a sentence of 25 years imprisonment would meet the ends of justice. From that sentence, we deduct the period of 3 years and 1 month that the appellant spent
20 on remand. He will therefore serve a sentence for a period of 22 years and 11 months imprisonment starting from 30th January, 2015, the date of his conviction.

We so order

Dated at Masaka this 15th day of Oct 2021.

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HON. MR. JUSTICE CHEBORION BARISHAKI

JUSTICE OF APPEAL

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HON. MR. JUSTICE STEPHEN MUSOTA

JUSTICE OF APPEAL

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HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI

JUSTICE OF APPEAL