THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO.551 OF 2016

(Arising out of High Court Criminal Case No.090 of 2013)

NKWAGALA ERIC::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Masaka before Justice Dr. Flavian Zeija dated 22nd December, 2016 in High Court Criminal Session No. 090 of 2013)

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE STEPHEN MUSOTA, JA

HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA

JUDGMENT OF COURT

This is an appeal against sentence of 43 years imprisonment imposed on the appellant by Dr. Flavian Zeija, J sitting at Masaka on 22nd December, 2016. The sentence resulted from a conviction of the appellant of the offence of aggravated defilement contrary to sections 129(4) (b) of the Penal Code Act.

The facts giving rise to this appeal as accepted by the learned trial Judge were that the victim, Muzaniha Ruth is a daughter to Ntambala Stephen and was aged 2 years at the time of defilement. The appellant was a herdsman staying at the home of Ntambala Maria together with the victim. Ntambala Maria was the grandmother of the victim. On the 8th day of April, 2013, the appellant did not go to look after cattle but instead stayed at home. The victim returned from school at 1pm and found the appellant at home with the grandmother. She later fell asleep and was taken to sleep by her grandmother. The grandmother left to dig at the nearby garden but upon her return, she found the appellant half naked lying on the victim performing a sexual act on her. The grandmother grabbed the appellant's trouser and called for help. The appellant was arrested and taken to police. Medical examination of the victim revealed that the victim was 2 years old with signs of superficial penetration but with ejaculation. The accused was also examined on Police Form 24A and found to be of sound mind. Subsequently, he was indicted, convicted and sentenced to 43 years imprisonment.

Being dissatisfied with the decision of the learned trial Judge, the appellant with leave of Court appealed against sentence only faulting the learned trial Judge for imposing on him a harsh, illegal and manifestly excessive sentence.

At the hearing of the appeal, Mr. Yawe Lawrence appeared for the appellant while the respondent was represented by Mr. Richard Birivumbuka, Chief State Attorney holding brief for Amumpaire Jennifer, an Assistant DPP.

Both counsel had filed written submissions which they adopted at the hearing. The appellant appeared in Court via zoom.

Counsel for the appellant submitted that the sentence of 43 years imprisonment imposed on the appellant was illegal since he was a child at the time of commission of the offence, he should have been sentenced as a child. Counsel further submitted that the appellant had been medically examined on PF 24 which indicated that he was 18 years old at the time of his examination. He added that on the 14th day of December, 2016, three years after the date when the offence was committed, the appellant testified on oath that he was 20 years old, a fact that the state did not dispute. According to counsel, this meant that the appellant was 17 years old at the time of commission of the offence, a fact that the trial Judge did not take into consideration while sentencing the appellant. He relied on ***Serubega Joseph V Uganda, Criminal Appeal No.147 of 2008,*** where the appellant was improperly sentenced as an adult yet the evidence on record showed that he was a child at the time of the commission of the offence.

Counsel further submitted that the appellant ought to have been sentenced as a child under the provisions of section 94(1) (g) of the Children's Act which provides for a maximum sentence of 3 years detention in a case where an offence punishable by death is proved against a child. He prayed that this Court sets aside the sentence and sets free the appellant since he has been in prison for

more than the maximum three years detention required in cases involving children.

Counsel submitted that the sentence of 43 years imprisonment imposed by the learned trial Judge was excessive and manifestly harsh assuming the appellant was an adult at the time of commission of the offence. He added that the appellant was a first offender, he was 20 years at the time of testifying in Court with a chance of reforming, he had been on remand for 3 years and 5 months. According to counsel, the learned trial judge did not take into consideration the said mitigating factors before sentencing the appellant to 43 years imprisonment.

Counsel further submitted that the sentence was vague because the learned trial Judge merely mentioned that the period the appellant had spent on remand would be taken into account. According to counsel, the learned trial Judge did not exactly note the period that the appellant had spent on remand. He invited Court to set aside this sentence on the grounds that it was harsh, manifestly excessive, ambiguous and illegal. He proposed a sentence of 10 years imprisonment.

Counsel for the respondent opposed the appeal and submitted that concerning the appellant's age, prosecution led evidence at page 12 and 13 of the record of appeal to prove the appellant's age through PW3 Kanyesigye Nathan Elisa, a Psychiatry Senior Health Officer who testified that on 16th April, 2013, he examined the appellant and found him to be 18 years old. He added that police form 24A was tendered in as PE1, there was no cross examination and the

appellant's age was not contested. He further testified that at page 16 of the Record of Appeal, the appellant informed Court that he was 20 years old and his trial was held after 2 years in prison. This corroborated the findings of PW3 regarding the appellant's age. In counsel's view, the provision of the Children's Act cited by counsel for the appellant was irrelevant.

Counsel further submitted that the sentence of 43 years imprisonment was neither harsh nor excessive because of the nature of the offence. He added that the victim was of a tender age at the time she was defiled, she was defiled while asleep and helpless. According to counsel, the learned trial Judge noted that the appellant was not remorseful and the victim was traumatized. Counsel prayed that the appeal is dismissed and the sentence of 43 years maintained.

The duty of this Court as the first appellate Court is to re-evaluate all the evidence on record and make its own finding. In so doing, it should subject the evidence to a fresh and exhaustive scrutiny. ***See Rule 30 of the Rules of this Court*** and ***Kifamunte Henry V Uganda, Supreme Court Criminal Appeal No.10 of 1997.***

We are alive to the principle that the appellate Court can only interfere with the sentence of the trial Court if there is an illegality, that is, if the trial Court acted contrary to the law or upon a wrong principle, or overlooked a material factor. The appellate Court will also interfere if the said sentence is harsh and/ or manifestly excessive. See ***Jackson Zita V Uganda, Supreme Court Criminal Appeal No.19 of 1995***

Counsel for the appellant submitted that the sentence of 43 years imprisonment imposed on the appellant by the learned trial Judge was illegal since he was a child at the time of commission of the offence, he should have been sentenced as a child. In reply, counsel for the respondent submitted that prosecution led evidence to prove the appellant's age through PW3, Kanyesigye Nathan Elisa, a Psychiatry Senior Health Officer and his evidence was never contested.

We have looked at the evidence of Kanyesigye Nathan Elisa, a psychiatry Senior Health Officer who testified that on 16th April, 2013, he examined the appellant, Nkwagala Eric and found him to be 18 years old. The record shows at page 13 that Police Form 24A was tendered in as PE1 without any objection from the defence and counsel for the appellant was indeed given an opportunity to cross-examine the witness on the said exhibit but the same was not done.

In ***Eldam Enterprises Ltd V SGS (U) LTD, SCCA No.5 of 2005***, the Supreme Court stated that evidence which is not challenged in cross-examination must be taken as true.

Counsel for the appellant contended that on 14th December, 2016, three years after the offence was committed, the appellant testified on oath that he was 20 years old. In counsel's view, this meant that the appellant was 17 years old at the time of commission of the offence.

We however note that counsel for the appellant did not adduce any evidence to prove that the appellant was 20 years old at the time he testified in Court. The

mention of him being 17 years at the time he committed the offence is merely speculative and conjecture.

In ***Mbabazi Lovence & Anor V Uganda, Court of Appeal Criminal Application No.47 of 2012***, S.B.K. Kavuma, DCJ (as he then was) stated that;

> *"It is trite that Courts of law act on credible evidence adduced before them and do not indulge in conjecture, speculation, attractive reasoning or fanciful theories."*

We therefore do not agree with counsel for the appellant's submission that the appellant was improperly sentenced as an adult because according to him the evidence on record showed that he was a child at the time of the commission of the offence.

Counsel for the appellant further submitted that the sentence was vague because the learned trial Judge merely mentioned that the period the appellant had spent on remand would be taken into account without exactly noting the specific period that the appellant had spent on remand.

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

> *"The accused is not remorseful. He defiled an innocent young girl who will never forget such an experience. She will grow up thinking that all men are monsters. The offence of defilement is on the increase in this region. There is need to send a message to those intending to commit the same that it will not be tolerated. A girl child needs protection.*

In the result, I sentence the convict to 43 years in prison. The time he has been on remand shall be taken into account."

The Supreme Court has in a recent decision of ***Abelle Asuman V Uganda, Supreme Court Criminal Appeal No.066 of 2016*** while interpreting its decision in ***Rwabugande Moses V Uganda, Supreme Court Criminal Appeal No.25 of 2014*** stated:

"What is material in that decision is that the period spent in lawful custody prior to the said trial and sentencing of a convict must be taken into account and according to the case of Rwabugande that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This Court used the words to deduct and in an arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from the Constitution.

Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution."

We therefore do not agree with counsel for the appellant that the sentence was vague merely because the learned trial Judge just mentioned that he had taken into account the period the appellant had spent on remand.

Counsel for the appellant proposed a sentence of 10 years imprisonment. We note from the sentencing record that the learned trial Judge only took into account the period that the appellant had spent on remand and did not consider other mitigating factors for example that the appellant was a first offender and was only 20 years old.

There is need to give the convicts especially the youth a chance to reform by not keeping them in prison for too long.

The age of the offender is a relevant mitigating factor in cases of extreme young age and extreme old age. The general principle is that young offenders should be given more treatment than punishment. Therefore young age is considered as providing lenient treatment to the offender. See ***A Guide to Criminal Procedure in Uganda, B.J Odoki, Third Edition at page 173.***

Having taken into account both the aggravating and mitigating factors and the period spent on remand, we find that the sentence of 43 years imprisonment was harsh and excessive. We set it aside.

Section 11 of the Judicature Act, CAP 13 permits this Court to exercise the power of the trial Court and impose an appropriate sentence.

We are also alive to the principle of consistency and uniformity. In ***Livingstone Sewanyana V Uganda, Supreme Court Criminal Appeal No.019 of 2006,*** the appellant was sentenced to 18 years for defiling his own biological daughter several times. This sentence was confirmed by both the Court of Appeal and the Supreme Court.

In ***Byera Denis V Uganda, Court of Appeal Criminal Appeal No. 99 of 2012***, the appellant was sentenced to 30 years imprisonment for defiling a 3 year old girl. On appeal, this Court reduced the sentence to 18 years and 4 months imprisonment.

The sentence of 43 years imprisonment is substituted with a sentence of 30 years imprisonment. Since the appellant had spent a period 3 years and 8 months on remand, we deduct that period from the 30 years and sentence the appellant to 26 years and 4 months to run from 22nd December, 2016, being the date of his conviction.

We so order

Dated at Masaka this ....15th.....day of .....Oct..... 2021.

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

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