

[Coram: Richard Buteera, DCJ; Elizabeth Musoke, JA and Cheborion Barishaki, JA]

10 **MUKASA PATRICK:.....APPELLANT**

UGANDA::::::::::::::::::RESPONDENT

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The appellant, Mukasa Patrick was indicted with the offence of Aggravated Defilement contrary to **Section 129 (3) and (4) of the Penal Code Act**. He pleaded guilty to the charge and was convicted on his own plea of guilty. He was sentenced to 20 years imprisonment by Justice Faith Mwendha, as she then was.

25 The facts of the case are that on the 16th day of July 2010, the appellant performed a sexual act with Namyalo Regina, a girl aged 4 and half years. On the fateful day, the appellant (the victim's grandfather) took the victim into his house, had sexual intercourse with her and then warned her not to tell anyone. The victim was heard screaming by a one Namubiru Immaculate who later saw the appellant carrying the
30 victim from his house. Namubiru asked the victim what had happened but she didn't respond. She decided to check the victim herself and saw semen around her private parts and on her clothes. Namubiru took the child to her grandmother Nassuna Sarah, who reported the matter to police. The appellant was arrested and charged with Aggravated defilement.

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The appellant pleaded guilty to the charge and was convicted on his own plea of guilty. He was sentenced to 20 years imprisonment.

Being aggrieved by the decision of the trial Court, the appellant with leave of Court appeals against sentence only on the following ground:-

- 10 **The learned trial Judge erred in law and fact when she failed to properly evaluate all the facts of the case and sentenced the appellant to a very harsh sentence of 20 years imprisonment.**

Legal representation

- 15 At the hearing, Ms. Janet Nakakande appeared for the appellant on State brief while Ms. Margaret Nakigudde, Assistant Director of Public Prosecutions appeared for the respondent. 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 Prisons.
- 20 Both counsel filed and adopted their written submissions.

Submissions of Counsel

- Counsel for the appellant submitted that the learned trial Judge erred in law and fact when she failed to properly evaluate all the facts of the case and sentenced the appellant
- 25 to a very harsh sentence of 20 years imprisonment.

She argued that since the victim's medical examination report showed that the hymen was intact and that no defilement was confirmed, the trial Judge ought to have given a lesser sentence. He added that the trial Judge ought to have also considered the fact that the appellant was repentant and remorseful while sentencing.

- 30 Counsel prayed that the appellant be set free, having spent 11 years in prison since 2010.

Counsel for the respondent opposed the appeal and supported the sentence as imposed by the trial Judge.

10 She averred that the charge was read and explained to the appellant who admitted to the charge and pleaded guilty. She added that the facts of the case were read out to the appellant, to which he confirmed that they were correct and then he was convicted on his own plea of guilty.

15 Counsel submitted that although the medical reports revealed that the victim's hymen was intact and suggesting that defilement was not confirmed, the medical report marked Exhibit P1 was dated 7th September 2010 while the offence was committed on 16th July 2010, one and a half months after the incident when all the victim's private parts had healed of any injuries and inflammation.

20 She further contended that although the appellant is said to have rubbed his penis on the victim's vagina, **section 129 (7) (b) of the Penal Code Amendment Act 8 of 2007** defines a sexual act as the unlawful use of an object or organ by a person on another person's sexual organ.

Counsel emphasised that the appellant pleaded guilty and also accepted the facts of the case as read to him.

25 She contended that the trial Judge considered both the mitigating and aggravating factors. She argued that the trial Judge, before sentencing to 20 years imprisonment considered all the submissions from both counsel on sentencing when he stated that ***"taking all the above into account - he is sentenced to 20 years imprisonment."***

Counsel submitted that the said sentence was lenient considering the fact that the offence was committed on a toddler of 4 and ½ years and the fact that the offence of aggravated defilement attracts a maximum sentence of death.

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True J

Counsel concluded that an appropriate sentence is a matter of discretion for the sentencing Judge as each case presents its own facts upon which a Judge exercises his discretion and the appellate Court is precluded from interfering with that discretion unless the sentence imposed is illegal, or founded upon a wrong principle of the law or where the trial Court has not considered a material factor and where the sentence is harsh or excessive in the circumstances. He relied on *Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No.10 of 1995* and *Abaasa Johnson vs. Uganda, Court of Appeal Criminal Appeal No.33 of 2010*.

He prayed that this Court upholds the sentence of 20 years and dismisses the appeal for lack of merit.

Resolution of the Appeal

This is an appeal on sentence only. We have to consider whether, as an appellate Court, we should interfere with the sentence of 20 years imprisonment as imposed on the appellant by the learned trial Judge.

The principles upon which an appellate Court should interfere with a sentence were considered by the Supreme Court in the case of *Kiwalabye Bernard vs. Uganda, Criminal Appeal No.143 of 2001*, where it was stated that an appellate Court can only interfere with the discretion exercised by the lower Court in imposing sentence where the sentence is manifestly excessive or so low as to amount to a miscarriage of justice or where the Court ignores to consider an important matter or circumstances which ought to be considered while passing sentence or where the sentence is based on a wrong principle.

In the instant case, during allocutus/mitigation, counsel for the defence/appellant submitted that: ***"The convict is a first offender who has pleaded guilty. He is repentant and remorseful. He has been on remand since 2010. I pray for leniency."***

The trial Judge while sentencing stated:-

“The convict is a first offender who has pleaded guilty. I note that the offence was committed on a toddler as the convict was 40 years old. This offence is very rampant in this area.

Taking the above into account - he is sentenced to 20 years imprisonment.”

10 From the above, the trial Judge took into account the aggravating and mitigating factors. The trial Judge, however, did not take into account the period the appellant spent on remand as required under **Article 23 (8) of the Constitution of Uganda**. The section provides: -

15 **“(8) Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.”**

The sentence of 20 years imprisonment imposed by the trial Judge without the taking into account the period spent on remand contravened **Article 23(8) of the Constitution of Uganda**.

In the result, we find that the sentence of 20 years imprisonment as passed by the trial Judge is illegal and it is hereby set aside.

Having found so, we invoke **section 11 of the Judicature Act (CAP 13)** which grants this Court powers of original jurisdiction. We shall therefore proceed to determine an appropriate sentence in the circumstances of this case.

The starting point in sentencing for the offence of aggravated defilement is 30 years and the maximum is death. See: **The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013**.

30 This Court in **Criminal Appeal No.341 of 2010, Okunyu Tom vs. Uganda**, the appellant defiled his daughter and was sentenced to life imprisonment for the offence of aggravated defilement by the trial Court. On appeal, this Court set aside the sentence of

life imprisonment and sentenced the appellant to 20 years imprisonment and only reduced it to 18 years upon consideration of the period spent on remand.

The Supreme Court in *Criminal Appeal No. 08 of 2009, Tigo Stephen v. Uganda*, confirmed a 20 years imprisonment sentence for the offence of aggravated defilement committed on a victim aged 6 years old.

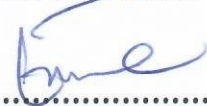
In the instant case, the appellant aged 40 years took advantage of the innocence of a little girl aged only 4 and ½ years when he defiled her. Being a grandfather to the victim, the appellant had a duty to protect the toddler but instead violated her. We take into consideration of the fact that the appellant was a 40-year-old first offender who readily pleaded guilty. He was repentant and remorseful and therefore capable of reform.

We sentence the appellant to 20 years imprisonment. Taking into account the 1 year and 8 months the appellant spent on remand, the appellant will remain with a sentence of 18 years and 4 months' imprisonment. The sentence shall run from the 19th September, 2012 the date of conviction.

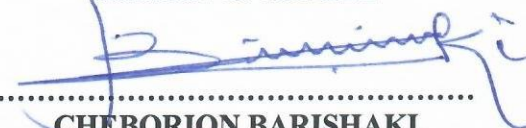
Dated at Kampala this 22nd day of Dec 2021



RICHARD BUTEERA
DEPUTY CHIEF JUSTICE



ELIZABETH MUSOKE
JUSTICE OF APPEAL



CHEBORION BARISHAKI
JUSTICE OF APPEAL