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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

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

CRIMINAL APPEAL NO. 279 OF 2015

SENDEGEYA SYLVESTER:.....APPELLANT

10

VERSUS

UGANDA:.....RESPONDENT

(Arising from the decision of the High Court by Alividza Elizabeth Jane, J in High Court Criminal case No.410 of 2012, dated the 23rd day of July 2015)

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JUDGMENT OF THE COURT

Introduction

The appellant, Sendegeya Sylvester was indicted on 2 counts of Aggravated Defilement contrary to **Section 129 (3) and (4) of the Penal Code Act**. He was acquitted on count
20 2 and he was sentenced to 20 years imprisonment on count 1 by Justice Alividza Elizabeth.

Background to the appeal

The case for the prosecution was that during the month of March 2012, the appellant
25 performed a sexual act with Nalukwago Margret (count 1) and Nassali Lydia (count 2).

The appellant used to fetch water for sale from the village well. The 1st victim (Nalukwago Margret) went to the well to fetch water and the appellant grabbed her, dragged her into the nearby bush, took off her panties, took off his trousers and rubbed his penis around her vagina. Thereafter, he gave the 1st victim 500/= and told her to go
30 home but not tell anybody about it. On another occasion, both victims went together to the well to fetch water and they met the appellant who told them to follow him in the nearby bush which they did. The appellant defiled the 1st victim again and also defiled the 2nd victim. He gave the girls 1000/= and told them to share it. The victims revealed



5 to their mother what had transpired and the matter was reported to Police. The appellant was arrested and subsequently charged.

He was tried and convicted for the offence of Aggravated Defilement on count 1 and he was acquitted on count 2 because the offence was not proved. The trial Judge sentenced the appellant to 23 years imprisonment from which she deducted the 3 years spent on
10 remand which left him with 20 years imprisonment to serve.

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

**The learned trial Judge erred in law and fact when she subjected the appellant to a sentence that was harsh, manifestly excessive and inconsistent
15 with previous judicial precedents.**

Legal representation

At the hearing, Mr. Mutange Ian Derrick represented the appellant on State brief while the respondent was represented by Mr. Kyomuhendo Joseph, a Chief State Attorney.
20 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.

Both counsel filed their written submissions.

Preliminary Objection

25 Counsel for the respondent raised a preliminary objection on a point of law in his written submissions, stating that the appeal is incompetent and illegally brought to this Court as the appellant did not seek leave of Court to appeal on sentence only as required by section 132 (b) of the trial on Indictments Act. For that reason, counsel prayed that the appeal be dismissed.

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5 During the hearing, counsel for the appellant sought leave of Court to appeal on sentence only. In response, counsel for the respondent abandoned the preliminary objection and stated that he had no objection to the appellant's Application for leave of Court.

Court, accordingly granted leave to the appellant to appeal on sentence only.

10 The written submissions filed previously by counsel for the appellant and counsel for the respondent were adopted at the hearing.


The case for the appellant

Counsel for the appellant submitted that the learned trial Judge erred in law and fact
15 when she subjected the appellant to a sentence that was harsh, manifestly excessive and inconsistent with previous judicial precedents. He relied on the case of *Owinyi William vs. Uganda, Court of Appeal Criminal Appeal No. 106 of 2013* and *German Benjamin vs. Uganda, Criminal Appeal No. 142 of 2010*, in support of his argument arguments.

Counsel argued that in imposing a sentence, the trial Court ought to consider previous
20 cases and precedents to ensure consistency in sentencing as provided by paragraph 6 (c) of the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013**. See: *Nisiima Gilbert vs. Uganda, Court of Appeal Criminal Appeal No. 106 of 2013*.

He submitted that, in the instant case, the trial Judge while sentencing the appellant,
25 failed to mention any previous similar cases in which Court sentenced offenders of offences similar to that of this case. Counsel relied on the case of *Mbunya Godfrey vs, Uganda, Supreme Court Criminal Appeal No. 004 of 2011*, to support his argument.

Counsel averred that the offence of aggravated defilement usually attracts a sentence not exceeding 15 years subject to the circumstances of the case. He relied on the cases
30 of *Jackson Zita vs. Uganda, Jackson Zita vs. Uganda, Supreme Court Criminal Appeal No. 19 of 1995, P. Akol vs. Uganda, Supreme Court Criminal Appeal No. 023*



5 *of 1994 and German Benjamin vs. Uganda, Court of Appeal Criminal Appeal No. 142 of 2010*, in which Court sentenced the appellants to sentences ranging between 7 to 15 years imprisonment.

He prayed that Court applies the principle of uniformity to find that the sentence of 20 years imprisonment as imposed by the trial Judge was excessive in the circumstances,
10 upon consideration of the fact that the appellant at the time of the offence was a first time offender, had family responsibilities, was remorseful and asked for leniency.

Counsel prayed that the sentence be reduced to a sentence of 12 years subject to the time he has already served.

15 **The case for the respondent**

Counsel for the respondent submitted that this Court will only interfere with a sentence imposed by a trial Court in a situation where the sentence is either illegal or founded upon a wrong principle of the law or where the trial Court has not considered a material factor in the case or has imposed a sentence which is harsh and manifestly excessive.

20 See: **Abaasa Johnson vs. Uganda, Court of Appeal Criminal Appeal No.33 of 2010.**

He averred that the trial Judge, in the instant case, considered the aggravating factors and mitigating factors and found that the former outweighed the latter and then sentenced the appellant to 23 years imprisonment.

Counsel submitted that the appellant was 64 years while the victim was only 10 years
25 old at the time the offence was committed. He argued that the appellant was supposed to protect the victim but instead took advantage of her and that's why the trial Judge rightly executed her duty of protecting the girl child whose upbringing is threatened by merciless people like the appellant.

He contended that the trial Judge was lenient when she sentenced the appellant to 23
30 years imprisonment considering the fact that he committed a grievous offence. He

5 argued that an offender should not be given a light sentence simply because there is need to create uniformity in sentencing.

Counsel submitted that although counsel for the appellant cited several cases where this Court reduced sentences that were deemed to be harsh, he did not point out the mitigating factors that the Justices of Appeal took into consideration to arrive at their
10 decisions.

He submitted that this Court has upheld sentences that are deemed harsh and excessive by the appellants in a situation where the aggravating factors outweighed the mitigating factors. Counsel relied on the case of *Bukenya Joseph vs. Uganda, Court of Appeal Criminal Appeal No. 222 of 2003*, where Court upheld a sentence of life imprisonment
15 against the appellant who had been convicted of aggravated defilement. In that case, the appellant was 65 years old and the victim was 6 years old at the time the offence was committed.

Counsel further relied on the case of *Mugasa Joseph vs. Uganda, Court of Appeal Criminal Appeal No.241 of 2003*, where Court enhanced a 17 years imprisonment
20 sentence for defilement to 25 years imprisonment having found that the aggravating factors outweighed the mitigating factors.

He prayed that the sentence be upheld and the appeal be dismissed.

Consideration by the Court

25 This is an appeal on sentence only. We are alive to the duty of this Court as the first appellate Court to re-appraise the evidence before the trial Court subjecting it to fresh scrutiny and make its own inferences of law and fact.

We have carefully studied the Court record, the submissions of counsel for each side as well as the law and the authorities cited.

- 5 The appellant faults the trial Judge for imposing a 23 years imprisonment sentence which he considers harsh and excessive in the circumstances.

It is now settled 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 illegal or the appellate Court is satisfied that in the exercise of the discretion the trial
10 Court ignored to consider an important matter or circumstances which ought to be considered when passing the sentence or the sentence was manifestly so excessive or low as to amount to an injustice. See: *Ogalo s/o Owuora v. Republic, [1954] 24 E.A.C.A 270.*

In the present case, the trial Judge while sentencing stated:-

- 15 *“The offence you are convicted of is serious, it carries a maximum sentence of death penalty. The convict is a very old man who should be protecting victims because you are telling Court you have grandchildren.*

*The victim you defiled is even younger than your grandchildren, what you did was shameful for your age, however since you are also aged, it also works as a
20 mitigating factor. Therefore, I sentence you to 23 years imprisonment. I will reduce 3 years to cover the period you have spent on remand therefore you are to serve 20 years imprisonment.*

It is assumed that by the time you leave, you will have been cured of that disease of yours taking advantage of young children.”

- 25 The above quoted decision of the trial Court on sentence shows that the trial Judge considered the aggravating factors and the mitigating factors.

The trial rightly used her discretion and sentenced the appellant to 23 years imprisonment on one count of aggravated defilement. Thereafter, the trial Judge took into account the 3 years that the appellant spent on remand and sentenced the appellant
30 to 20 years imprisonment.

5 In our view, the sentence of 20 years imprisonment was neither harsh nor excessive considering the circumstances of this case.

This Court in **Criminal Appeal No.53 of 2015, Katende Neziphoru vs. Uganda**, confirmed a 22 years imprisonment sentence for the offence of Aggravated defilement.

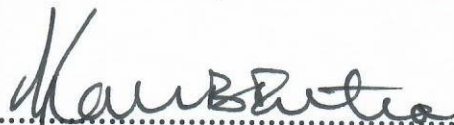
10 In **Okunyu Tom vs. Uganda, Court of Appeal Criminal Appeal No.341 of 2010**, sentenced the appellant, who defiled his biological daughter to 20 years imprisonment for the offence of aggravated defilement and only reduced it to 18 years upon consideration of the period spent on remand.

15 The Supreme Court in the case of **Okello Geoffrey vs. Uganda, Criminal Appeal No.34 of 2014**, confirmed a sentence of 22 years imprisonment as upheld by the Court of Appeal for the appellant who defiled a child below the age of 18 years.

Taking into consideration of the cases above cited, we find that the sentence of 20 years imprisonment was not illegal nor based on wrong principles and neither was it manifestly harsh nor excessive given the circumstances of this case. We therefore find no reason for Court to interfere with it.

20 We accordingly uphold the decision of the trial Court and dismiss this appeal.

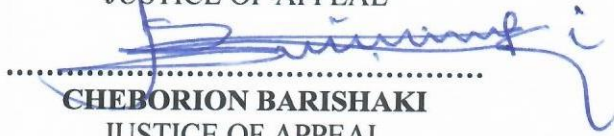
Dated at Kampala this 22nd day of Dec2021

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RICHARD BUTEERA
DEPUTY CHIEF JUSTICE

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30
ELIZABETH MUSOKE
JUSTICE OF APPEAL

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CHEBORION BARISHAKI
JUSTICE OF APPEAL