

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA HELD AT MASAKA
(Coram: Barishaki Cheborion, Stephen Musota, & Muzamiru M. Kibeedi, JJA)

5

CRIMINAL APPEAL NO. 053 OF 2015

KATENDE NEZIPHORO ::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

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

10 *[Appeal from the decision of the High Court of Uganda sitting at Masaka (Hon. Justice Rugadya Atwooki) delivered on 29th November 2015 in Criminal Session Case No. HCT-06-CR-SC-027-2012]*

JUDGMENT OF THE COURT

15 The appellant was indicted with the offence of Aggravated Defilement contrary to section 129(3) and (4a) of the Penal Code Act.

The prosecution's case was that the appellant and the victim's parents were neighbours. On 30th July 2011 the victim, whose names will hereinafter be abbreviated as "**SM**", went to spend a night at the home of the appellant as
20 her parents were away at a function. During the night, the appellant demanded sex from her and when she refused, the appellant threatened her. The appellant then had sexual intercourse with SM and she felt a lot of pain. He threatened her not to reveal.

The following day, the mother of SM found her not walking properly. The
25 mother asked SM what had happened and she revealed what had happened. The mother reported to Lwengo Police. The appellant was arrested. The victim



was examined by Dr. Watime and her hymen was established to have been ruptured 4 days ago. The victim was aged 11 years.

30 Upon his own plea of guilty, the appellant was convicted of aggravated defilement contrary to Section 129(3) and (4) of the Penal Code Act and sentenced to imprisonment of 22 years.

With leave of court granted under Section 132 (1) (b) of the Trial on Indictments Act, the Appellant now appeals to the Court of Appeal of Uganda on the sole ground that:

35 *The learned trial judge erred in law and fact when he imposed a harsh sentence on the Appellant without full regard to available mitigating factors on record.*

REPRESENTATIONS:

40 At the hearing, Mr. Andrew Tusingwire represented the Appellant on State Brief while Mr. Baine Samuel Moses, Chief State Attorney in the office of the Director of Public Prosecutions (DPP), represented the respondent.

45 Due to the COVID-19 Pandemic restrictions, the appellant was not in court physically but attended the proceedings via video link to Prison. Both parties sought, and were granted, leave to proceed by way of written submissions which were already on the court record. They also briefly addressed the court orally.

APPELLANT'S SUBMISSIONS:

Counsel faulted the trial judge for failing to consider the mitigating factors raised by the defence counsel among which was that the appellant was 34



50 years old, pleaded guilty so he was remorseful, saved court's time and resources, first offender, and had been on remand for 3 years and 5 months. That had the trial judge considered the mitigating factors, he would not have imposed such a harsh and manifestly excessive sentence. Counsel referred us to the case of Taremwa Wilson Vs Uganda, Court of Appeal Cr. Appeal No. 125 of 2013, where this court reduced the sentence of the Appellant convicted on his own plea from 18 years imprisonment to 11 years imprisonment.


Counsel therefore prayed that the sentence of the Appellant be accordingly reduced from 22 years imprisonment to 10 years imprisonment.

RESPONDENT'S REPLY:

60 The respondent opposed the appeal.

Counsel submitted that the Appellant was sentenced to 22 years imprisonment after the Learned Trial Judge taking into consideration all the mitigating and aggravated factors. Further, that the sentence of 22 years imprisonment was within parameters of the law, justifiable and fair. That it also follows the Constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions, 2013. Counsel referred us to the case of Asega Gilbert Vs Uganda, Court of Appeal Cr. Appeal No. 016 of 2013, where this honourable Court upheld the sentence of 30 years' imprisonment on each of the two counts of defilement to run concurrently in a case where the victims of Aggravated Defilement were aged 9 and 6 years respectively.

Counsel therefore prayed that the appeal be dismissed, and that the Appellant's sentence to 22 years imprisonment be confirmed.



RESOLUTION OF THE GROUND OF APPEAL:

75 It is now settled that for the Court of Appeal, as a first appellant court, to
interfere with the sentence imposed by the trial court which exercised its
discretion, it must be shown that the sentence is illegal, or founded upon a
wrong principle of the law; or where the trial Court failed to take into account an
important matter or circumstance; or made an error in principle; or imposed a
sentence which is harsh and manifestly excessive in the circumstances. See
80 Kamya Johnson Wavamuno Vs Uganda, Supreme Court Criminal Appeal
No.16 of 2000 (Unreported); Kiwalabye Bernard Vs Uganda, Supreme Court
Criminal Appeal No. 143 of 2001 (unreported); Wamutabanewe Jamiru Vs
Uganda, Supreme Court Criminal Appeal No. 74 of 2007 and Rwabugande
Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014

85 While sentencing the appellants, the trial court stated thus:

*"I have considered the mitigating factors and aggravating factors. The
Victim, her mother and father are in court and the father asked court to
pass sentence as it sees fit.*

The charge was aggravated defilement.

90 **Matters in aggravation:**

- *Age of victim, 11 years.*
- *She was taken through pain at her tender age.*
- *This could affect her [future] life.*
- *Defilement rampant.*

95 **Mitigating factors:**

- *Accused only 34 years.*
- *Pleaded guilty, so:*
 - a) *Remorseful.*
 - b) *Saved time and resources.*
 - c) *Saved victim testifying and torture.*

100

But resources not saved as witnesses already in court and [want to] have their transport refunded.

- *First offender.*
- *Remand period of 3 years and 5 months.*
- *State prayed for 30 years.*
- *Defence prayed for 20 years.*

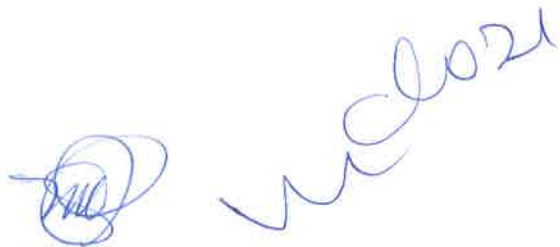
I would consider all the above. After deducting the period of remand, I sentence accused to imprisonment for 22 years.”

From the above, it is crystal clear that the trial court considered the mitigating factors that the appellant is complaining about. It also considered the aggravating factors before passing the sentence of 22 years imprisonment. So the appellant’s complaints are unfounded.

In any case, the sentence is not out of range with sentences passed in cases of similar nature.

In Abale Muzamil Vs Uganda, Court of Appeal Criminal Appeal No.0039 of 2014 (delivered on 24th January 2019) where a neighbour was convicted of aggravated defilement of a child of 9 years, the sentence of 19 years was confirmed by the Court of Appeal.

In Tiboruhanga Emmanuel vs Uganda, Court of Appeal Criminal Appeal No. 0655 of 2014, this Court stated that the sentences approved by this Court in previous aggravated defilement cases, without additional aggravating factors, range between 11 years to 15 years. The Court considered the fact that the appellant was HIV positive as an additional aggravating factor in that he had, by committing a sexual act on the victim while HIV positive, exposed her to the risk of contracting HIV/AIDS. The Court imposed a sentence of 25years imprisonment.



130 In Anguyo Siliva V. Uganda, Court pf Appeal Criminal Appeal No.038 of 2014,
the appellant was 32 years old at the time he committed the offence of
aggravated defilement of a girl aged 14 years. The appellant knew that he was
HIV positive when he committed the offence. Having taken into account the
period of 2 years, eleven months and 2 days that the appellant had been in
lawful custody before sentence, this court sentenced him to serve 21 years and
28 days in prison.

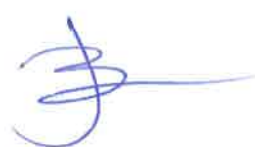
135 In Olara John Peter v. Uganda, Court of Appeal Criminal Appeal No.30 of
2010, the appellant was convicted of aggravated defilement of a girl aged 14
years on his own plea of guilty. He was 29 years old and knew that he was HIV
positive. He appealed against a sentence of 16 years complaining that it was
manifestly excessive in view of the fact that he pleaded guilty. This court
considered that the victim was exposed to the danger of contracting HIV and
140 confirmed that the sentence of 16 years' imprisonment was neither manifestly
excessive nor harsh in the circumstance of the case.

DECISION:

145 The appeal against sentence fails. The sentence of the High Court of 22 years
imprisonment for the conviction for Aggravated Defilement is accordingly
upheld.

Signed, dated and delivered at 12th this day of
..... August 2021.


BARISHAKI CHEBORION
JUSTICE OF APPEAL

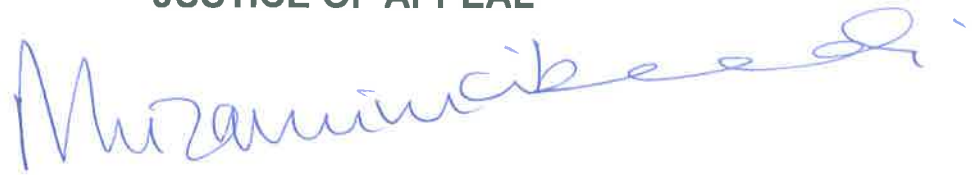








**STEPHEN MUSOTA
JUSTICE OF APPEAL**



**MUZAMIRU MUTANGULA KIBEDI
JUSTICE OF APPEAL**

