THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Kakuru, Mutangula Kibeedi & Mulyagonja, JJA

CRIMINAL APPEAL NO. 115 OF 2014

SENYONJO PAUL :::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of Hon. Lady Justice Elizabeth Ibanda Nahamya, J, dated 4th April 2014 in High Court Criminal Session Case No. 155 of 2014)

Introduction

This is an appeal against the decision of the High Court sitting at Mpigi in which the appellant was convicted of the offence of aggravated defilement contrary to section 129 (3) & (4) (a), (b) and (c) of the Penal Code Act on his own plea of guilt. He was sentenced to 21 years' imprisonment on the 4th April 2014.

Background

The facts that were admitted by the appellant were that the victim, referred to in this judgment as BC, was six years old. On the 4th August 2010 she was at Busimuzi Landing Site with her mother. The mother sent the victim and her 2 ½ year old brother home to go and do some house chores.

On the way home, the victim was accosted by the appellant who was well known to the two children because he was a resident of the same village. The appellant grabbed BC, took her to the bush and performed a sexual act upon her. The appellant requested the victim to repeat the act the following day but she declined because she was in pain.

On 6th August 2010 while the complainant, a police officer, was on duty, one Rovita brought the victim to him at Bunjako Police. She informed him that the victim had a discharge in her private parts and she had taken her to a health centre but the victim was referred to a hospital for better management. The victim was examined and it was established that she was defiled two days before.

At the trial, the appellant pleaded guilty and the trial judge convicted and sentenced him to imprisonment of 21 years. With leave of this court, he appealed against sentence only and his sole ground of appeal was stated as follows:

> *"The learned trial judge erred in law and fact when she passed a harsh and excessive sentence of 21 years in the circumstances of the case without giving due weight to the mitigating factors."*

Representation

At the hearing of the appeal, the appellant was represented by learned counsel, Ms Susan Wakabala on state brief. The respondent was represented by Ms Vicky Nabisenke, Assistant Director of Public Prosecutions. Both counsel filed written submissions before the hearing as directed by the court. This appeal has been disposed of on the basis of written arguments only.

Appellant's submissions

For the appellant, Ms Wakabala submitted that though the trial judge took both aggravating and mitigating factors into consideration, she did not give the mitigating factors the weight that was due and deserving to them. That though the appellant first denied the charge, he changed his plea and admitted that he committed the offence. Counsel submitted that this was a sign of remorse on the appellant's part.

Counsel further submitted that though the difference in age between the appellant and the victim was big (36 years), the injuries to the victim were not grave. The medical doctor who examined the victim stated in his report that there was reddening on the open of the vagina but the hymen was intact. That this meant that there was no penetration of the victim, which would have had grave adverse effects given her age.

The appellant's counsel went on to submit that the appellant had since his imprisonment made efforts and taken action to reform. That the appellant spent 4 years in custody before his trial so that in effect the trial judge passed a sentence on him of 25 years. She submitted that this was harsh and excessive in the circumstances of the case. She referred us to the decision of this court in **Omara Charles v Uganda, Criminal Appeal No. 158 of 2014**, in which the appellant was convicted on two counts of aggravated defilement of two girls, aged 10 and 12 years. The appellant in that case who was 33 years old was sentenced to 40 years and 28 years imprisonment respectively by the trial court. She submitted that this court reduced the sentences to 11 years and 17 years respectively, to run concurrently.

Counsel finally submitted that courts have to be cautious of the need for uniformity and consistency, especially in cases with similar facts, though facts are not exactly the same. She prayed that this court finds that the sentence imposed upon the appellant was harsh and manifestly excessive, set it aside and impose an appropriate sentence. She proposed that a sentence of 15 years would be appropriate.

Respondent's submissions

In reply, Ms Nabisenke reiterated all the aggravating and mitigating factors that were considered by the trial judge before sentencing. She submitted that the trial judge found that the aggravating factors far

outweighed the mitigating factors. That she also found that there was need to guarantee safety and protection for young children from such sexual acts by applying deterrent principles and putting the appellant far away from society. That the trial judge deducted almost 4 years that the appellant spent in lawful custody before his trial by deducting those from the intended sentence of 25 years to make 21 years of imprisonment, which she then imposed on the appellant.

The respondent's counsel referred us to the decision of the Supreme Court in **Livingstone Kakooza v Uganda, Criminal Appeal No. 017 of 1993**, where the court restated the principle that an appellate court should not interfere with the sentence passed by a trial court unless the trial court acted on a wrong principle, overlooked some material factor, or the sentence was manifestly harsh and excessive.

Ms Nabisenke further referred us to the decision in **Kyalimpa Edward v Uganda, Supreme Court Criminal Appeal No. 10 of 1995** where the court held that an appropriate sentence is a matter for the discretion for the sentencing judge. Each case presents its own facts upon which the judge exercises his discretion. That the appellant court will not interfere with the sentence imposed by the trial court unless it is illegal or unless the court is satisfied that the sentence was manifestly excessive as to amount to an injustice.

Counsel for the respondent submitted that in this case there was no illegality occasioned by the trial judge so as to warrant interference with the sentence she imposed. That the sentence was neither harsh nor excessive based on the circumstances under which the offence was committed. She submitted that the trial judge did not act on any wrong principle, neither did she overlook any material factor. She judiciously exercised her discretion in deciding that the sentence of 21 years was appropriate.

Counsel for the respondent further referred us to the Sentencing Guidelines for the Courts of Judicature, Legal Notice No 8 or 2013 and submitted that paragraphs 5 (b) and (c) thereof show that the aim of sentencing is to deter persons from committing offences by separating them from society, where necessary.

Counsel for the respondent went on to submit that the courts should not allow the rights of the convict to overshadow those of the victim of the crime during sentencing. That in determining the appropriate sentence to impose courts of law should always ensure that justice is done to both the convict and the victim of the crime. She relied on the decision of Kisaakye, JSC, in **Busiku Thomas v Uganda, Supreme Court Criminal Appeal No. 33 of 2011**, in which she made the observations that counsel commended to us. She further submitted that the trial judge took both the law and the rights of the appellant and the victim of the crime into account and rightly came to the decision to sentence the appellant to 21 years imprisonment.

Counsel for the respondent finally submitted that she is aware of the principles of uniformity and consistency in sentencing. That a sentence of 21 years in prison is within the range of sentences passed by this court for the offence of aggravated defilement. She referred us to the sentences imposed in **Kamugisha Asan v Uganda, Criminal Appeal No. 212 of 2017, Sentongo Latibu v Uganda, Criminal Appeal No. 73 and 111 of 2016**, in which sentences for aggravated defilement for children aged 3 and 5 years were reduced to 23 years and 25 years imprisonment, respectively.

Counsel then submitted that the circumstances in the two case cited above were similar to those in the case now before us. That since the trial judge took into account the period spent on remand before his conviction and sentence, she prayed that in the spirit of uniformity and

consistency, this court finds that the sentence of 21 years imposed by the trial judge was not harsh and/or manifestly excessive, maintain it, and dismiss the appeal.

Resolution of the Appeal

The duty of this court as a first appellate court is stated in rule 30 (1) of the Judicature (Court of Appeal Rules) Directions, SI 13-10. It is to re-appraise evidence and come up with inferences of fact and reach its own decision. In the case now before us, we are required to reappraise the evidence that was presented in respect of the sentence of the appellant and come up with our own decision on the matter.

We are guided by the time honoured established principles of law in **James v R (1950)18 EACA** and **Ogalo s/o Owoura v R (1945) EACA 270,** re-stated in **Kiwalabye Bernard v Uganda; Court of Appeal Criminal Appeal No.143 of 2003;** that:

> *"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 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 where the sentence imposed is wrong in principle."*

We observed that after the appellant pleaded guilty to the offence charged, the trial judge allowed the victim, her mother and father to make brief statements before sentencing. The appellant's counsel at the trial presented the mitigating factors on his behalf.

The appellant's counsel submits that the trial judge gave more weight to the aggravating factors than the mitigating factors. We shall therefore consider what the trial judge had to say in respect of both.

In respect of the aggravating factors, the learned trial judge observed that:

> *"... the victim was a child of tender years; the sexual act was done in the presence of her brother aged 2 ½ years. The child was on its way to fulfil her mother's errands. Therefore she was a well behaved child in my view. She was walking innocently to go when she was accosted by the convict who was a neighbour. The convict knew that she was a child of tender years. The child contracted a venereal disease and had a lot of pain in her private parts. Aggravated defilement is rampant in Mpigi jurisdictional area; (he) was aged 46 years a difference of 40 years."*

The trial judge then considered the mitigating factors as they were stated for the appellant as follows:

> *First offender; readily pleaded guilty; been on remand since 2010 (almost 4 years though not quite; father of two boys – still below adolescent age; reconsidered his position and pleaded guilty thereby saving court's further resources. Considering the particular facts of this case I realise that the aggravating factors outweigh the mitigating. (sic) Just imagine a 46 year old man who has no shame to have sexual intercourse with a child of 6 years yet (he) is capable of getting a fully grown woman. The girl was traumatised as she told court. She now fears men. The father of the victim, has told court that she suffered a lot of pain in her private parts and pus was oozing there under. The sexual act affected her schooling so much that she feared to move, he was forced to change her school. The mother re-echoed the same sentiments. The convict has told court that if a sexual act was performed on one of his boys, he would feel pain."*

The trial judge then summed up all that was said and ruled thus:

> *The law on aggravating (sic) defilement was meant to guarantee the safety and protection of young children from sexual acts. In this case, I will apply the deterrent principles notwithstanding the plea of guilty. The convict who dared to ask the 6 (six) year old a second round of sexual intercourse must be put away from society. I want the victim in this case to feel safe and secure. I would have sentenced you to 25 years imprisonment. The Prosecution has asked for 23 years imprisonment; the defence lawyer has advocated for 13 years, you have shamelessly asked for 5 years. The parents should be happy if you were incarcerated for 20 years. I have taken into consideration that almost 4 years you spent on*

remand. I therefore sentence you to 21 years (Twenty one years) imprisonment."

For the appellant, counsel complained that the trial judge put more weight on the aggravating factors than the mitigating factors, especially the fact that the appellant readily pleaded guilty to the offence.

We find no fault on the part of the trial judge for laying emphasis on the aggravating factors. There is no law against it. Neither is there any law that requires the trial judge to consider the plea of guilty as a weighty factor in sentencing over and above the aggravating factors. It is however one of the many factors that may be taken into consideration in mitigating the sentence imposed on a convict.

Nonetheless, we observed that the trial judge did not consider the principles of consistency and uniformity in sentencing. The principles were discussed in **Aharikundira Yusitina v Uganda, Supreme Court Criminal Appeal No. 27 of 2015.** The court observed that Guideline No. 6(c) of the Constitution (Sentencing Guidelines) Directions, Legal Notice No 8 of 2013 provides that:

> **"Every court shall when sentencing an offender take into account the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances."**

In as far as the principles apply to the appellate courts the court observed that:

> *"While sentencing, an appellate court must bear in mind that it is setting guidelines upon which lower courts shall follow while sentencing. According to the doctrine of stare decisis, the decisions of appellate courts are binding on the lower courts. Precedents and principles contained therein act as sentencing guidelines to the lower courts in cases involving similar facts or offences since they provide an indication on the appropriate sentence to be imposed."*

The doctrine of *stare decisis* applies to trial courts as well. They are to render decisions that are consistent with the decisions that have been rendered by the appellate courts. And in that regard, the Supreme Court in the case of **Aharikundira Yuventina** (supra) held thus:

> *"It is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation."*

We must now consider the sentences that have been imposed for similar offences by this court and the Supreme Court in order to determine whether the sentence of 21 years, on top of the four years that the appellant had spent in lawful custody before sentence complied with the requirement for consistency and uniformity.

In **Katende Ahamad v Uganda, Supreme Court Criminal Appeal No. 6 of 2004,** the appellant defiled his biological daughter who at the material time was 9 years old. The Supreme Court on a second appeal sentenced the appellant to 10 years' imprisonment after taking into account the period of 2 ½ years he had spent in lawful custody prior to his conviction and sentence.

In **Kizito Senkula v Uganda, Court of Appeal Criminal Appeal No. 24 of 2001,** the victim of the offence was 11 years old and the Court of Appeal held that a sentence of 15 years was appropriate.

In **Lukwago Henry v Uganda, Court of Appeal Criminal Appeal No 0036 of 2010,** in which the decision was handed down on 16 July 2014, the appellant was convicted of the offence of aggravated defilement of a victim who was 13 years old. This court upheld a sentence of 13 years' imprisonment that was imposed on the appellant.

In **Ogarm Iddi v Uganda, Supreme Court Criminal Appeal No. 0182 of 2009,** the victim was 13 years old and the Court of Appeal upheld a sentence of 15 years' imprisonment for the offence of aggravated defilement.

And in **Ninsiima Gilbert v Uganda, Court of Appeal Criminal Appeal No. 0180 of 2010,** the appellant was charged and convicted for the offence of aggravated defilement. The victim was 8 years old and the trial court sentenced the convict to 30 years' imprisonment. On appeal, this court reduced the sentence to 15 years' imprisonment.

In **Byamukama Joseph v. Uganda, Court of Appeal Criminal Appeal No. 216 of 2015**, the 23-year-old appellant who was the father of a girl aged 10 years repeatedly defiled her after sending away her mother. Because he had previously been convicted for the same offence perpetrated against another victim, on the 2nd October 2018, this court reduced his sentence of 30 years in prison by the trial court to 20 years.

Finally, in **Kagoro Deo v. Uganda, Court of Appeal Criminal Appeal No 82 of 2011**, the 65-year-old grandfather of a child aged 2½ years defiled her and he was convicted and sentenced to life imprisonment. This court, on the 20th day of June 2019, substituted the sentence of imprisonment for life to a sentence of 22 years. The court took into account the period spent in lawful custody before trial to come to a sentence of 19 years to run from the date of his conviction by the trial court.

In view of the sentences that have been handed down by this court and the Supreme Court for the offence of aggravated defilement which are in the range of 10 years to 22 years, at the highest, we are of the view that the sentence of 21 years that was imposed on the appellant was manifestly excessive and harsh in the circumstances. We therefore set

it aside and shall impose an appropriate sentence, pursuant to section 11 of the Judicature Act.

We have considered the aggravating and mitigating factors that were set out by the trial court, which we reproduced above. We consider that a term of imprisonment of 16 years would meet the ends of justice. We take into account that the appellant was in lawful custody for a period of 4 years before his conviction and now sentence him to 12 years' imprisonment. The sentence shall run from the 4th April 2014, the day on which he was convicted.

It is so ordered.

6-5-2021

Kenneth Kakuru
JUSTICE OF APPEAL

Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL

Irene Mulyagonja
JUSTICE OF APPEAL