THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO. 332 OF 2015

(Arising from the decision of Hon. Justice Eudes Keitirima in High Court Criminal Session Case No. 0157 of 2012)

SSEJOBA ROBERT:: APPELLANT

VERSUS

UGANDA :: RESPONDENT

CORAM: HON. JUSTICE CHEBORIUON BARISHAKI, JA

HON. JUSTICE STEPEHEN MUSOTA, JA

HON. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA

JUDGMENT OF THE COURT

The appellant was indicted, tried and convicted of the offence of Aggravated Defilement contrary to section 129 (3) (4) (a) and (c) of the Penal Code Act and sentenced to 35 years imprisonment.

The appellant was dissatisfied with the sentence passed by the trial court and with leave of Court under S. 132 (1) (b) of the Trial on Indictments Act filed this appeal on a sole ground that;

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The learned trial Judge erred in both law and fact when he sentences the appellant to 35 years imprisonment which sentence is harsh and manifestly excessive in the circumstances.

Background

The victim used to stay with the appellant after he had chased away his wife, the victim's mother. The victim was 8 years old at the time the offence was committed. In the month of August 2010, when the victim was sleeping in her bed at night, she woke up to find the appellant was trying to fix his penis in her vagina. The victim felt pain but the appellant warned her not to make an alarm. During the same month, the appellant went to the victim's bed and tried to have sexual intercourse with her. The victim started to walk with difficulty and the appellant told the victim to accuse one Semugabi. The two were summoned at police and the victim informed police that the appellant used to perform sexual acts with her.

Representation

At the hearing of the appeal, Ms. Nansubuga appeared for the appellant while Ms. Anna Kiiza, Chief State Attorney, appeared for the respondent.

Appellant's submissions

It was contended for the appellant that the learned trial Judge only considered the period the appellant had spent in lawful custody yet there were other mitigating factors like the fact that the appellant was a first offender of youthful age. Counsel relied on the Supreme Court

decision in **Livingstone Kakooza Vs Uganda S.C.C.A No. 17 of 1993** which cited with approval the case of **Abaasa Johnson and another Vs Uganda COA Criminal Appeal No. 33 of 2010** on the holding that an appellate court will also interfere with the sentence where the trial court overlooked some material factor.

Counsel relied on **Ninsiima Gilbert Vs Uganda C.A.C.A No. 0180 of 2010** in which the 30year imprisonment sentence was set aside for being harsh and excessive and the appellant was sentenced to 15 years imprisonment.

Respondent's submissions

In reply, counsel for the respondent submitted that the sentence meted on the appellant was appropriate in the circumstances of this case. The HIV positive appellant defiled his 8 year old daughter twice and this kind of action calls for a deterrent sentence. Counsel relied on **Kyalimpa Edward Vs Uganda CS.C.C.A No. 10 of 1995** in which it was held that an appellate court will not normally interfere with the discretion of the sentencing Judge unless the sentence is illegal or was manifestly so high to amount to an injustice.

Consideration of the Appeal

The principles on which this Court may interfere with a sentence are well settled. An appellate court should not interfere with a sentence imposed by a trial court where the trial court has exercised its discretion on sentence, unless the exercise of that 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 the trial court ignored to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in principle (see ***Kyewalabye Bernard v. Uganda Supreme Court Criminal Appeal No. 143 of 2001).*** It does not matter that this Court would have given a different sentence if it had been the one trying the appellant (see ***Ogalo s/o Owoura v. R (1954) 24 EACA 270*)**.

We have evaluated the record of proceedings of the sentencing Judge as well as the trial record and judgment. We have also carefully considered the submissions of Counsel for both sides.

The sentencing order of the learned trial Judge states;

> *"I have heard both the aggravating and mitigating factors. However the acts of the convict of having sex with his own daughter were not only heinous but barbaric to say the least. Instead of taking care of his young daughter an act that is not even done by animals.*
>
> *This coupled with the fact that the convict was HIV positive and hence a death warrant he had given to his young daughter. Such beastly action calls for a deterrent sentence.*
>
> *I have considered the period the convict has spent on remand, and I will now sentence him to 35 (thirty five) years imprisonment. The convict has a right of appeal against the conviction and sentence."*

The maximum sentence for the offence of Aggravated Defilement is death. Sentencing, as a punishment for an offence is meant to be a retribution, deterrent and also to rehabilitate the offender. Both aggravating and mitigating factors have to be considered by the sentencing Judge. Since the sentencing Judge did not consider the mitigating factors, we have no option but to set aside the sentence passed by the trial court and sentence afresh.

This court has the same powers as the High Court, pursuant to Section 11 of the Judicature Act. It states,

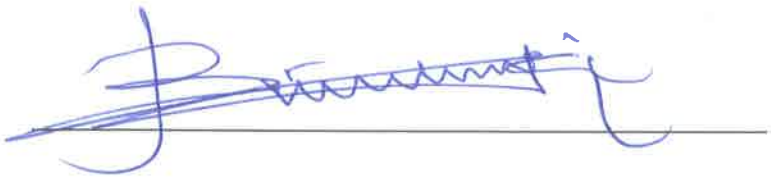
> ***'11. Court of Appeal to have powers of the court of original jurisdiction.***
>
> *For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated'*

In the instant case, we have considered that the appellant was a first offender, he was 39 years old at the time of the commission of offence, he was remorseful and the period he spent on remand. Nevertheless he committed a very serious offence whose maximum punishment was death. The appellant was HIV positive although there is no evidence he infected the victim but the risk was there and he defiled his daughter who was living under his care. This act was incapable of reparation and calls for a deterrent sentence.

We are satisfied that a sentence of 30 years imprisonment from the date of conviction [24 November 2015] will meet the ends of justice in this case.

We so order.

Dated this 12th day of August 2021



Hon. Justice Cheborion Barishaki, JA

Hon. Justice Stephen Musota, JA

Hon. ~~Lady~~ Justice Muzamiru Mutangula Kibeedi, JA