

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 043 OF 2013**

WAKATA JOSEPH:.....APPELLANT

VERSUS

UGANDA:.....RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kiboga before Mwonda, J. (as she then was) delivered on 17th April, 2013 (conviction) and 24th April, 2013 (sentencing) in Criminal Session Case No. 33 of 2012)

**CORAM: HON. MR. JUSTICE RICHARD BUTEERA, DCJ
HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE CHEBORION BARISHAKI, JA**

JUDGMENT OF THE COURT

Background

On 17th April, 2013, the High Court (Mwonda, J. (as she then was)) convicted the appellant of the offence of Aggravated Defilement contrary to **Section 129 (3) and (4) (a)** of the **Penal Code Act, Cap. 120**. On 24th April, 2013 the High Court sentenced the appellant to 35 years imprisonment.

The decision followed the trial of the appellant on an indictment that alleged that, he had on 17th August, 2012 at Kigabwa Village in the Kyankwanzi District performed an unlawful sexual act with (N.S a minor (the victim)), a girl aged 6 years.

The facts as adduced and accepted by the learned trial Judge are as follows. The appellant and the victim both lived at Kigabwa Village in Kyankwanzi District. On 17th August, 2012, the appellant, an uncle to the victim asked the victim to follow him to a well to fetch water. On the way to the well, the appellant took the victim to a bush and had sexual intercourse with her. He promised to buy her a chapatti and asked her not to tell her mother about the incident. The victim reported the incident to her elder brother PW2

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Aggrey Naluwoza, who in turn reported to the victim's mother PW3 Nambuya Kezia. PW3 notified the nearby police station and the appellant was arrested. The victim was taken for medical examination and the report indicated that she had been defiled.

The appellant denied the offence when he opened his case. He stated that the prosecution witnesses had told lies against him, and claimed that PW3 was jealous of him and wanted to take his maize. The learned trial Judge however believed the prosecution evidence and convicted the appellant, thereafter sentencing him as stated earlier. Being dissatisfied with the sentence imposed by the trial Court, and after this Court granted him leave for the purpose, the appellant now appeals on the sole ground that:

"The learned trial Judge erred in law and in fact when she subjected the appellant to a sentence that was harsh and manifestly excessive in the circumstances of the case."

The respondent opposed the appeal.

Representation

At the hearing, Mr. Mutange Ian Derrick, learned counsel appeared for the appellant, on State Brief. Ms. Sharifah Nalwanga, learned Chief State Attorney in the office of the Director of Public Prosecutions, appeared for the respondent.

In line with regulations issued by the Uganda Prisons Service to prevent exposure of prisoners to COVID-19, the appellant was required to stay at Luzira Prison where he was incarcerated, but he connected with the hearing, remotely via Zoom Video Conferencing Technology.

Written submissions filed for the respective parties were, with leave of the Court, adopted in support of the case for each side.

Appellant's submissions

Counsel for the appellant urged this Court to find that the sentence imposed by the trial Court was harsh and excessive and to set it aside. He referred this Court to the decision in **Owinji William vs. Uganda, Court of Appeal**



Criminal Appeal No. 106 of 2013 (unreported) that restated the applicable principles when an appellate Court is asked to interfere with a sentence imposed by the trial Court. An appellate Court would be justified to interfere, if, in sentencing, the trial Court evidently acted on a wrong principle or overlooked a material particular or if the sentence challenged is so low or manifestly harsh and excessive so as to amount to a miscarriage of justice.

Counsel referred to the decision of the Supreme Court in **Mbunya Godfrey vs. Uganda, Supreme Court Criminal Appeal No. 4 of 2011 (unreported)** and the decision of this Court in **Ninsiima Gilbert vs. Uganda, Criminal Appeal No. 0180 of 2010**, as well as to **Rule 6 (c) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013**, all which collectively emphasize the need for courts to apply consistency in sentencing, by ensuring that they impose sentences that are comparable with sentences imposed in previously decided cases with similar facts. Counsel referred to the sentences imposed in several previously decided aggravated defilement cases. In **Kizito Senkula vs. Uganda, Supreme Court Criminal Appeal No. 24 of 2001 (unreported)**, the Supreme Court found a sentence of 15 years appropriate in an aggravated defilement case. In another aggravated defilement case, **Bukenya Joseph vs. Uganda, Court of Appeal Criminal Appeal No. 222 of 2003 (unreported)**, the Court of Appeal upheld a life-imprisonment sentence then construed as 20 year imprisonment. In **Sam Buteera vs. Uganda, Supreme Court Criminal Appeal No. 21 of 1994 (unreported)**, the Supreme Court upheld a sentence of 12 years imprisonment in a case where the appellant, a herdsman had been convicted of defiling an 11 year old victim.

Counsel faulted the learned trial Judge for imposing a sentence of 35 years imprisonment that was inconsistent with the sentences imposed in previously decided Aggravated Defilement cases, which as shown from the above cases, in non-exceptional cases seldom go beyond 15 years imprisonment. He contended that the sentence imposed on the appellant could only have

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been reached because the learned trial Judge ignored to take into account those previously decided cases.

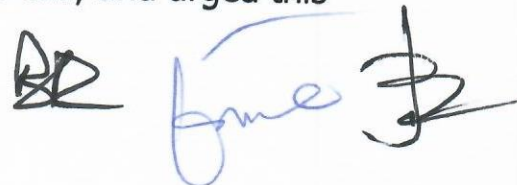
It was further submitted that the learned trial Judge failed to comply with the provisions of **Article 23 (8) of the 1995 Constitution** as well as the guidance set out in **Rule 15 (2) of the Sentencing Guidelines**, that enjoin the trial Courts to take into account the period a convict has spent on remand while sentencing in so far as she omitted to take into account the period that the appellant had spent on remand. Further, it was contended that the learned trial Judge did not consider the fact that the appellant was a first offender. For the above reasons, counsel urged this Court to set aside the sentence of 35 years that the trial Court imposed and substitute in its place a shorter sentence of 15 years imprisonment and thereafter to deduct the period the appellant spent on remand.

Respondent's submissions

Counsel for the respondent supported the sentence that the trial Court imposed on the appellant. She referred to the case of **Kobusheshe vs. Uganda, Court of Appeal Criminal Appeal No. 110 of 2008 (unreported)** where it was re-stated that a sentence imposed by the trial Court may only be interfered with in limited circumstances, such as, where the trial Court acted on a wrong principle or where it overlooked a material factor or where the sentence imposed is harsh or manifestly excessive.

It was also submitted that despite the mitigating factors submitted in favour of the appellant, the aggravating factors against him justified the sentence that was imposed. The appellant committed a serious offence attracting a maximum sentence of death. The victim of the offence, was very young aged 6 years old. There was also evidence to suggest that violence had been used on the victim as she had sustained injuries on her private parts. To further compound matters, the appellant was an uncle of the victim.

However, counsel agreed that the trial Court omitted to consider the period spent by the appellant on remand as enjoined under the law, and urged this Court to take that omission into account.



Resolution of Appeal

We have carefully studied the Court record, and considered the submissions of counsel for both sides, as well as the law and authorities submitted in support thereof. We have also considered other applicable law and authorities that were not cited.

The duty of this Court as a first appellate Court, even in appeals against sentence only, is to reappraise the material on record and come up with its own conclusions on all issues of law and fact. **(See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, S.I 13-10 and the authority of Uganda vs. Ssimbwa, Supreme Court Criminal Appeal No. 37 of 1995).** We shall bear the above duty in mind, as we resolve the sole ground of appeal.

It was contended that in sentencing the appellant, the learned trial Judge omitted to take into account the period he had spent on remand prior to sentencing. In her brief sentencing remarks at page 13 of the record, the learned trial Judge stated:

"The convict is a first offender, but this offence is very rampant in this area. The convict showed no remorsefulness. I shall therefore pass a harsh sentence. He is sentenced to 35 years imprisonment."

We therefore accept the submission for the appellant, which was rightly conceded to by counsel the respondent, and find that the learned trial Judge did not consider the relevant remand period. Thus, the sentence she imposed was illegal for having been passed in disregard of the provisions of **Article 23 (8) of the 1995 Constitution**, which provides as follows:

"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."



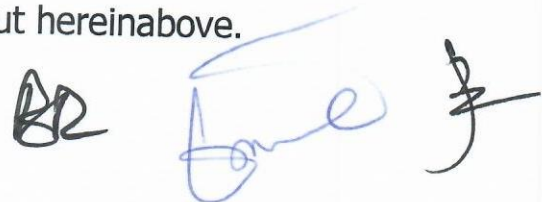
Accordingly, the sentence imposed cannot stand and we hereby set it aside. We shall proceed to determine a fresh sentence pursuant to the provisions of **Section 11** of the **Judicature Act, Cap. 13** which, in the circumstances permit us to do so. In arriving at an appropriate sentence, we shall apply the principle of consistency in sentencing, which requires us to consider the sentences imposed in previously decided cases with similar facts. In **Mugasa Joseph vs. Uganda, Court of Appeal Criminal Appeal No. 241 of 2003 (unreported)**, this Court found a sentence of 17 years imprisonment for defilement too lenient and enhanced it to 25 years imprisonment.

In **Othieno John vs. Uganda, Court of Appeal Criminal Appeal No. 174 of 2010 (unreported)**, this Court confirmed a sentence of 29 years imprisonment for aggravated defilement where the victim was aged 14 years.

In **Okello Geoffrey vs. Uganda, Criminal Appeal No. 34 of 2014 (unreported)**, the Supreme Court confirmed a sentence of 22 years imprisonment in a case of aggravated defilement where a child below the age of 18 years had been defiled.

We have also considered the mitigating factors submitted for the appellant as follows. The appellant was a first offender. He was aged 62 years and therefore at an advanced age. The aggravating factors were as follows. The offence of which the appellant was convicted was serious in nature and attracted the death sentence as the maximum. The victim of the offence was very young aged 6 years at the time of commission of the offence. The appellant was moreover an uncle to the victim. Taking into account all the circumstances of the case, we find a sentence of 29 years imprisonment, appropriate in the circumstances of the case. The appellant was arrested on 17th August, 2012, and at the date of sentencing on 24th April, 2013, he had been on remand for a period of 8 months and 7 days. After deducting the remand period, we shall sentence the appellant to 28 years, 3 months and 23 days imprisonment, to run from the date of his conviction on 17th April, 2013.

In conclusion, the appeal succeeds on the terms set out hereinabove.



We so order.

Dated at Kampala this 28th day of May 2022.


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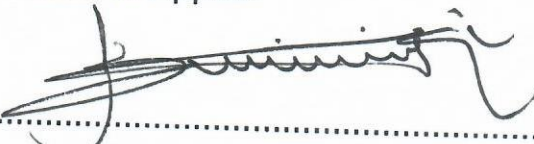
Richard Buteera

Deputy Chief Justice


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Elizabeth Musoke

Justice of Appeal


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Cheborion Barishaki

Justice of Appeal