THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 053 OF 2011

NTARE AUGUSTINE::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mpigi before Mwonda, J. (as she then was) delivered on 31st January, 2011 in Criminal Session Case No. 210 of 2010)

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 31st January, 2011, 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 the same day, the High Court sentenced the appellant to 25 years imprisonment.

The decision followed the trial of the appellant on an indictment that alleged that he had on 26th March, 2010 at Seeta-Bweya Village in Mpigi District performed a sexual act with N.S (a minor (the victim)), a girl who was under the age of 14 years. The victim was aged 11 years at the time.

The facts as adduced and accepted by the learned trial Judge are as follows. The appellant and the victim lived in Seeta-Bweya Village in Mpigi District. The appellant was an askari, but also owned a shop where he sold household goods. On 26th March, 2010, the victim, in the company of one Ms. Luwasa went to the appellant's shop. Ms. Luwasa had to tend to other business and left the victim at the appellant's shop, but said she would return to take the victim back to her home. Ms. Luwasa did not return by nightfall. At about

8.30 p.m, the victim, alone had started on her journey back to her home, but the appellant insisted on accompanying her. As they walked along, the appellant told the victim that he loved her. He then made the victim go to his house, where he had a sexual act with her by placing a finger in the victim's vagina. In the meantime, anxious relatives and other residents of the village had started to search for the victim, who had delayed to return home. One of those residents PW2 Tamale Ahamada, had gone to check at the appellant's shop and he met with the appellant who denied knowledge of the victim's whereabouts. PW2 had then started calling out the victim's name, and although she did not initially respond, she had later replied. PW2 then went into the appellant's house and rescued the victim. The victim told PW2 about the incident in which the appellant had performed a sexual act on her. PW2 reported to the area LC Vice-Chairman, who forwarded the matter to the nearby Police Station. The appellant was subsequently arrested.

The appellant denied the offence when he opened his defence case. He alleged that an uncle of the victim had a grudge with him over the affections of a woman, and had led to the fabrication of the case against him. However, the learned trial Judge believed the prosecution evidence and convicted the appellant as charged, thereafter sentencing him as stated earlier. After obtaining leave from this Court, the appellant now appeals against sentence only on the sole ground that:

> **"That the learned trial Judge erred in law and fact when she sentenced the appellant to 30 years imprisonment which is manifestly harsh."**

The respondent opposed the appeal.

Representation

At the hearing, Ms. Sarah Awelo, learned counsel on State Brief appeared for the appellant. Mr. George William Byansi, learned Senior Assistant Director of Public Prosecutions appeared for the respondent.

In accordance with then existent Prison regulations to prevent the exposure of inmates to COVID-19, the appellant followed the hearing via video link enabled by Zoom Conferencing Technology, while he remained at Luzira Government Prison.

Written submissions filed for both sides, were, with leave of the Court adopted in support of their respective cases.

Appellant's submissions

Counsel submitted that grounds existed to justify this Court to set aside the sentence imposed by the trial Court and impose a more lenient sentence. Such grounds, which are now well-established, were restated in the case of **Abaasa Johnson vs. Uganda, Court of Appeal Criminal Appeal No. 33 of 2010 (unreported),** where it was held that an appellate Court may interfere with a sentence where an of the following circumstances are established. If the sentence was either illegal. Where the sentence was founded upon a wrong principle of law. If the trial Court did not consider a material factor or where the sentence imposed is harsh and excessive in the circumstances. In the present case, the sentence was illegal, because the learned trial Judge did not take into account the period that the appellant spent on remand as **Article 23 (8)** of the **1995 Constitution** enjoined her to do. In view of the highlighted illegality, counsel urged this Court to set aside the sentence imposed and determine a fresh sentence.

In determining a fresh sentence, and in line with the principle of consistency in sentencing, counsel urged this Court to be mindful of the nature of sentences imposed in previously decided cases with similar facts such as **Kizito Senkula vs. Uganda, Court of Appeal Criminal Appeal No. 24 of 2001 (unreported); and Lukwago Henry vs. Uganda, Court of Appeal Criminal Appeal No. 036 of 2010 (unreported)** where shorter sentences were considered appropriate. Counsel proposed a sentence of 10 years imprisonment as appropriate in the present case.

Respondent's submissions

Counsel for the respondent supported the sentence that the learned trial Judge imposed on the appellant, and very briefly submitted that she reached that after considering all the relevant factors, including the period the appellant had spent on remand. He urged the Court to dismiss the appeal.

Resolution of the Appeal

We have carefully studied the record, considered the submissions of counsel for both sides and the law and authorities cited. We have also considered other relevant law and authorities that were not cited.

It is now well-established that on a first appeal, like the present one, this Court has a duty to reappraise all the material on record and come up with its own conclusions on all issues of fact. **(See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10 and Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported)).** We shall remain alive to the highlighted duty as we resolve the sole ground of appeal.

This appeal is against sentence only. Counsel for the appellant urged this Court to find that the sentence imposed on the appellant was illegal as the learned trial Judge had omitted to take into account the period that the appellant spent on remand prior to sentencing, as she was enjoined to do under **Article 23 (8) of the 1995 Constitution.** The provision stipulates:

> **"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."**

In **Kizito Senkula vs. Uganda, Supreme Court Criminal Appeal No. 24 of 2001 (unreported)** while discussing the import of the provisions of Article 23 (8), the Court stated:

> **"As we understand the provisions of Article 23 (8) of the Constitution, they mean that when a trial Court imposes a term of imprisonment as**

sentence on a convicted person, the Court should take into account the period which the person spent on remand prior to his/her conviction. Taking into account does not mean arithmetical exercise."

A trial Court, therefore, complied with the provisions of Article 23 (8), if it could be demonstrated that when sentencing a convict, the trial Court was alive to the period that the convict had spent on remand prior to sentencing. In the present case, the learned trial Judge had this to say when she sentenced the appellant:

> **"The convict is a first offender who has almost a year (sic). However, this offence is very rampant in this area. I shall pass a deterring sentence. He is sentenced to 25 years imprisonment."**

In the above passage, the learned trial Judge mentioned the period that the appellant had spent on remand, and took it into account although she never conducted an arithmetic exercise by deducting the remand period from the sentence that she had found appropriate. This meant the final sentence was inclusive of the period that the appellant had spent on remand.

The second point that was argued by counsel for the appellant is that the sentence imposed on the appellant was harsh and excessive if compared with the sentences imposed in previously decided aggravated defilement cases. In **Livingstone Kakooza vs. Uganda, Supreme Court Criminal Appeal No. 17 of 1993 (unreported)**, the Court stressed that:

> **"Sentences imposed in previous cases of similar nature while not being precedents do afford material for consideration"**

We have considered the sentences in the following previously decided cases of a similar nature. 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 find that the sentence of 25 years imprisonment that the learned trial Judge imposed did not exceed the permissible sentencing range discernable from the above cases. Moreover, the learned trial Judge took into account both the aggravating and mitigating factors of the case as well as the period spent on remand. Therefore, we find no reason to interfere with the sentence that the learned trial Judge imposed and we uphold it.

In conclusion, we find no merit in the appeal and we dismiss it.

We so order.

Dated at Kampala this ..... day of ..... 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