THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 080 OF 2010

SSERUYANGE YUDA TADEO::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mpigi before Nahamya, J. delivered on 12th May, 2010 in Criminal Session Case No. 0241 of 2008)

CORAM: HON. MR. JUSTICE RICHARD BUTEERA, DCJ
HON. MR. JUSTICE CHEBORION BARISHAKI, JA
HON. MR. JUSTICE MUZAMIRU KIBEEDI, JA

JUDGMENT OF THE COURT

Background

On 12th May, 2010, the High Court (Nahamya, J.) 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 33 years imprisonment.

The decision followed the trial of the appellant on an indictment that alleged that, he had on 7th May, 2008, at Golola Village in the District of Mpigi perfomed a sexual act with N.J (a minor (the victim)), a girl under the age of 14 years. The victim was 9 years old.

The facts as adduced and accepted by the learned trial Judge are as follows. The appellant was a relative of the victim and, both he and the victim lived at Golola Village in Mpigi District. On 7th May, 2008, the appellant went to the victim's home, where he found the victim. He told the victim that he was unwell and requested the victim to go to his home and care for him. The victim agreed. While at his home, the appellant made the victim to sleep on his bed, and later that night he performed a sexual act on the victim. The victim tried to make an alarm, but the appellant covered her mouth to mute her. The next morning, the victim left the appellant's home and reported the incident to her cousin PW3 Maria Nakazibwe. On 11th May, 2008, the

appellant was arrested, after the area LC1 Chairman and the Defence Secretary had been notified of the incident with the victim. On 12th May, 2008, the incident was also reported at the nearby Kiriri Police Post. The police referred the victim for medical examination.

The appellant denied the offence and gave evidence suggesting that a grudge between himself and the victim's relatives, some of whom testified as prosecution witnesses had led them to give false evidence against him. However, the learned trial Judge believed the prosecution case and evidence and convicted the appellant as charged, and thereafter sentenced him accordingly.

The appellant did not wish to challenge the decision of the learned trial Judge to convict him as charged. However, being dissatisfied with the sentence that the trial Court imposed on him, the appellant, with leave of this Court, now appeals to this Court against sentence only. The sole ground of appeal is that:

> " **The learned trial Judge erred in law and fact when she failed to properly evaluate all the facts of the case and sentenced the appellant to a very harsh sentence of 35 years."**

The respondent opposed the appeal.

Representation

At the hearing, Ms. Janet Nakakande, learned counsel appeared for the appellant, on State Brief. Ms. Vicky Nabisenke, learned Assistant 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

The case for the appellant is that the sentence that the trial Court imposed was inappropriate. Counsel for the appellant stressed the young age of the

appellant who at the time of sentencing, was still relatively young aged 26 years. In counsel's view, the young age of the appellant ought to have persuaded the learned trial Judge to impose a shorter sentence, because at his young age, the appellant was capable of reforming into a useful citizen. A lengthy custodial sentence would be of no value and instead would deprive the appellant of his productive years. Moreover, the learned trial Judge erroneously stated that the appellant was aged 26 years at the time he committed the offence contrary to the evidence that showed that he was 24 years. Counsel further contended that the fact that the appellant was a first offender was not considered by the learned trial Judge.

Counsel further contended that the sentence of 35 years imprisonment imposed on the appellant, which is longer than one of life imprisonment-computed at 20 years imprisonment, was harsh and excessive. She urged this Court to substitute a sentence of 15 years imprisonment instead, which would help the appellant to be reintegrated back into society as a productive citizen.

Respondent's submissions

Counsel for the respondent supported the sentence imposed on the appellant. She referred this Court to the authority of **Rwabugande Moses vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014 (unreported)** restating the principles stated in the earlier authority of **Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1995**, for the proposition that an appellate Court may only interfere with a sentence imposed by the trial Court in limited circumstances when the appellant highlights any of the well-known grounds. Counsel urged this Court to find that the learned trial Judge considered all the relevant factors in sentencing and that as such there were no grounds for this Court to interfere with the sentence she imposed which was neither excessive nor illegal.

Counsel contended that to reduce the sentence imposed by the trial Court would be tantamount to this Court giving primacy to the appellant's interests over and above those of the victim. Despite the mitigating factors submitted for the appellant, there were several factors that aggravated the offence and justified the sentence that was imposed. The victim was very young aged just 9 years, when she was sexually abused by the appellant, her own cousin, who at 24 years, ought to have known better. She invited this Court to follow

Kisaakye, JSC's dictum in the authority of **Busiku Thomas vs. Uganda, Supreme Court Criminal Appeal No. 33 of 2011 (unreported)** where she discouraged the practice of appellate Courts giving primacy to the rights of a convicted person over those of the victim, by the Court giving favourable attention to mitigating factors in disregard of the unfavourable aggravating factors.

It was further submitted for the respondent that the appellant's sentence was imposed prior to the Supreme Court decision that articulated the consistency principle, and that as such, the learned trial Judge could not have been required to retrospectively apply that principle.

All in all, counsel submitted that the appellant failed to advance any reason to justify this Court to interfere with the sentence imposed on him, and urged this Court to maintain that sentence.

Resolution of the Appeal

We have carefully studied the record of appeal, and considered counsel's submissions as well as the law and authorities cited. We have also considered the law and authorities although not cited that were relevant in determination of the present appeal.

The duty of this Court as a first appellate Court 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 are also mindful of the principle that an appellate Court may only interfere with a sentence imposed by the trial Court in limited circumstances. In **Rwabugande Moses vs. Uganda Criminal Appeal No. 25 of 2014**, the Supreme Court restating the applicable principles, observed:

> **"In Kyalimpa Edward vs. Uganda; Supreme Court Criminal Appeal No.10 of 1995, the principles upon which an appellate court should interfere with a sentence were considered. The Supreme Court referred to R vs. Haviland (1983) 5 Cr. App. R(s) 109 and held that:**
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> **An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not**

normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice: Ogalo s/o Owoura vs. R (1954) 21 E.A.C.A 126 and R vs. MOHAMEDALI JAMAL (1948) 15 E.A.C.A 126. (Emphasis ours)

We are also guided by another decision of this court, Kamya Johnson Wavamuno vs. Uganda Criminal Appeal No.16 of 2000 in which it was stated:

It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a material consideration, or an error in principle was made. It is not sufficient that the members of the Court would have exercised their discretion differently. (Emphasis Ours)

In Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001 it was held:

The appellate court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentences unless the exercise of the discretion is such that the trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence."

In this case, the appellant alleges that the learned trial Judge overlooked the material principle of the age of the appellant. The appellant was aged 24 years old and was relatively young with a chance of reforming into a better citizen, if a shorter sentence had been imposed. Counsel for the respondent disagreed. She submitted that the learned trial Judge duly considered the young age of the appellant but felt, and rightly so that the aggravating factors in this case warranted a harsh sentence. The victim was very young aged just 9 years and the appellant, a cousin to the victim should have known better than to sexually abuse her.

In sentencing, the learned trial Judge made the following remarks at page 108 of the record:

"Aggravated defilement is a serious offence which entails a maximum death sentence. These cases of defilement are on the rise. This is witnessed from the many defilement cases that this Court has handled in this session. Children of tender years are defiled by both young men and old men in Mpigi.

I have duly considered the mitigating factors advanced by the defence and the aggravating factors advanced by prosecution. However, the accused was a cousin of the victim. The accused defiled the victim twice at such a tender age of 9 years. The accused was 26 years whom the victim looked at as a guardian and brother. The accused abused the innocence of this young girl, in fact this was incest which is religiously condemned and morally wrong. This young girl is now 11 years and although she was sexually abused by the accused two years ago, this will affect her physically and emotionally for the rest of her life. I would have sentence you to a maximum sentence of death.

However, considering the fact that the time you committed this offence, you were 26 years and had been on remand for two years, I hereby sentence you Sseruyange Yuda Tadeo to thirty-five years (35) years. The period of two years you have spent on remand has been considered and should be deducted. You will therefore serve a final term of thirty-three (33) years imprisonment."

Although the learned trial Judge remarked that she had considered all the mitigating and aggravating factors, it is our view, that a reasonable person, would conclude from reading those remarks that it was the factors that the learned trial Judge explicitly referred to, that prominently weighed on her mind as she sentenced the appellant. The reasonable person would conclude, that because she did not, in her sentencing remarks, explicitly refer to the fact that the appellant was a first offender, the learned trial Judge did not consider it to be a material factor. This was an error. In our view, the fact of a being a first offender is a material factor that a sentencing Court ought to consider. In the authority of **Kamya Johnson Wavamuno vs. Uganda Supreme Court Criminal Appeal No. 016 of 2000 (unreported)** in which it was held that an appellate Court may interfere with a sentence imposed by the trial Court if there was failure to take into account a material consideration in sentencing.

In the present case the learned trial Judge failed to take into account the fact that the appellant was a first offender when she sentenced him. For that reason, we shall interfere and set aside the sentence of 33 years imprisonment that was imposed on the appellant.

We shall, pursuant to **Section 11** of the **Judicature Act, Cap. 13** which empowers us to do so, proceed to determine a fresh sentence for the appellant, having set aside the sentence imposed by the trial Court. We are

mindful of the mitigating factors submitted for the appellant as follows. The appellant was a first offender with no previous conviction record. He was aged 24 years at the time of the commission of the offence and 26 years at sentencing and was therefore relatively young man, capable of reforming and being reintegrated back into society as a useful citizen. The appellant was also remorseful for the offence. Further, the appellant was responsible to look after his mother.

We have also considered the aggravating factors that were submitted by the prosecution. The serious nature of the offence that the appellant committed. The young age of the victim, who, aged 9 years at the time of commission of the offence, was vulnerable and should have been protected by the appellant, her cousin.

We are also mindful to apply the principle of consistency in sentencing as articulated in the authority of **Aharikundira Yustina vs. Uganda, Supreme Court Criminal Appeal No. 027 of 2015 (unreported)**, where it was stated:

> **"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."**

Accordingly, we have considered the sentences imposed in previously decided aggravated defilement cases. 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 **Opio Moses vs. Uganda, Court of Appeal Criminal Appeal No. 118 of 2010 (unreported)**, this Court confirmed a sentence of 27 years imprisonment sentence for aggravated defilement for an appellant who was a biological father to the 9 years old victim.

In **Okello Geoffrey vs. Uganda, Supreme Court Criminal Appeal No. 34 of 2014 (unreported)**, the Supreme Court confirmed a sentence of 22 years imprisonment in a case of aggravated defilement.

In view of the sentencing ranges in the above mentioned cases, we find that a sentence of 29 years imprisonment is appropriate in the present case. From that sentence, we shall deduct the period spent by the appellant on remand. The appellant was arrested on 12th May, 2008, and had spent 2 years on remand by the date of his sentencing on 12th May, 2010. The appellant shall therefore serve a sentence of 27 years imprisonment to run from the date of his conviction on 12th May, 2010.

In conclusion, this appeal is allowed on the terms stated herein above.

We so order.

Dated at Kampala this ..... day of ..... 2022.

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Richard Buteera

Deputy Chief Justice

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Cheborion Barishaki

Justice of Appeal

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Muzamiru Mutangula Kibeedi

Justice of Appeal