THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

(Coram: Elizabeth Musoke, Cheborion Barishaki & Hellen Obura, JJA)

CRIMINAL APPEAL NO. 488 OF 2014

OBONYO ORUMI alias OSANGIRI::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(An appeal from the decision of the High Court at Tororo before His Lordship Hon. Justice Kawesa I. Henry dated 27th May, 2014 delivered in Criminal Session Case No. 0087 of 2010)

JUDGMENT OF THE COURT

Introduction

The appellant was convicted by the High Court at Tororo (Kawesa,J) of the offence of aggravated defilement contrary to sections 123 & 124 of the Penal Code Act and sentenced to 20 year's imprisonment.

Background to the Appeal

The facts giving rise to this appeal as ascertained from the court record are that the appellant had a sexual relationship with the victim, AJD (PW1) who was 13 years old at the time. The appellant had sexual intercourse with the victim several times at Otirok village, in a one Osungu's house. The victim conceived and suffered an early pregnancy loss allegedly with the facilitation of the appellant. When she started bleeding, her parents took her to St. Anthony Hospital for medical attention. Subsequently, the appellant was arrested and charged with the offence of aggravated defilement. He was tried, convicted and sentenced as aforementioned.

Being dissatisfied with the decision of the learned trial Judge, the appellant appealed to this Court on the following grounds;

> *"1. The learned trial Judge erred in law and fact by failing to properly evaluate evidence on the record-coming to a wrong conclusion when he convicted the appellant. (sic)*
>
> *2. The learned trial Judge erred in law and fact when he failed to take the plea of the appellant and occasion a miscarriage of justice.*
>
> *3. The learned trial Judge erred in law and fact by imposing a manifestly harsh and excessive sentence."*

Representations

At the hearing of this appeal, Mr. David Kyozira represented the appellant on State Brief while Ms. Immaculate Angutoko, Chief State Attorney from the Office of the Director Public Prosecutions represented the respondent. The appellant was not physically present in court, due to the restrictions intended to combat the spread of Covid-19 virus and the Standard Operating Procedures (SOPs) given by the Ministry of Health for that purpose. However, he was facilitated to attend the proceedings from prison using zoom technology. With leave of Court, both parties filed written submissions which have been considered in this judgment.

Case for the appellant

At the commencement of his submission, counsel informed Court that he intended to first deal with grounds 2 & 3 and with ground 1, if necessary.

On ground 2, counsel submitted that plea taking is a facet of our criminal justice system and that when an accused person appears before the court on a charge, the court has a legal obligation to read it out and explain the substance to him or her. He added that upon doing so, the court then gets to ask the accused if he understands the charge read to him before

asking him whether he admits or denies the truth of it. Counsel contended that all this must be properly done or else any omission amounts in law to a miscarriage of justice.

Further, that it is not reflected anywhere on the court record that plea-taking was administered on the appellant. Counsel submitted that the court reneged on a legal duty of reading and explaining the substance of the charge to the appellant as required by the Constitution of the Republic of Uganda (the Constitution), section 60 of the Trial on Indictments Act (TIA) and the decision in ***Adan vs Republic [1973] EA 446***. He also contended that there was no Adhola speaking interpreter in court for a reasonable tribunal to impute that probably the indictment was read and explained to the appellant in Japadhola language. He prayed that this Court finds from the foregoing that no plea was administered on the appellant.

In regard to ground 3, counsel submitted that this Court is entitled to interfere with the sentence passed by the trial court where the Judge acted upon some wrong principle or overlooked some material fact or if the sentence is manifestly excessive. He referred to the cases of ***James vs Rex (1950) 18 EACA 147*** and ***Livingstone Kakooza vs Uganda, SCCA No. 17 of 1993 (unreported).***

Counsel submitted that the learned trial Judge wrongly considered the aggravating factors and he ended up imposing a harsh sentence on the appellant. He argued that merely because PW2 made a statement that she and the appellant both belong to the Birangoni-clan is not proof that PW1 has a blood relation with him. Further, that it ought to be shown and proved to the court that a blood relationship exists between PW1 and the appellant. Counsel also submitted that PW1 did not abort but had a still birth.

Counsel contended that the learned trial Judge ignored to consider the mitigating factors that were presented. He submitted that the trial court did not take into account the 3 $^{1}/_{2}$ years the appellant spent on remand which implies that the appellant is to serve an additional prison term of 3 $^{1}/_{2}$ years which makes the sentence unconstitutional and illegal and ought to be

quashed. He referred to the case of ***Ederema Tomasi vs Uganda, CACA No. 554 of 2013*** to support his submission. Alternatively, counsel submitted that in the event that this Court does not quash the sentence, it should consider the mitigating factors presented and reduce the sentence to 10 year's imprisonment.

Having submitted on grounds 2 and 3, counsel abandoned ground 1.

On the whole, he prayed that this Court allows the appeal, quashes the conviction and sets the appellant free.

The Respondent's reply

Counsel opposed the appeal on both grounds and responded to them in the order set out by counsel for the appellant. In reply to ground 2, counsel submitted that whereas the learned trial Judge did not record verbatim that charges were read to the appellant, it can be deduced from the appellant's reply; "It is not true" which was followed by "P.N.G" that the charges were duly read to the appellant. She also added that the appellant was represented by counsel and there was no protest throughout the proceedings to indicate that charges were not read to him or that he did not understand the language. She submitted that a plea of not guilty was properly entered and the due processes of a fair trial were accorded to the appellant.

It was further submitted that there was no miscarriage of justice occasioned to the appellant since he underwent a full trial and was accorded all the fair trial rights including cross examining witnesses and giving his defence. Counsel argued that if at all the charges were not read to him, then the appellant would not have defended himself by stating in his defence that he has never had sexual intercourse with the victim. According to counsel, the appellant was informed and he was fully aware of the offence with which he was charged. She referred to the case of ***Tuhumire Mary vs Uganda, Criminal Appeal No. 352 of 2015*** in which the learned trial Judge did not record the language of interpretation and on appeal this Court did

not consider his conviction a miscarriage of justice. She prayed that this Court makes the same finding in this case where the learned trial Judge failed to record that charges were read to the appellant.

On ground 2, counsel submitted that whereas the appellant elaborately faulted the learned trial Judge for allegedly not taking into account the mitigating factors, it is settled law that sentence is a discretion of a trial Judge and an appellate court will only interfere with a sentence imposed by the trial court if it is evident that it acted on a wrong principle or overlooked some material fact or if the sentence imposed is manifestly harsh and excessive in view of the circumstances of the case. She referred to the case of ***Kiwalabye Benard vs Uganda, SCCA No. 143 of 2001*** which was cited with approval in ***Blasio Ssekawooya vs Uganda, CACA No. 107 of 2009.***

Counsel submitted that the learned trial Judge considered both the mitigating and aggravating factors at page 15 of the court record and also took note of the 3 years the appellant spent on remand though he omitted to deduct them as required by Article 23(8) of the Constitution. However, she argued that whereas in ***Rwabugande Moses vs Uganda, SCCA No. 25/2014,*** it was held that the taking into account must be arithmetically done, that decision was made on 3rd March 2017 after the judgment in the instant case and therefore it does not apply to it. She contended that it was in the regime of ***Kizito Senkula vs Uganda, SCCA No. 2001; Kabuye Senvawo vs Uganda, SCCA No. 2 of 2002; Katende Ahamed vs Uganda, SCCA No. 6 of 2004*** and ***Bukenya Joseph vs Uganda, SCCA No. 17 of 2010*** which held that taking into consideration of the time spent on remand does not necessitate a sentencing court to apply a mathematical formula.

Counsel prayed that in the event that this Court finds that the period spent on remand was not taken into account, only the 3 years the appellant spent on remand should be deducted.

Resolution by the Court

The duty of this Court as a first appellate court is to re-evaluate the evidence on record and come up with its own conclusion. ***See: Rule 30 of the Judicature (Court of Appeal Rules) Directions*** and ***Kifamunte Henry vs Uganda, SCCA No. 10 of 1997.***

We have carefully studied the court record and the submissions of both counsel. Since counsel for the appellant abandoned ground 1 and only submitted on grounds 2 and 3, we shall determine those two grounds of appeal as argued.

On ground 2, the appellant faults the learned trial Judge for failing to read and explain the substance of the charge to the appellant as required by the Constitution, section 60 of the TIA and the decision in ***Adan vs Republic*** *(supra)*, which failure occasioned a miscarriage of justice.

Article 28 of the Constitution guarantees right to a fair hearing. Clauses (1) & (3) (b) & (f) thereof that are relevant to the issue under consideration provide as follows:

"28. Right to a fair hearing

(1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

(3) Every person who is charged with a criminal offence shall—

(b) be informed immediately, in a language that the person understands, of the nature of the offence;

(f) be afforded, without payment by that person, the assistance of an interpreter if that person cannot understand the language used at the trial;

Section 60 of the TIA provides the procedure for pleading to indictment. It states thus;

"Section 60 Pleading to indictment.

The accused person to be tried before the High Court shall be placed at the bar unfettered, unless the court shall cause otherwise to order, and the indictment shall be read over to him or her by the chief registrar or other officer of the court, and explained if need be by that officer or interpreted by the interpreter of the court; and the accused person shall be required to plead instantly to the indictment, unless, where the accused person is entitled to service of a copy of the indictment, he or she shall object to the want of such service, and the court shall find that he or she has not been duly served with a copy."

The case of ***Adan vs Republic*** *(supra)* as per Spry V-P at page 446 more elaborately stated this procedure to guide courts. He stated as follows:

"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. *If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded."* (Emphasis added)

We must observe that the relevant portion of the judgment is what we have bolded and underlined above because the rest is only applicable where the accused person admits the offence, as clearly stated at the beginning of the 1st sentence.

Be that as it may, what stands out in Article 28 (3) (b) & (f) of the Constitution, section 60 of the TIA and the decision in ***Adan vs Republic*** *(supra)*, as quoted above, is the requirement for a charge to be read and the ingredients of the offence explained to an accused person in a language he or she understands. The rationale for this requirement is easily discernable; a person should be well informed about the offence he or she is being accused of committing so that he or she can make an appropriate response/plea and later prepare a defence. This requirement is an integral part of what constitutes a fair hearing as guaranteed under Article 28 (1) of the Constitution.

With the above position of the law in mind, we shall now consider whether the trial court complied with it and if not, whether any injustice was occasioned to the appellant. In so doing, we shall reproduce the proceedings of plea taking as recorded by the trial court. At page 1 of the record of proceedings, it is indicated as follows: -

> ***"23/04/2014***
>
> ***Accused present*** *(Japadhola Language)*
>
> ***RSA:*** *Luzige*
>
> *Mutembuli for accused*
>
> *It is not true*
>
> ***Court :*** *PNG*

RSA: *No witnesses, I pray for hearing date, I pray that matter be fixed for 06/05/2014.*

Assessors: *1. Aketch Bena*

2. Emukule Julius

Court: *Hearing for 06/05/2014*

Hon. Justice Kawesa I. Henry

Judge

23/04/2014."

It is clear from the record of proceedings that the trial court omitted to indicate that the charge and the particulars of the offence were read out to the appellant, so far as possible in his own language (Japadhola), or in a language which he could speak and understand. Neither was it indicated that all the essential ingredients were explained to the appellant nor that a Japadhola language interpreter was present. All that is on record in regard to the plea taking is the appellant's response; "It is not true" and the entry, "PNG" by the learned trial Judge which presupposes that the statement was in response to the charge that was read to him and he understood it. Whether or not the ingredients were explained to him is not known because the only means of verifying it is the court record.

The pertinent question we now need to address as enjoined by section 34 (1) of the Civil Procedure Code Act (CPCA) and section 139 of the TIA is whether the learned trial Judge's omission as indicated above caused a failure of justice to the appellant that would necessitate quashing the conviction and setting aside the sentence. Section 34 (1) of the Civil Procedure Code Act (CPCA) provides as follows;

"34. Powers of appellate court on appeals from convictions

(1)The appellate court on any appeal against conviction shall allow the appeal if it thinks that the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on the ground of a wrong decision on any question of law if the decision has in fact caused a miscarriage of justice, or on any other ground if the court is satisfied that there has been a miscarriage of justice, and in any other case shall dismiss the appeal; except that the court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred." [Emphasis added].

Section 139(1) of the TIA provides as follows;

"139. Reversability or alteration of finding, sentence or order by reason of error, etc.

(1) ***Subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission, irregularity*** *or misdirection in the summons, warrant, indictment, order, judgment or other proceedings before or during the trial* ***unless the error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice.***

(2) In determining whether any error, omission, irregularity or misdirection has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings." [Emphasis added].

We note the guidance given in section 139 (2) of the TIA and we have also considered the decision of this Court in ***Sebuliba Siraji vs Uganda, CACA No. 0319 of 2009*** where the conviction of the appellant on a plea of guilty was being challenged on appeal because the court record did not show that the charge was read and explained to him in Luganda, the only language he understood. This Court, in dismissing the appeal, found that omission by the trial court to record the language of interpretation was not fatal because the record clearly

indicated that the indictment and facts were not only put but fully explained to the appellant. The court noted that the accused's answers in all the stages of the proceedings showed that he had understood what was said to him, its consequences and what the proceedings were all about. The finding of this Court was based on the trial court record which showed that the appellant's counsel had informed court that he had explained to the appellant the sentence that a murder charge carries and the appellant had confirmed that his lawyer had explained to him the consequences of a conviction for the offence of murder and he had understood it.

This Court, in addition to the above findings, observed that there was no protest on record from counsel for the appellant to indicate that the appellant did not understand or misunderstood anything. The conviction was upheld on that basis.

We note from the trial court record in the instant case that the appellant was represented by counsel Mutembuli and as argued by counsel for the respondent, he could have raised an objection if indeed the appellant had pleaded without the charge being read and the ingredients of the offence explained to him. There is no indication that any objection was raised by the said counsel. We must however, observe that quite often irregularities during trials go unnoticed especially by counsel on state brief. We would therefore be hesitant to rely purely on counsel's failure to raise an objection to conclude that all was well.

However, we also taken into account the fact that the appellant in this case pleaded not guilty to the charge and the matter proceeded for trial, in which case, he was able to understand the case against him as the prosecution witnesses testified and make his defence.

We therefore find that even though there was an omission to explain to the appellant the ingredients of the offence of aggravated defilement, and to indicate that there was a Japadhola interpreter in court, no miscarriage of justice was occasioned to him. In such circumstances, this Court is not inclined to set aside the conviction in view of the provisions of section 34 (1) of the CPCA and section *139(1) of the TIA.*

In the premises, ground 1 of this appeal fails.

On ground 2, counsel for the appellant submitted that the sentence of 20 years imprisonment is manifestly harsh and excessive and he prayed that this Court reduces it to 10 years imprisonment.

Conversely, counsel for the respondent submitted that although the learned trial Judge having taken into account the period of 3 years the appellant had spent on remand, omitted to deduct it from the sentence imposed as required by law, it did not prejudice the appellant since the case of ***Rwabugande Moses vs Uganda*** *(supra)* does not apply, the same having been decided after this case was determined.

This Court can only interfere with the sentence of a lower court where in the exercise of its discretion, the court imposes a sentence which is manifestly excessive or so low as to amount to a miscarriage of justice or where the court ignores 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***: ***Kiwalabye Bernard vs Uganda*** *(supra)*; ***James vs R, (1950) 18 EACA 147*** and ***Ogalo s/o Owoura vs R, (1954)24 EACA 270.***

In the instant case, the learned trial Judge considered both the mitigating and aggravating factors that were presented before he imposed the sentence. The mitigating factors are that; the appellant was a first offender, he was remorseful, he was on remand for 3 $^{1}/_{2}$ years which time is sufficient to cause a reform and he has one child and a wife who both need his attention and care. A sentence of community service or caution was prayed for. In aggravation it was presented that; the victim was only 13 years old, the appellant committed incest with the victim, the trauma caused the victim to have a still birth at 13 years, abortion was committed at the instigation of the appellant, there was repeated sexual abuse and there is also prevalence of the offence in the area. A sentence of 35 year's imprisonment was prayed for.

While sentencing the appellant, the learned trial Judge stated as follows;

> *"The offence of Aggravated Defilement is a capital offence attracting a death penalty in the rarest of the rare cases. In mitigation it is stated accused is a first offender, has been on remand for about 3 years.*
>
> *The aggravating factors are that the girl was very young, got pregnant and aided to abort. She became a social delinquent and got into illegal early marriage as a result of illicit sexual exposure. Accused committed the offence in disregard of the repeated warnings of the mother and other clan leaders even after being told that the relationship was criminal (Defilement) and a taboo (incest). All the above created stigma to the girl and parents and reduced their social esteem.*
>
> *Accused's behavior was grossly evil, criminal and daring. In court he was not remorseful and seemed to boast how the mother wanted him to take this girl for a wife. He needs a deterrent, punitive and corrective sentence to teach him and others to avoid a repeat of such conduct.*
>
> *He is sentence (sic) to serve 20 years in custody. I so order."*

We note from the wording of the above sentencing ruling that while the learned trial Judge mentioned the 3 years the appellant had spent on remand when considering the mitigating factors, he did not indicate that he had taken them into account while sentencing.

Article 23(8) of the Constitution requires court, in imposing a term of imprisonment to take into account any period a convict spent in lawful custody in respect of the offence before completion of his or her trial.

We agree with counsel for the respondent that this case was decided in the sentencing regime of ***Kizito Senkula vs Uganda*** *(supra)*; ***Kabuye Senvawo vs Uganda*** *(supra)*; ***Katende Ahamed vs Uganda*** *(supra)* and ***Bukenya Joseph vs Uganda*** *(supra)* where the Supreme Court held that;

"It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence that court would give. But it must be considered and that consideration must be noted in the judgement" [*Emphasis added*].

However, as clearly stated in those authorities, the period spent on remand must be considered and that consideration must be noted in the judgement. It is therefore our finding that since the learned trial Judge in this case did not note anywhere in his sentencing ruling that he had taken into account the period of 3 years which the appellant had spent in lawful custody, the sentence of 20 year's imprisonment imposed on the appellant is illegal.

For that reason, we set it aside and invoke section 11 of the Judicature Act which gives this Court the powers, authority and jurisdiction as that of a trial Court to impose an appropriate sentence of its own.

In so doing, we have ourselves considered both the mitigating and aggravating factors that were presented during the sentencing proceedings as reproduced above and we shall also look at the sentences this Court has imposed in cases of a similar nature.

In ***Kibaruma John vs Uganda, CACA No. 225 of 2010*** the appellant was convicted of the offence of aggravated defilement of a 9-year-old girl and was sentenced to 15 year's imprisonment. On appeal to this Court, his sentence was reduced to 11 year's imprisonment.

In ***German Benjamin vs Uganda, CACA No. 142 of 2010*** the victim who was aged 5 years was sexually assaulted by a 35-year-old appellant who was convicted and sentenced to 20 year's imprisonment. On appeal, this Court set aside the sentence and substituted it with a sentence of 15 year's imprisonment.

In ***Candia Akim vs Uganda, CACA No. 0181 of 2009,*** this Court upheld a sentence of 17 year's imprisonment for the offence of aggravated defilement. The appellant in that case was

a step-father of the 8-year-old victim, which implies that he had parental authority over her and as such he ought to have protected her instead of sexually abusing her.

It is clear from the above previous decisions of this Court that the sentence for the offence of aggravated defilement ranges between 11 years to 17 year's imprisonment depending on the facts and circumstances of each case. However, in this case, having taken note of the appellant's authority over the victim and that he impregnated her and facilitated her to abort thus subjecting her to a very painful and traumatic experience, we find that a sentence of 20 year's imprisonment meets the ends of justice. We note that the appellant had been in pre-trial custody for a period of 3 years. Pursuant to Article 23 (8) of the Constitution, we deduct that period from the 20 year's imprisonment and sentence the appellant to 17 year's imprisonment to be served from the date of conviction, that is, 27/05/2014.

In the premises, the appeal against conviction is dismissed and the appeal against sentence is allowed in the above stated terms.

We so order.

Dated at **Jinja** this..23rd.....day of.....march.....2022

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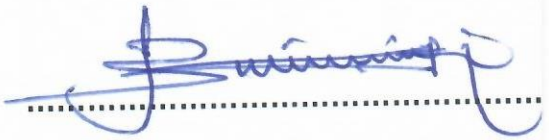
Elizabeth Musoke

JUSTICE OF APPEAL



Cheborion Barishaki

JUSTICE OF APPEAL

Hellen Obura

JUSTICE OF APPEAL