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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Richard Buteera, DCJ; Elizabeth Musoke, JA and Cheborion Barishaki, JA]

CRIMINAL APPEAL NO. 076 OF 2010

KIIZA GEOFFREY:.....APPELLANT

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VERSUS

UGANDA:.....RESPONDENT

(Arising from the decision of the High Court by Elizabeth Ibanda Nahamya, J in High Court Criminal case No.74 of 2012, dated the 12th day of May 2010)

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JUDGMENT OF THE COURT

Introduction

The appellant, Kiiza Geoffrey was indicted on 2 counts of the offence of Aggravated Defilement contrary to **Section 129 (3) and (4) of the Penal Code Act**. He was sentenced to 30 years imprisonment on count 1 and 30 years imprisonment on count 2, the sentences were to run consecutively.

Background to the appeal

It was alleged that during the month of December 2008, at Kisozi village in Mpigi District, the appellant performed a sexual act with Karongo Lillian, a girl aged 12 years (count 1). It was also alleged that between December 2008 and 15th April 2009 at Kisozi village in Mpigi District, the appellant performed a sexual act with Babirye Lydia, a girl aged 12 years (count 2).

The facts of the case as discerned from the record are that:- the appellant was the victims' stepfather and they lived together as a family. The victims' mother travelled in December 2008 leaving them in the care of the appellant. On several occasions, the appellant when drunk or sober forcefully had sexual with both the victims between the

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5 month of December 2008 until April 2009. The victims informed Mbabazi Hope (PW4), (who was their neighbour and a friend to their mother), of the sexual abuse and how he treated them like his wives. PW4 advised the girls to report the matter to their teachers at School.

10 The girls told the school's Deputy headmaster of the sexual abuse who immediately informed the Head teacher. The Head teacher reported the matter to Police and the appellant was arrested.

The victims were medically examined. The report showed that the first victim Karongo Lillian had been frequently defiled and that her hymen had ruptured along time ago. The second victim's found with signs of penetration and a ruptured hymen.

15 The appellant was charged, tried and convicted for the offence of aggravated Defilement. He was sentenced to 30 years imprisonment on count 1 and 30 years imprisonment on count 2, the sentences were to run consecutively.

The appellant was aggrieved by the decision of the trial Court on sentence. With leave of Court, the appellant appealed on sentence only on the following ground:-

20 **“The learned trial Judge erred in law and fact when she subjected the appellant to a sentence that was harsh, manifestly excessive and inconsistent with previous judicial precedents.”**

Legal Representation

25 At the hearing, Ms. Awero Sarah represented the appellant on State brief while the respondent was represented by Mr. Noah Kunya, a Chief State Attorney. Due to the COVID-19 pandemic restrictions, the appellant was not physically present in Court but attended the proceedings via video link using Zoom technology from Prisons.

Both counsel filed and adopted their written submissions.



5 **Submissions of Counsel for the appellant**

Counsel submitted that the learned trial Judge erred in law and fact when she subjected the appellant to sentence's that were harsh, manifestly excessive and inconsistent with previous judicial precedents. He relied on the case of *Owinji William vs, Uganda, Court of Appeal Criminal Appeal No. 142 of 2010*.

10 She submitted that this Court in the case of *Nisiima Gilbert vs. Uganda, Criminal Appeal No. 106 of 2013*, while elaborating on the sentencing as per the sentencing guidelines and precedents stated that: *"the said guidelines have to be applied into account past precedents of Court decisions where the facts of those decisions have a resemblance to the case under trial."*

15 Counsel argued that the trial Judge ought to have considered previous cases and precedents while imposing sentence in order to ensure consistency in sentencing as provided by **Paragraph 6 (c) of the Constitutional (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** and as emphasised by the case of *Mbunya Godfrey vs. Uganda, Supreme Court Criminal Appeal No. 004 of 2011*.

20 She contended that the offence of aggravated defilement attracts a sentence usually not exceeding 15 years subject to peculiar facts. She relied on the cases of *Jackson Zita vs. Uganda, Jackson Zita vs. Uganda, Supreme Court Criminal Appeal No. 19 of 1995, P. Akol vs. Uganda, Supreme Court Criminal Appeal No. 023 of 1994, German Benjamin vs. Uganda, Court of Appeal Criminal Appeal No. 142 of 2010*, where Court
25 sentenced the appellants to sentences ranging from 7 to 15 years imprisonment.

Counsel prayed that Court considers the fact that the appellant was a first offender, had family responsibilities, was remorseful and he asked for leniency. He prayed that Court applies the principle of uniformity of sentences and finds that the sentence of 30 years imprisonment was harsh and excessive in the circumstances. He prayed that the sentence
30 be reduced to a sentence of 15 years imprisonment.

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5 **Submissions of Counsel for the respondent**

Counsel submitted that the appellate Court will not interfere with the sentence imposed by the trial Court unless the sentence imposed was illegal, based on wrong principles or manifestly harsh or excessive. See: *Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No.10 of 1995*.

10 He argued that sentence of 30 years imprisonment on each count was so low considering the aggravating factors and the fact that the sentences were to run concurrently.

Counsel contended that all the authorities cited by counsel for the appellant are distinguishable with the present case as the appellants in the cited cases had sexually assaulted one victim where as two victims were defiled in the instant case.

15 Counsel referred Court to this Court's decision in *Criminal Appeal No. 16 of 2013, Asega Gilbert vs. Uganda*, where Court confirmed a sentence of 30 years imprisonment for an appellant who was convicted for two counts of Aggravated defilement. The sentence was to run concurrently.

He argued that the trial Judge in the instant case sentenced the appellant upon
20 consideration of the aggravating factors and mitigating factors.

Counsel contended that the sentence of 30 years is too lenient considering the fact that the maximum sentence for the offence of aggravated defilement is death. He added that the trial Judge properly exercised her discretion within the precincts of the law.

He prayed for Court not to interfere with the sentence and that the sentences be upheld
25 and the appeal be disallowed.

5 **Consideration by the Court**

This is an appeal on sentence only. As a first appellate Court, we are required to re-appraise the evidence adduced at the lower Court and to make our own inferences. See **Rule 30(1) of the Rules of this Court** and *Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997*.

10 We have carefully perused the Court record, submissions of counsel as well as the authorities cited and other relevant authorities not cited to us.

Counsel for the appellant faulted the trial Judge for sentencing the appellant to a consecutive sentence 30 years imprisonment for two counts of aggravated defilement. According to counsel, the said sentence was harsh and excessive in the circumstances
15 of the case.

As an appellate Court, this Court can only interfere with a sentence imposed by a trial Court in very limited circumstances. This Court can only where the sentence is either illegal, or founded upon a wrong principle of the law, or where the Court has failed to consider a material factor. Court can also do so if the sentence is harsh and manifestly
20 excessive in the circumstances. See: *James v. R. (1950) 18 E.A.C.A. 147* and *Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001*, among others.

The Supreme Court in *Kyalimpa Edward vs Uganda, Criminal Appeal No. 10 of 1995*, further clarified the principles governing interference of sentence by the appellate Court and noted that an appropriate sentence is a matter for the discretion of the sentencing
25 Judge because each case presents its own facts upon which a Judge exercises his discretion.

We shall bear the above principles in mind in re-evaluation of the evidence on record.

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5 Imposing a concurrent or consecutive sentence is at the Judicial officer's discretion. The sentencing powers of the High Court are provided in section 2 of the Trial on Indictments Act. The section provides:-

- 1) The High Court may pass any lawful sentence combining any of the sentences which it is authorised by law to pass.
- 10 2) When a person is convicted at one trial of two or more distinct offences, the High Court may sentence him or her for those offences to the several punishments prescribed for them which the court is competent to impose, those punishments, when consisting of imprisonment, to commence the one after the expiration of the other, in such order as the court may direct, unless
15 the court directs that the punishments shall run concurrently.
- 3) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section, in the case of convictions for several offences at one trial, shall be deemed to be a single sentence. (Emphasis added)

The Supreme Court in *Criminal Appeal No.01 of 2014, Magala Ramathan vs. Uganda*,
20 had occasion to handle a similar matter and held:

"We agree with the Court of Appeal's interpretation of Section 2 (supra) that the general rule is for the High court to impose a consecutive sentence and a convict will only concurrently serve sentences arising out of distinct offences if the court so directs.

25 *We however must underscore the need for an accused to know why a Judge arrived at a particular decision. In the persuasive authority of Ndwandwe vs. Rex [2012] SZSC 39, the Supreme Court of Swaziland considered what judicious exercise of the sentencing discretion entails as follows:*

30 *"The exercise of sentencing discretion must be a rational process in the sense that it must be based on the facts before the court and must show the purpose the sentence is meant to achieve. The Court must be conscious and deliberate in its choice of punishment and the records of the court must show the legal reasoning behind the sentence. The legal reasoning will reflect the application of particular principles and the result it is expected to achieve. The choice of applicable principles and*
35 *the sentence will depend on the peculiar facts and needs of each case. The choice will involve a consideration of the nature and circumstances of the crime, the interest of the society and the personal circumstances of the accused other mitigating factors and often times a selection between*



5 *or application of conflicting objectives or principles of punishment. (Our emphasis)”*

It is therefore expected that whether a judge opts for a consecutive or a concurrent running of sentences, her reasoning should be on record.

10 *Be that as it may, it is a trite principle of law that in ordering a consecutive sentence, the total sentence must be proportionate to the offence and the circumstances surrounding each case.*

The above principle is reflected in Section 8 of the Sentencing guidelines which provide that:

15 *(1) Where the court imposes consecutive sentences, the court shall first identify the material part of the conduct giving rise to the commission of the offence and determine the total sentence to be imposed.*

(2) The total sum of the cumulative sentence shall be proportionate to the culpability of the offender.” (Emphasis is added)

In the instant case, the trial Judge while sentencing stated as follows:-

20 *“The offence one of aggravated defilement carries a maximum sentence of death. The convict in this case defiled two girls who were under his authority, therefore, instead of playing the role of a parent, he instead used the victims sexually. He lured the girls into a “sex harp” to be played at his leisure. He played fiddle diddle with his step children. Offences of this nature are very*
25 *grave and impact negatively on the future of these two young children in the present case. Hence these cases should be accorded the seriousness that they deserve as the accused behaved in a very cruel and callous manner.*

30 *Court has considered that the accused has been on remand since 6th March 2009. Considering all the aggravating and mitigating factors in this case, the convict is sentenced to thirty (30) years imprisonment on the first count, the year you have been on remand would be computed against this term. On the second count, the convict is sentenced to thirty (30) years imprisonment. The year spent on remand would be computed against this term. The sentences are to run consecutively.”*

35 From the above, it is clear that the trial Judge considered both the aggravating factors and the mitigating factors as well as the period spent on remand while sentencing. Before pronouncing the sentence for each count, the trial Judge stated the reasoning

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5 behind passing the said consecutive sentence. She found that the aggravating factors outweighed the mitigating factors and rightly used her discretion to sentence the appellant to 30 years imprisonment on each count of aggravated defilement.

The consecutive sentence totalling to 60 years imprisonment, however, was out of the sentencing range for the offence of aggravated defilement.

10 In *Criminal Appeal No. 016 of 2013, Asega Gilbert vs. Uganda*, this Court confirmed a concurrent sentence of 30 years imprisonment for an appellant who was convicted of two counts of aggravated defilement. The offences were committed on victims aged 9 and 6 years old, who were nieces to the appellant.

This Court in the case of *Kalisa John Tom vs. Uganda, Criminal Appeal No.0045 of*
15 *2015*, set aside a sentence of 52 years imprisonment for the offence of aggravated defilement for being out of range. Court substituted the said sentence with a sentence of 25 years imprisonment.

In the result, we find that the sentence of 60 years imprisonment as passed by the trial Judge was out of the sentencing range for the offence of aggravated defilement. We
20 hereby set it aside for that reason only.

Having found so, we invoke **section 11 of the Judicature Act (CAP 13)** which grants this Court, powers of original jurisdiction and determine an appropriate sentence in the circumstances of this case.

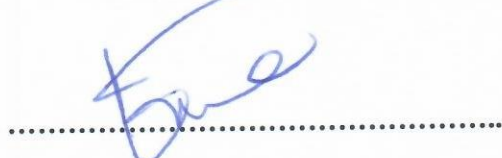
We have considered all the aggravating and mitigating factors in this case and hereby
25 sentence the appellant to 30 years imprisonment in respect of each count. We take into account the 1 year and 2 months that the appellant spent on remand. The appellant will therefore serve a sentence of 28 years and 9 months' imprisonment on each count, the sentences shall run concurrently from 12th May, 2010 the date of conviction.

5 Dated at Kampala this 10th day of February 2021



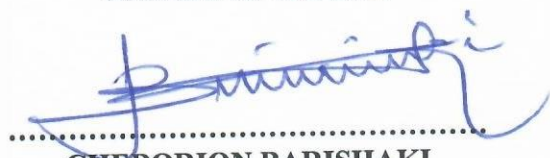
RICHARD BUTEERA
DEPUTY CHIEF JUSTICE

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ELIZABETH MUSOKE
JUSTICE OF APPEAL

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CHEBORION BARISHAKI
JUSTICE OF APPEAL

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