

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0278 OF 2015**

KAWOOYA BENARD:.....APPELLANT

VERSUS

UGANDA:.....RESPONDENT

(Appeal from the decision of the High Court of Uganda at Entebbe before Alividza, J. delivered on 20th July, 2015 in Criminal Session Case No. 0387 Of 2015)

**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 20th July, 2015, after he had pleaded guilty, the High Court (Alividza, 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 (as amended)**. The appellant was sentenced to 20 years imprisonment.

The appellant had been taken to the High Court for trial on an indictment that alleged that, he had, between the second academic term of 2014 and November, 2014 at Lugonjo Nakiwogo Div "B" Entebbe Municipality in Wakiso District unlawfully had sexual intercourse with N.A (a minor (the victim)), a girl under the age of 18 years when he is the biological father of the said N.A. The victim was 14 years old at the time.

The facts as read by prosecution counsel and accepted by the appellant are as follows. On 30th October, 2014, the victim went to attend school, like she normally did. The head teacher noted that the victim was pregnant and he inquired about who was responsible for the pregnancy. The victim told the headmaster that the appellant, her father, with whom he lived had on several occasions had sexual intercourse with her. She had tried to resist the appellant's sexual acts, but he had overpowered her. The appellant had said


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that it was necessary to have sexual intercourse with the victim for ritualistic purposes in order to gain wealth. The victim's mother worked in Juba, South Sudan and therefore was unavailable to help the victim. On receiving the victim's report, the headmaster reported the matter to the nearby police station. The appellant was arrested. The victim was sent for medical examination and found to have injuries on her private parts consistent with a sexual act having been performed on her.

On acceptance of the above facts, the learned trial Judge convicted the appellant as charged and thereafter sentenced him as stated earlier. The appellant was dissatisfied with the sentence imposed by the trial Court and appealed to this Court. The Court granted leave for the appellant to proceed with his appeal against sentence only on the sole ground that:

"That the learned trial Judge erred in law and fact by imposing a manifestly harsh sentence on the appellant."

The respondent opposed the appeal.

Representation

At the hearing, Ms. Alwelo Sarah, learned counsel on State Brief appeared for the appellant. Ms. Acio Caroline, learned Chief State Attorney in the Office of the Director of Public Prosecutions represented the respondent.

In accordance with existing Prison regulations to prevent exposure of inmates to COVID-19, the appellant followed the hearing remotely from Luzira Government Prison via Zoom Technology.

Written submissions previously filed for the parties were at the hearing adopted in support of the parties' respective cases.

Appellant's submissions

In support of the sole ground of appeal, counsel for the appellant began by reiterating the applicable principles when this Court is faced with an appeal against sentence which were restated in the authority of **Abaasa Johnson vs. Uganda, Court of Appeal Criminal Appeal No. 33 of 2010 (unreported)**:

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"...this Court will only interfere with a sentence imposed by a trial Court in a situation where the sentence is either illegal or founded upon a wrong principle of law. It will equally interfere with sentence where the trial Court has not considered a material factor in the case; or has imposed a sentence which is harsh and manifestly excessive in the circumstances."

Counsel contended that the learned trial Judge ignored to consider several material factors which should have led her to impose a shorter sentence. The appellant was a first offender and had pleaded guilty and had save Court's time and resources. The guilty plea also indicate that he was remorseful for committing the offences. Further, counsel referred this Court to two previously decided Aggravated Defilement cases-**Katende Ahamad vs. Uganda, Supreme Court Criminal Appeal No. 6 of 2004 and Kizito Senkula vs. Uganda, Court of Appeal Criminal Appeal No. 24 of 2001 (both unreported)**, where shorter sentences were imposed.

In view of the above submissions, counsel urged this Court to consider the above submissions and impose a shorter sentence of 10 years imprisonment to enable the appellant to be reintegrated back into his community as a reformed person.

Respondent's submissions

Counsel for the respondent supported the sentence that was imposed on the appellant. While acknowledging that this Court may, in certain circumstances set out in the authority of **Livingstone Kakooza vs. Uganda, Supreme Court Criminal Appeal No. 17 of 1993 (unreported)**, interfere with a sentence imposed by a trial Court, counsel submitted that the appellant, has not in his submissions, raised any reason to justify this Court to interfere with the relevant sentence. The appellant merely wants this Court to take a more favourable view of the mitigating factors submitted at the trial Court. She contended that the aggravating factors in this case outweighed the mitigating factors. The appellant's sexual assault on the victim caused permanent negative emotional impacts. The appellant is the biological father of the victim and was meant to offer care rather than abuse the girl. The sexual abuse of the victim happened on more than one occasion and resulted in her becoming pregnant for the appellant. The pregnancy jeopardized the



victim's chances of gaining an education. Moreover, the offence of aggravated defilement is a serious offence and incidents of its commission were on the rise. Counsel concluded by submitting that the learned trial Judge did not overlook any material factor while sentencing the appellant, and passed a legal sentence that is consistent with the sentencing range for aggravated defilement. She prayed this Court to uphold the sentence that the learned trial Judge imposed.

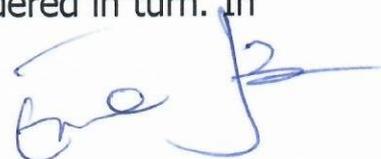
Resolution of the Appeal

We have carefully studied the Court Record, considered the submissions of counsel for both sides and the law and authorities cited. Other relevant law and authorities not cited have also been considered.

On a first appeal from the decision of the trial High Court, this Court has a duty to reappraise the evidence 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 Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997)**. Further, on appeal against sentence, this Court should bear in mind the principles set out in **Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1995 (unreported)**, it was stated:

"As Dunn L.J observed in Re Haviland's case (supra) at page 114, 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/her discretion. It is the practice that an appellate Court will not normally interfere in the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed was manifestly so excessive as to amount to an injustice: Ogalo s/o Owoura vs. R (1954) 21 EACA 270 and R v. Momedali Jamal (1948) 15 EACA 126."

The appellant relies on two grounds to challenge the sentence imposed against him. First, that the learned trial Judge ignored to consider the guilty plea of the appellant. Secondly, that the learned trial Judge imposed a sentence that is longer than the sentences imposed in previously decided aggravated Defilement cases. Each of the grounds is considered in turn. In




her sentencing remarks at page 15 of the record, the learned trial Judge stated:

"The offence you are charged with carries a maximum sentence of death. Since you have not wasted Court's time and pleaded guilty I will start with the sentencing range of 25 years instead of 35 years imprisonment and add or reduce the years depending on the aggravating factors.

The convict deserves a harsh sentence given the circumstances of the defilement. This child was related to you, she had been entrusted to you by her mother who was away, there is need to learn self-restraint or control. The victim suffered shame and humiliation, it is a taboo in our culture for your relative to have sex with you and more so it is said that you are the biological father of the girl.

Therefore, I sentence you to 21 years and will reduce the 1 year you have spent on remand. Therefore, you will serve 20 years imprisonment."

The learned trial Judge clearly considered the appellant's guilty plea and credited it to him by reducing the starting point for sentencing the appellant from 35 years to 25 years. We, therefore reject counsel for the appellant's contention that the learned trial Judge omitted to consider the said guilty plea. However, we accept counsel for the appellant's submission that the learned trial Judge omitted to consider the fact that the appellant was a first offender, considering that she made no mention of that fact in her sentencing remarks. The learned trial Judge probably would have imposed a shorter sentence if she had. We note that the fact of a convict being a first offender is a material factor that a trial Court should consider when sentencing. In **Friday Yasin vs. Uganda, Court of Appeal Criminal Appeal No. 16 of 2012 (unreported)**, this Court set aside a sentence imposed by a trial Court which had omitted to consider the fact that the appellant was a first offender during sentencing. In the **Abaasa Johnson case (supra)**, it was held that this Court may interfere if in imposing the challenged sentence, the trial Court failed to consider a material factor. In the present case, we have to set aside the sentence imposed because the learned trial Judge failed to consider the material factor that the appellant was a first offender.




We shall, pursuant to **Section 11** of the **Judicature Act, Cap. 13**, which empowers us to do so, proceed to impose a fresh sentence having set aside the sentence that the learned trial Judge imposed. We shall consider the nature of sentences imposed in previously decided Aggravated Defilement cases, that ought to have guided the learned trial Judge when she sentenced the appellant on 20th July, 2015.

In **Ntambala Fred vs. Uganda, Court of Appeal Criminal Appeal No. 177 of 2009 (unreported)** delivered on 11th February, 2015, this Court upheld a sentence of 14 years imprisonment that the trial Court had imposed in an aggravated defilement case. The appellant was convicted of defiling his biological daughter then aged 14 years.

In **Kizito Senkula vs. Uganda, Supreme Court Criminal Appeal No. 24 of 2001 (unreported)** delivered on 18th December, 2002, the Supreme Court upheld a sentence of 15 years imprisonment in a case where the appellant had been convicted of defiling a girl under the age of 18 years, who was also his relative.

In **Katende Ahamad vs. Uganda, Supreme Court Criminal Appeal No. 6 of 2004 (unreported)** delivered on 5th July, 2007, the Supreme Court upheld a sentence of 10 years imprisonment in a case where the appellant forcefully performed a sexual act with a 9 year old girl.

We have also considered the mitigating factors in this case. The appellant was a first offender who had shown remorse for committing the offences, which was indicated by the fact that he pleaded guilty. He was also repentant and had started to reform while in prison as he had enrolled in a school to pursue an education. As for the aggravating factors, it was submitted that the appellant had been convicted of a serious offence with a maximum sentence of death. The victim of the offence was a daughter of the appellant who was supposed to be protected and loved rather than abused by the appellant. The appellant had repeatedly defiled the victim leading her to become pregnant at a very young age. It was also submitted that instances of commission of aggravated defilement by close relatives were rampant in the trial Court's direction.

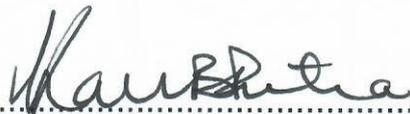



After considering all the material highlighted above, we find a sentence of 15 years imprisonment appropriate in the present case. The appellant was arrested on 30th October, 2014 and at his sentencing on 20th July, 2015, he had been on remand for a period of 8 months and 20 days. After taking into account the said remand period, the appellant shall serve a sentence of 14 years, 3 months and 10 days imprisonment to run from the date of his conviction on 20th July, 2015.

In conclusion, the appeal succeeds on the terms set out in this judgment.

We so order.

Dated at Kampala this 11th day of Jan 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