THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 081 OF 2019

MABIKE ATHANASIOUS::::::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mpigi before Baguma, J. delivered on 19th March, 2019 (conviction) and 21st March, 2019 (sentencing) in Criminal Session Case No. 065 of 2016)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA
HON. LADY JUSTICE EVA K. LUSWATA, JA

JUDGMENT OF THE COURT

Background

On 19th March, 2019, the High Court (Baguma, J.) convicted the appellant of the offence of Aggravated Defilement contrary to **Section 129 (3)** and **(4) (c)** of the **Penal Code Act, Cap. 120 (as amended)**. On 21st March, 2019, the High Court sentenced the appellant to 13 years imprisonment.

The decision of the High Court followed the trial of the appellant on an indictment that alleged that he had, between February and March 2016, being a teacher of N.C (the victim, a minor aged 14 years), performed a sexual act on her.

The facts of the case, as we have gathered from the record, may be summarized as follows. Between 2014 to 2016, the victim, a resident of Nakaziba Village in Mpigi District, attended Bakyibira Primary School in the said village. The appellant was her teacher at the said school, teaching her the subjects of Social Studies and Science. On an uncertain date between February and March, 2016, the appellant found the victim in class with other pupils. He asked the other pupils to go and fetch water, while he asked the victim to remain behind and write notes on the black board. The appellant

then went towards the victim, got hold of her, pushed her to the floor and had sexual intercourse with the victim. The appellant warned the victim not to report the incident to anyone. Nonetheless, the victim told her friend N.A (also a minor about the incident).

Subsequently, the victim became pregnant. The victim's aunt, Nabakooza Mary, upon noticing the pregnancy asked the victim who was responsible and the victim mentioned that it was the appellant. The victim's aunt reported the news to the former's grandmother, who eventually told the victim's father about the victim's pregnancy. The victim's father reported to the nearby police station who sent officers to the victim's school to arrest the appellant. The appellant was arrested and charged of aggravated defilement. Meanwhile, the victim carried the baby to term but sadly lost her child during child birth. After believing the above facts, the learned trial Judge convicted the appellant as charged and sentenced him as stated earlier.

The appellant does not wish to contest his conviction by the learned trial Judge, and appeals, with leave of this Court, against sentence only on a single ground, framed as follows:

> **"That the learned Justice of the High Court of Uganda erred in law and fact in sentencing the appellant to 13 years imprisonment which sentence was deemed illegal, manifestly harsh and excessive in the circumstances."**

The respondent opposed the appeal.

Representation

At the hearing, Mr. Emmanuel Muwonge, learned counsel, represented the appellant on State Brief. Ms. Nakafeero Fatinah, learned Chief State Attorney in the Office of the Director Public Prosecutions, represented the respondent. The appellant followed the hearing via Zoom Video Technology, while he remained at the prison facility where he was incarcerated.

The Court, at the hearing, adopted written submissions filed in support of the respective cases for either side, and the same have been considered in this judgment.

Appellant's submissions

Counsel for the appellant, in support of the sole ground of appeal, submitted that the learned trial Judge, while sentencing the appellant, only considered the period that the appellant spent on remand, but did not consider other mitigating factors raised for the appellant, namely – that the appellant was first offender, the sole bread winner for his family, and a teacher. Counsel further contended that the appellant was of a relatively youthful age of 34 years at the time of sentencing, and therefore a young man capable of reforming. Counsel contended that failure by a trial Court to take into account mitigating factors raised for an accused person, renders the sentence imposed by it liable to be set aside on appeal. For this proposition counsel referred to the authority of **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001 (unreported).** Counsel also cited the authority of **Tamale Richard vs. Uganda, Criminal Appeal No. 19 of 2012 (unreported)**, where this Court set aside a sentence imposed by the trial Court on the ground that the trial Court had failed to consider mitigating factors raised for the appellant.

Furthermore, counsel contended that the trial Court did not conduct an arithmetic exercise while taking into account the period that the appellant spent on remand prior to sentencing, as required under the guidance in the authority of **Rwabugande vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014 (unreported),** and for that reason, too, the sentence imposed on the appellant was liable to be set aside. Counsel concluded by urging this Court to set aside the sentence imposed on the appellant and substituting a lawful sentence.

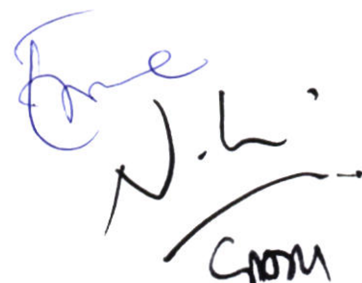
Respondent's submissions

In reply, counsel for the respondent cited several Supreme Court authorities, namely, **Kiwalabye vs. Uganda, Criminal Appeal No. 141 of 2001**;

Kamya vs. Uganda, Criminal Appeal No. 16 of 2000; and **Kyalimpa vs. Uganda, Criminal Appeal No. 10 of 1995 (all unreported)** where the principles on appellate intervention with a sentence imposed by the trial Court have been discussed. Counsel submitted that according to the highlighted authorities, an appellate Court will only interfere in limited circumstances, including where the sentence passed by the trial Court was illegal or where the trial Court passed a manifestly harsh and excessive sentence or where it failed to take into account a material factor.

Counsel submitted that contrary to the appellant's submissions otherwise, the learned trial Judge conducted an arithmetic exercise, while taking into account the period the appellant spent on remand prior to sentencing, in accordance with the guidance laid down in the Supreme Court authority of **Nashimolo vs. Uganda, Supreme Court Criminal Appeal No. 046 of 2017 (unreported)**. The learned trial Judge deducted the period of 2 years and 6 months from the sentence of 15 years and 6 months imprisonment, he deemed appropriate, before imposing a sentence of 13 years imprisonment on the appellant.

As for the appellant's submission that the learned trial Judge did not take into account certain mitigating factors for the appellant, counsel replied that the learned trial Judge took into account all relevant mitigating and aggravating factors, but considered, rightly so, that the aggravating factors outweighed the mitigating factors and therefore justified the sentence imposed on the appellant. Counsel pointed out that the appellant was a teacher of the victim on whom he carried out a sexual act, and also that the victim had become pregnant as a result. The appellant had authority over the victim and abused the trust that the victim had in him. Furthermore, the offence of Aggravated Defilement for which the appellant was convicted is a serious offence which attracts the mandatory death sentence, and has a starting point of 35 years imprisonment under the **Constitution (Sentencing Guidelines For Courts of Judicature) (Practice) Directions, 2013**. Moreover, according to counsel, the learned trial Judge



considered the mitigating factors advanced for the appellant; that he was a first offender; a father responsible for his children.

Counsel also submitted that a sentence of 13 years imprisonment for Aggravated Defilement is neither manifestly harsh nor excessive, and that in other similar cases longer sentences have been imposed. Counsel referred to the authority of **Bukenya Joseph vs. Uganda, Supreme Court Criminal Appeal No. 17 of 2020 (unreported)** where the Supreme Court confirmed a sentence of 20 years imprisonment for aggravated defilement. Counsel urged this Court to find that the sentence of 13 years imprisonment imposed on the appellant for Aggravated Defilement was neither harsh nor manifestly excessive, and that it was imposed after the trial Court taking into account all relevant mitigating and aggravating factors, and to uphold the sentence.

Resolution of the Appeal

We have carefully studied the record, considered the submissions of counsel for either side and the law and authorities cited in support thereof. Other applicable law and authorities have also been considered. This is a first appeal from a decision of the High Court in exercise of its original jurisdiction, and on such appeals, this Court is expected to reappraise the evidence and draw inferences of fact **(See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10)**. In **Kifamunte vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1998 (unreported),** the Supreme Court stated:

> **"We agree that on first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."**

We note that the duty for this Court to give its own consideration and views of the evidence extends to first appeals against sentence only, such as the

present one, and therefore, we shall bear the above principles in mind as we determine this appeal. Counsel for the appellant makes two points on this appeal – 1) that the trial Court omitted to consider certain mitigating factors raised in the appellant's favour; and 2) that the trial Court passed an illegal sentence, in that contrary to the law, it did not properly take into account the period that the appellant spent on remand. Counsel for the appellant therefore submits that, for the aforementioned reasons, this Court ought to interfere with the sentence imposed by the trial Court.

The principles on appellate intervention with the sentence of the trial Court have been discussed in several authorities, and were helpfully summarized in the authority of **Rwabugande vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014 (unreported)**, where the Court stated:

> **"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)**
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> **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:**
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> **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)**
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> **In Kiwalabye vs. Uganda, Supreme Court Criminal Appeal N0.143 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."

The learned trial Judge made the following remarks while sentencing the appellant:

> **"The accused is a first offender but still showed no degree of remorse. I have looked at the aggravating and mitigating factors. The accused was a teacher to the victim. The accused is sentenced to 15 years and 6 months. Since he has been on remand for 2 years and 6 months, I reduce the sentence to 13 years."**

The first point made for the appellant concerns the manner of taking into account the period he spent on remand. **Article 23 (8)** of the **1995 Constitution** which provides for the taking into account of the remand period provides as follows:

> **"(8) 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."**

What is referred to, in the above provision, as the period a convict "spends in lawful custody in respect of the offence [for which he/she is convicted] before the completion of his or her trial" is what is commonly known as the remand period, and, pursuant to the provisions of Article 23 (8), that period is supposed to be taken into account in imposing the term of imprisonment. We note that the appellant's sentencing took place on 21st March, 2019, which was after the Supreme Court had on 3rd March, 2016, rendered judgment in the **Rwabugande case (supra)**, in which guidance on the interpretation of Article 23 (8) was given, as follows:

> **"It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the**

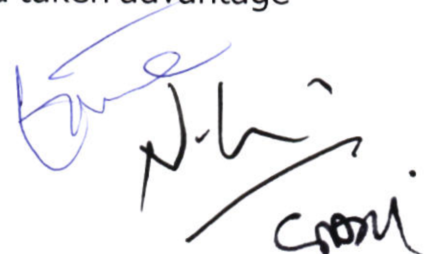
final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused."

In considering the second point raised for the appellant, two questions arise, namely; 1) whether the trial Court ascertained the precise period the appellant had spent on remand and 2) whether after doing so, the trial Court deducted the remand period from the sentence imposed on the appellant. According to the appellant's testimony in Court, he was arrested on 24th August, 2016, and thus by the time of his sentencing on 21st March, 2019, he had been on remand for 2 years, 6 months and 27 days. Therefore, the appellant spent 2 years, 6 months and 27 days on remand. However, the trial Court credited him with a shorter period of 2 years and 6 months. Thus, according to the **Rwabugande case**, the trial Court failed to specifically credit to the appellant, the precise period of time he spent on remand. In **Nashimolo vs. Uganda, Criminal Appeal No. 46 of 2017 (unreported)**, the Supreme Court held that decisions, rendered subsequent to the Rwabugande case, that do not follow the principles articulated therein, are made per incuriam for failing to apply binding principles, and the sentences passed in such decisions are illegal. Therefore, the learned trial Judge in the present case imposed an illegal sentence on the appellant, having acted contrary to the princples in the Rwabugande case. Accordingly, we set aside the sentence.

Where this Court sets aside a sentence imposed by the trial Court, it may, pursuant to powers granted it under **Section 11** of the **Judicature Act, Cap. 13**, proceed to impose a fresh sentence, it considers appropriate. Section 11 provides:

"11. Court of Appeal to have powers of the court of original jurisdiction. For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."

In reaching an appropriate sentence, we have considered both the aggravating and mitigating factors, submitted at the trial. For the aggravating factors, it was submitted that the appellant had taken advantage



of a very young girl, aged 15 years; that he was the victim's teacher and breached her trust when he defiled her; that the sexual act on the victim had led to pregnancy and to the victim losing her baby during child birth, which had greatly traumatized her. It was also submitted that the offence of aggravated defilement was very rampant in the area and there was need for a deterrent sentence. We have also considered that the offence of aggravated defilement is a serious offence for which the maximum sentence is the death sentence. As for the mitigating factors, it was submitted that the appellant was a first offender with no previous conviction; that he was the sole bread winner for a family with 4 children; that he was capable of reforming and becoming a useful citizen after serving his sentence.

We are also mindful to apply the consistency principle as articulated in **Aharikundira Yustina vs. Uganda, Supreme Court Criminal Appeal No. 27 of 2015 (unreported)**. This principle is to the effect that when dealing with appeals concerning sentencing, an appellate Court has a duty to ensure that it imposes a sentence that is consistent with the sentences imposed in previously decided cases with similar facts. We have considered some previously decided aggravated defilement cases. In **Oumo Ben alias Ofwono vs. Uganda, Supreme Court Criminal Appeal No. 20 of 2016 (unreported),** the Supreme Court and the Court of Appeal found appropriate and upheld a sentence of 26 years imprisonment, imposed by the trial Court in a case of aggravated defilement. The appellant, aged 26 years, had defiled his own daughter aged 3 ½ years.

In **Ntambala Fred vs. Uganda, Supreme Court Criminal Appeal No. 20 of 2016 (unreported)**, the Supreme Court and the Court of Appeal found appropriate and upheld a sentence of 14 years imprisonment, imposed by the trial Court in a case of aggravated defilement. The appellant had defiled his own daughter aged 14 years.

In **Tiboruhanga vs. Uganda, Court of Appeal Criminal Appeal No. 0655 of 2014**, this Court imposed a sentence of 22 years imprisonment in

a case of aggravated defilement. The appellant, who was HIV positive had defiled a 13-year-old girl.

In **Bukenya vs. Uganda, Criminal Appeal No. 17 of 2010 (unreported)**, the Supreme Court imposed a sentence of 20 years imprisonment after setting aside a sentence of life imprisonment imposed by the trial Court and upheld by the Court of Appeal, in a case where the appellant a 65 year old man was convicted for defiling a 6 year old girl.

In **Senoga vs. Uganda, Criminal Appeal No. 074 of 2010 (unreported)**, this Court upheld a sentence of 30 years imprisonment, the High Court had imposed for aggravated defilement. The appellant a 40-year-old man was convicted of defiling his niece, a 10-year-old girl.

As can be seen from the above authorities, sentences ranging anywhere from 15 years imprisonment to 30 years imprisonment, have, in previously decided cases, been imposed for aggravated defilement. In the present case, we find a sentence of 15 years imprisonment appropriate. From that sentence we shall deduct the period of 2 years, 6 months and 27 days that the appellant spent on remand, leaving a sentence of 12 years, 6 months and 3 days imprisonment, which the appellant shall serve from the date of his conviction on 19th March, 2021.

In conclusion, the appeal is allowed on the terms stated in this judgment.

We so order.

Dated at Kampala this ......6th...... day of ......Sept...... 2022.

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Elizabeth Musoke

Justice of Appeal

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Christopher Gashirabake

Justice of Appeal

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Eva K. Luswata

Justice of Appeal