THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0373 OF 2019

MIVULE FAROUK ALIAS MUNA::::::::::::::::::::::::::::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mpigi before Kawesa, J. delivered on 26th September, 2019 in Criminal Session Case No. 024 of 2018)

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

JUDGMENT OF THE COURT

On 26th September, 2019, the High Court (Kawesa, 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 18 years imprisonment.

The High Court decision followed the trial of the appellant on an indictment that alleged that he had, on the 24th day of September, 2017, at Najjuwi Village in Mpigi District, performed an unlawful sexual act upon N.A, a minor (the victim) a girl aged 3 years.

The facts of the case, as can be gathered from the record, can be summarized as follows. The victim N.A lived with her father (PW1) and two siblings at Najjuwi Village in Mpigi District. The appellant had been working for PW2 Naiga Zaitun, who lived at the same village. The appellant was also known to the victim's father, as he used to pass PW1's home on his way to fetch water. On 24th September, 2017, at about 3.00 p.m, PW1 was resting in his house when he noticed that his children were not there. PW1 began looking for his children, and when he went to the back of the house, he found the appellant carrying the victim on his laps, her under garments partly

removed, and his erect penis outside his trouser. When the appellant saw PW1, he dropped the child and ran away from the scene. He also fled from the village. PW1 reported the matter to the nearby Nakilebe Police Post. On 25th September, 2017, the appellant was arrested in the home of PW2 at Nsambya in Kampala District. He was taken back to Nakilebe Police Post, and was subsequently charged and tried for Aggravated Defilement of the victim.

At the trial, the appellant denied having defiled the victim. However, the learned trial Judge believed the prosecution case and convicted the appellant as charged, and thereafter sentenced him accordingly. The appellant does not challenge the learned trial Judge's decision on conviction. However, being dissatisfied with the sentence imposed by the learned trial Judge, the appellant, with leave of this Court, now appeals against sentence only on one ground as follows:

> **"That the learned trial Judge erred in law and fact in sentencing the appellant to 18 years imprisonment which sentence was deemed illegal, manifestly harsh and excessive in the circumstances."**

The respondent conceded to the appeal.

Representation

At the hearing, Mr. Emmanuel Muwonge, learned counsel, represented the appellant on State Brief. Ms. Sherifah Nalwanga, 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 began by referring this Court to the authority of **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No. 143 of**

2001 (unreported) for the proposition that an appellate Court is not to interfere with the sentence imposed by the trial Court which has exercised its discretion unless the exercise of the discretion resulted in a harsh or manifestly excessive sentence or where the sentence imposed was so low as to amount to a miscarriage of justice or where the sentence proceeded on a wrong principle. Counsel also referred to **Guideline 6 (1) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** which states that every sentencing Court must take into account all circumstances it considers relevant. Counsel contended that the learned trial Judge did not, while sentencing, take into account several mitigating factors submitted for the appellant; that he was a first offender, and that he had spent 2 ½ years on remand. He submitted that a sentence passed without taking into account mitigating factors for the accused person is liable to be set aside on appeal as was done in **Tamale vs. Uganda, Court of Appeal Criminal Appeal No. 19 of 2012 (unreported).**

Counsel further submitted that the sentence imposed on the appellant is illegal for the reason that the trial Court failed to properly take into account the period spent by the appellant on remand. He submitted that, according to the authority of **Rwabugande vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014 (unreported)**, the proper taking into account of the remand period requires an arithmetic exercise in which the trial Court should deduct the period the appellant spent on remand from any sentence it imposes, and thereafter come up with the final sentence. Counsel pointed out that in the present case, the trial Court did not follow the guidance laid down in the **Rwabugande case (supra)** and it therefore passed an illegal sentence on the appellant.

In view of the above submissions, counsel prayed that this Court sets aside the sentence imposed on the appellant and imposes a shorter, lawful sentence.

Respondent's submissions

Counsel for the respondent conceded to the appeal and agreed that the sentence imposed on the appellant was illegal on the ground that the trial Court did not, while sentencing the appellant, properly take into account the period the appellant had spent on remand. She conceded that as per the guidance in **Rwabugande (supra),** a sentencing Court is obligated to take into account the remand period by conducting an arithmetic exercise, but this was not done, as the learned trial Judge merely stated that he sentenced the appellant to 18 years imprisonment from the date of his first admission on remand.

Counsel however submitted that in the circumstances of the present case, the sentence of 18 years imprisonment imposed on the appellant was appropriate, notwithstanding, the fact that the trial Court did not properly consider the period the appellant spent on remand. Counsel submitted that the maximum sentence for aggravated defilement for which the appellant was convicted is the death sentence, with a starting point for sentencing of 35 years imprisonment under the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013**. The trial Court considered all the mitigating and aggravating factors before imposing the sentence. For the aggravating factors, the Court considered that the victim was very young, aged just 3 years. As for the mitigating factors, the Court considered that the appellant was a first offender, and a young man who needed rehabilitation. Further still, counsel submitted that longer sentences have been imposed in similar previously decided cases, for example, in the case of **Byera vs. Uganda, Court of Appeal Criminal Appeal No. 99 of 2012 (unreported)** where this Court imposed a sentence of 20 years imprisonment where the appellant was convicted of defiling a 3 year old girl. Counsel concluded by praying that this Court maintains the sentence of 18 years imprisonment, and deducts therefrom the period of 2 years and 6 months which the appellant spent on remand and sentences him to 15 years and 6 months imprisonment.

Resolution of the Appeal

We have carefully studied the record, and also considered the submissions of counsel for either side. Other relevant authorities that were not cited have also been considered. This is a first appeal against the sentence imposed by the trial High Court. We are mindful that on such appeals, this Court is expected to reappraise the evidence and draw its own inferences of fact. **See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, S.I 13-10**. Furthermore, as was held in **Kifamunte vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported)**, a first appellate Court is expected to consider all materials before the trial Court and come up with its own conclusions.

It is also worth stating that an appellate Court may only interfere with a sentence imposed by a trial Court in limited circumstances. The principles in this regard were helpfully summarized in the case 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:**
>
> **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 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 highlighted authorities provide that an appellate Court may interfere, interalia, where the sentence imposed by the trial Court is illegal. In the present case, the appellant argues that the trial Court's sentence was illegal because it failed to properly take into account the period he had spent on remand. This argument concerns **Article 23 (8)** of the **1995 Constitution** which provides:

"(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."

In the **Rwabugande case (supra)**, the Supreme Court held that taking into account for purposes of the above provision requires an arithmetic exercise where the remand period is deducted from any sentence imposed as appropriate. The Court stated:

"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 the present case, the learned trial Judge stated, while sentencing the appellant, as follows:

"Offence carries a maximum sentence of death. The aggravating factors are that the victim is only three years. The mitigation is that the accused is a first offender. This court considers accused needs rehabilitation.

Since he is a young man who can change. He is sentenced to serve 18 years running from first date of admission on remand."

It is clear that the learned trial Judge did not follow the Rwabugande guidance. He neither ascertained the period the appellant spent on remand nor did he specifically credit it to the appellant by deducting it from the sentence he considered appropriate. It therefore follows that the sentence that the learned trial Judge did not properly take into account the period that the appellant spent on remand, as he was required to do under **Article 23 (8)** of the **1995 Constitution**. We therefore set aside the sentence imposed on the appellant for being illegal.

Having set aside the sentence, we shall proceed to determine an appropriate fresh sentence, pursuant to the powers of the Court under **Section 11** of the **Judicature Act, Cap. 13**, which 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."

We have considered all the relevant factors. The aggravating factors were as follows: the victim of the offence was very young aged just 3 years, and the appellant was aged 39 years old. We have also considered that the offence of aggravated defilement is a serious offence that attracts the maximum death sentence. Moreover, the offence of aggravated defilement is reprehensible. The mitigating factors were that the appellant was a first offender; was at a relatively young age of 30 years and had the ability to reform in prison and return to society as a reformed citizen.

We are also alive to the need to apply the consistency principle, which is to the effect that, while sentencing, a Court should impose sentences consistent with the sentences imposed in previously decided cases with similar facts. **(See: Aharikundira vs. Uganda, Supreme Court Criminal Appeal No. 27 of 2015 (unreported)).** We have considered several previously decided aggravated defilement cases. 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.

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.

After considering all factors, in the present case we find a sentence of 20 years imprisonment appropriate. The appellant was on remand, from the date of his arrest on 25th September, 2017 until the date of his sentencing on 26th September, 2019, a period of 2 years and 1 day. We shall deduct the remand period from the sentence we imposed, which leaves the appellant to serve a sentence of 17 years, 11 months and 29 days imprisonment from the date he was convicted on 26th September, 2017.

In conclusion, the appeal is allowed, on the terms stated hereinabove.

We so order.

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

.....

Elizabeth Musoke

Justice of Appeal

.....

Christopher Gashirabake

Justice of Appeal

.....

Eva K. Luswata

Justice of Appeal