THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0419 OF 2017

MUKIIBI MARTIN::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mpigi before Obura, J. (as she then was) delivered on 25th March, 2015 in Criminal Session Case No. 120 of 2014)

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 25th March, 2015, the High Court (Obura, J. (as she then was)) convicted the appellant on two counts, both, of the offence of Aggravated Defilement contrary to **Section 129 (3)** and **(4) (a)** of the **Penal Code Act, Cap. 120 (as amended)**. The High Court sentenced the appellant to two concurrent sentences of 18 years imprisonment, on each count.

The appellant was presented to the High Court for trial on an indictment containing two counts. In count one, it was alleged that the appellant had, on the 29th day of March, 2013, at Maddu Town, Maddu Sub-County in Gomba District, performed a sexual act with N.J, a minor girl aged 3 years. In count two, it was alleged that the appellant had, on the same date and place, performed a sexual act with N.V, a minor girl aged 6 years.

The facts of the case, as we have gathered from the record, may be summarized as follows. The victims N.J and N.V lived, with their parents Kimera Geoffrey and Nanteza Molly, in Maddu A Village in Maddu Sub-County in Gomba District,. The appellant was a friend to the victims' family and often went to their home to watch television. On 29th March, 2013, at about 8.30

p.m, the victims' parents went out for the night. They left the appellant and the victims at home. The appellant was watching television while the victims were sleeping. The appellant took advantage of the parents' absence and had sexual intercourse with the victims. The appellant left the house before the victims' parents returned later that evening. The next day, the victims' parents noticed that victims sustained injuries. The following day, the complainants noticed that N.J felt pain and would cry while urinating. They checked her and found bruises around her private parts. The parents also noted that N.V was walking with difficulty, and on checking her private parts found white sperm like substances. The parents interrogated N.V and she said that the appellant was in N.J's bedroom and that she had heard strange noises coming from the bedroom when the appellant was there. The parents also noted that the appellant stopped going to their home as he was doing previously. The parents reported a case of defilement of the victims to the nearby police, and the appellant was subsequently arrested and charged with aggravated defilement.

On 5th March, 2015, the appellant, following committal, appeared before the High Court for plea taking on two counts relating to defilement of the two victims. He pleaded not guilty on both counts. On 25th March, 2015, the matter came up for further hearing, and the appellant informed the trial Court that he was pursuing plea bargaining. Later that day, the appellant agreed to change his plea to guilty on the two counts. The High Court, thereafter, convicted him upon his own plea of guilty and sentence him as mentioned earlier.

The appellant is dissatisfied with the manner of his sentencing and has appealed to this Court on the sole ground framed as follows:

> **"1. That the learned trial Judge erred in law and fact when he failed to equally offset a period of 1 year and 11 months from the sentence on count II thus thereby occasioning a miscarriage of justice."**

The respondent opposed the appeal.

Representation

At the hearing, Mr. Kenneth Sebabi, learned Counsel, appeared for the appellant on State Brief. Ms. Nabaasa Carolyn Hope, learned Principal Assistant DPP and Ms. Emily Mutuzo, learned 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 those submissions have been considered in this judgment.

Appellant's submissions

Counsel for the appellant submitted that the learned trial Judge failed to properly take into account the period the appellant spent on remand while imposing the sentence on count 2, which rendered the sentence imposed on count 2 illegal. Counsel referred to several authorities, including, **Kyalimpa vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1995**, **Kamya vs. Uganda, Supreme Court Criminal Appeal No. 16 of 2000** and **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001 (all unreported**) for the proposition that an appellate Court can set aside a sentence imposed by the trial Court, on grounds, interalia, that the sentence was illegal. Counsel also referred to **Rwabugande vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014 (unreported)** for the proposition that taking into account means that the sentencing account must ascertain and deduct the remand period from any sentence it considers appropriate and that failure to do so renders the sentence illegal. He also cited **Nashimolo vs. Uganda, Supreme Court Criminal Appeal No. 46 of 2017 (unreported)** which emphasized the need to apply the principles articulated in Rwabugande. Counsel submitted that in the present case, the trial Court only made an arithmetic deduction on count 1 but did not do so on count 2, and that this rendered the sentence on count 2, illegal. He urged

this Court to set aside the sentence imposed in Count 2 and substitute a lawful sentence.

Respondent's submissions

Counsel for the respondent submitted that although the learned trial Judge did not deduct the appellant's remand period from the sentence imposed in count 2, no miscarriage of justice had been occasioned. The learned trial Judge deducted the remand period from the sentence agreed upon in count 1 of 20 years, which was longer than the sentence in count 2, and it became unnecessary to make a second deduction on count 2. The appellant would still serve a sentence of 18 years imprisonment. In counsel's view, it would have been a miscarriage of justice if the sentence on count 2 was higher than that on count 1. Furthermore, that the time spent on remand was in respect of both counts and could not have been deducted twice. Counsel urged this Court to maintain the sentences imposed on the appellant because they were arrived at following a plea bargain agreement which the appellant concluded voluntarily.

Resolution of the Appeal

We have carefully studied the record, and considered the submissions of counsel for either side and the law and authorities cited. This is a first appeal against a decision of the High Court, acting in exercise of its original jurisdiction. The duty of this Court in such appeals is to reconsider the materials before the trial Court and to make its own conclusions on all issues. **See: Kifamunte vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported).** Furthermore, **Rule 30 (1) (a)** of the **Judicature (Court of Appeal Rules) Directions, S.I 13-10** provides that on a first appeal, this Court ought to reappraise the evidence and make inferences of fact.

We further note that this appeal is against sentence only, and wish to reiterate that there are limited grounds which justify an appellate Court to interfere with a sentence imposed by the trial Court. The grounds for such interference have been discussed in many cases and it is unnecessary to go

over them in this appeal. It is sufficient to say, for purposes of the present appeal, that an appellate Court will be justified to interfere if the sentence imposed by the trial Court is illegal. One instance of an illegal sentence is where, during sentencing, the trial Court omitted to take into account the period that the appellant spent on remand. Such sentences are deemed to be contrary to **Article 23 (8)** of the **1995 Constitution** which enjoins sentencing courts to take into account the period spent on remand. **(See: Rwabugande vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014)**

The learned trial Judge, had this to say, while sentencing the appellant:

> **"The sentence agreed upon by the parties in the plea bargain agreement is 20 years for count I and 18 years for count II.**
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> **However, since the accused has been on remand for a period of one year and eleven months (almost two years), I will deduct that period from the sentence agreed upon on count I and sentence the accused persons to 18 years imprisonment on that count. On count II the accused is sentenced to the 18 years agreed upon. The sentences shall be served concurrently."**

We noted that the sentencing of the appellant was done pursuant to a plea bargain agreement he executed with the respondent. The agreement was to sentence the appellant to 20 years imprisonment on count 1 and 18 years imprisonment on count 2. The learned trial Judge took into account the period the appellant spent on remand and the only practical effect of doing so was to reduce the longer sentence on count 1 from 20 years to 18 years. It may well be that taking into account the remand period would reduce the sentence on count 2 to 16 years, but considering that two sentences were imposed, the appellant would still have to serve 18 years imposed on count 1. We therefore agree with counsel for the respondent that no miscarriage of justice was occasioned due to the learned trial Judge's failure to deduct the remand period from the sentence on count 2. The sole ground of the appeal must fail.

We, therefore, find no merit in the appeal, and we dismiss it.

We so order.

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