THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0375 OF 2019

SSEKANDI ARAFATI::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mpigi before Kawesa, J. delivered on 25th September, 2019 in Criminal Session Case No. 34 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 25th September, 2019, the High Court (Kawesa, J) convicted the appellant on one count of the offence of **Aggravated Defilement** contrary to **Section 129 (4) and 4 (c) of the Penal Code Act, Cap. 120**. The High Court, thereafter, sentenced the appellant to 20 years imprisonment.

The High Court decision followed the trial of the appellant on an indictment that, in relevant part, alleged that he had, at a date unknown during the month of October 2017, at Katende Kikondo in the Mpigi District performed a sexual act with M.E (a minor, the victim), a boy aged below the age of fourteen years) and being a person in authority over him. The victim was aged 10 years at the time.

The facts of the case, as we have ascertained from the record, may be summarized as follows. The appellant had a home at Katende Village in Mpigi District, where he offered shelter for homeless children, he met at various places. In October, 2017, the appellant met ME, the victim, and other children, near the Kabaka's Lake in Lubaga, Kampala District, and took them to his home in Katende. In the night, the victim and the other children went to sleep on the same mattress as the appellant. The appellant then took

advantage and performed anal sex on the victim. The victim tried to resist, but the appellant overpowered him and ignored his alarms. The victim also tried alarming but was silenced by threats that the appellant would take him to Kampiringisa Prison. The next day, the victim and the other children, left the appellant's home and went to seek shelter at another home called Agape Ministries Home in Najjanakumbi in Kampala. On reaching that home, the victim told the Home Caretaker that the appellant had defiled him. Later, the Home Caretaker accompanied the victim to report a case of defilement against the appellant at the nearby Police Station. The appellant was subsequently arrested, charged and convicted in connection with the sexual act he committed on M.E. He was thereafter sentenced accordingly.

The appellant, being dissatisfied with the sentence imposed by the learned trial Judge, now appeals, with leave of this Court, on the sole ground that:

> **"That the learned trial Judge erred in law and fact when he meted out a manifestly harsh and excessive sentence against the appellant."**

The respondent conceded to the appeal.

Representation

At the hearing, Mr. Henry Kunya assisted by Ms. Lydia Namuli, both learned counsel, represented the appellant on State Brief. Mr. Sam Oola, Senior Assistant 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 began by referring to the principle, as articulated in cases like **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001** and **Kimera vs. Uganda, Court of Appeal Criminal**

Appeal No. 427 of 2014 (both unreported), that an appellate Court is not to interfere with the sentence imposed by the trial Court, in exercise of its discretion on sentencing, unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice. Counsel submitted that the sentence imposed on the appellant was manifestly excessive considering the mitigating factors submitted for the appellant; that he was a first offender aged 40 years old and therefore capable of reforming and being reintegrated in society; that he was responsible for providing for a family consisting of a wife and four children; that the appellant was a useful citizen who was providing employment and accommodation to the victims. Counsel also submitted that the appellant had spent 2 years on remand before he was convicted and sentenced. Counsel contended that in light of the highlighted mitigating factors, the sentence imposed by the learned trial Judge is manifestly harsh.

Counsel further submitted that the sentence imposed on the appellant is out of the usual sentencing range for cases of aggravated defilement. Counsel referred to **Katende vs. Uganda, Supreme Court Criminal Appeal No. 06 of 2004 (unreported)**, where a sentence of 10 years imprisonment for aggravated defilement, was confirmed as appropriate by the Supreme Court. The appellant was found to have defiled his own 9-year-old daughter on several occasions; and **Kizito vs. Uganda, Supreme Court Criminal Appeal No. 24 of 2001 (unreported)** where the Supreme Court imposed a sentence of 13 years imprisonment for aggravated defilement. The appellant was found to have defiled an 11-year-old girl. Counsel contended that in the present case, a sentence of 8 years imprisonment, taking into consideration the period of 2 years the appellant spent on remand, was appropriate. He urged this Court to set aside the sentence imposed by the trial Court and substitute the shorter sentence he proposed.

Respondent's submissions

Counsel for the respondent submitted that there was merit in the appeal to the extent that the learned trial Judge, in sentencing the appellant, omitted

to take into account the period the appellant had spent on remand, as required by the provisions of **Article 23 (8) of the 1995 Constitution**. Counsel submitted that in **Rwabugande vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014 (unreported),** it was held that complying with Article 23 (8) requires an arithmetic exercise where the trial Court deducts the ascertained remand period from any sentence it deems appropriate, and that failure to conduct the arithmetic exercise means that the remand period has not been properly taken into account, thereby rendering any sentence imposed illegal for failure to comply with a constitutional provision. Counsel submitted that the learned trial Judge had not taken into account the period the appellant spent on remand, in accordance with the Rwabugande guidance, and he therefore invited this Court to find that the sentence imposed was illegal, set it aside and impose a fresh sentence.

Counsel further submitted that this Court should, in determining an appropriate fresh sentence, take a very serious view of the circumstances of the offence. The appellant lured the victim, a vulnerable street child using a ploy of securing employment for him, and thereafter took advantage and subjected the boy to a sordid and horrible sexual experience. The act was wicked and abominable. In addition, the appellant aged 40 years was capable of being a father of the victim aged only 10 years. Counsel urged this Court to pass a similar sentence to the one imposed in **Tindifa vs. Uganda, Court of Appeal Criminal Appeal No. 0256 of 2011 (unreported)**, where the appellant was sentenced to 20 years imprisonment for aggravated defilement. the appellant was found to have defiled his daughter, a young girl aged 9 years. Counsel submitted that after imposing a sentence of 20 years imprisonment, this Court should then deduct the period the appellant spent on remand of 1 year, 10 months and 22 days, leaving the appellant to serve a sentence of 18 years, 1 month and 8 days imprisonment.

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. We have also considered other relevant authorities not cited. This is a first appeal against sentence only and we are mindful that this Court has a duty, when deciding such appeals, to appraise the evidence and draw inferences of fact **(Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, S.I 13-10)**. In **Uganda vs. Ssimba, Supreme Court Criminal Appeal No. 37 of 1995 (unreported)**, it was held that it is the duty of the first appellate Court to give the evidence on record as a whole that fresh and exhaustive scrutiny which the appellant is entitled to expect, and draw its own conclusions of fact.

We must also stress that an appellate Court may only interfere with a sentence imposed by the trial Court in limited circumstances, including, and in so far as relevant to the present case, where the sentence is illegal or where the sentence is manifestly harsh and excessive**. (See: Rwabugande vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014 (unreported**).

Counsel for the respondent raised a point on illegality of the sentence of the trial Court, albeit counsel for the appellant had not seriously canvassed it. It was submitted that the learned trial Judge did not properly take into account the period the appellant spent on remand as he was enjoined to do, by virtue of **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."**

The Supreme Court in the **Rwabugande case (supra)** gave guidance on the interpretation of the above provision. It 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."

The learned trial Judge, in sentencing the appellant, stated that he had "given the accused person 20 years imprisonment running from first day of remand". The learned trial Judge neither ascertained the period the appellant spent on remand nor did he deduct it from the sentence of 20 years he deemed appropriate. Counsel for the respondent, therefore, correctly submitted that the learned trial Judge failed to conduct an arithmetic exercise so as to properly take into account the period the appellant spent on remand, and as a result passed an illegal sentence. We therefore set aside the sentence imposed on the appellant.

We shall, pursuant to powers vested in this Court by **Section 11** of the **Judicature Act, Cap. 13**, proceed to determine an appropriate fresh sentence. Section 11 provides as follows:

"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."

During the sentencing proceedings, several aggravating factors were submitted by the prosecution; that the victim of the offence was only 10 years old; that the appellant took advantage of the victim's vulnerability as a street child and lured him to his home to defile him. We have also considered the fact that the offence of aggravated defilement is a serious offence attracting a maximum sentence of death. We have also considered the mitigating factors submitted for the appellant; that he was a first offender and that he was responsible for a family of a wife and 4 children. Furthermore, we have considered that the sentences imposed in previous cases of aggravated defilement, as cited by counsel in the present case, range anywhere between 10 years to 20 years imprisonment.

We have considered all circumstances and consider a sentence of 17 years appropriate. From that sentence, we shall deduct the period the appellant spent on remand. The appellant was arrested at the end of October, 2017 although it is difficult to state the precise date of his arrest. However, on 1st November, 2011, the appellant was sent for medical examination meaning that he was already in custody at that time, which was about 1 year, 10 months and 24 days, but considering that the date of arrest cannot be precisely determined, we shall round off, and take it that the remand period was 2 years. The appellant shall therefore serve a sentence of 15 years imprisonment to run from the date of his conviction on 23rd September, 2019.

For the above reasons, the appeal is allowed on the terms stated hereinabove.

We so order.

Dated at Kampala this 16th 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