

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CRIMINAL APPEAL NO. 031 OF 2018**

**TWESIGYE ESAU:.....APPELLANT**

**VERSUS**

**UGANDA:.....RESPONDENT**

*(Appeal from the decision of the High Court of Uganda at Mpigi before Alividza, J. delivered on 27<sup>th</sup> April, 2018 in Criminal Session Case No. 097 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**

On 18<sup>th</sup> April, 2018, the High Court (Alividza, J.) convicted the appellant of the offence of **Aggravated Defilement** contrary to **Section 129 (3) and (4) (b) of the Penal Code Act, Cap. 120**. On 27<sup>th</sup> April, 2018, the High Court sentenced the appellant to a sentence of 32 years imprisonment.

The High Court decision came upon conclusion of the trial of the appellant on an indictment that alleged that he had on 9<sup>th</sup> May, 2015, at Kigwanya-Nabbingo in the District of Wakiso, performed a sexual act with N.J (a minor, the victim), a girl aged 8 years and at the time he was infected with HIV.

The facts of the case, according to the findings of the learned trial Judge, can be summarized as follows. N.J, the victim, and the appellant, at all material times, both lived at Kigwanya-Nabbingo Village. On the fateful day, the victim's aunt sent her to the appellant's house to collect a phone. When she got there, the appellant asked her to enter his house, closed the door, then removed her knickers and slept on her. The appellant, thereafter warned the victim not to tell anyone about the incident. The victim, nonetheless, informed her aunt the next day and a case of defilement was reported against the appellant at the nearest police station. The appellant was subsequently charged and thereafter convicted and sentenced as earlier mentioned.

The appellant does not contest his conviction. He appeals against sentence only, with leave of this Court on a sole ground, framed as follows:

**"That the learned trial Judge erred in law and fact when she passed a sentence of 32 years imprisonment upon the appellant which is manifestly harsh and excessive, 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. Mr. Joseph Kyomuhendo, learned Chief State Attorney in the Office of the Director Public Prosecutions, appeared for 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 mitigating factors submitted for the appellant and thereby arrived at a harsh and excessive sentence. He pointed out that several mitigating factors were submitted for the appellant; that he was a first offender aged 48 years, and was the sole bread winner for his family.

Furthermore, counsel submitted that the sentence of 32 years imprisonment imposed on the appellant was harsher than sentences imposed in similar previously decided aggravated defilement cases, and that in imposing that sentence, the learned trial Judge erroneously departed from the conventional rule of uniformity in sentencing as articulated in **Aharikundira vs. Uganda, Supreme Court Criminal Appeal No. 27 of 2015 (unreported)** where it was held that consistency is a vital principle of the sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation. Counsel cited the case of **German vs. Uganda, Court of Appeal Criminal**

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**Appeal No. 142 of 2010 (unreported)**, where this Court reduced a sentence of 20 years imprisonment for aggravated defilement to 15 years imprisonment, after deeming the sentence harsh and excessive. The appellant, a 35-year-old man was found to have defiled a 5 year old girl.

In counsel's view, had the learned trial Judge addressed her mind to the mitigating factors and the principle of uniformity of sentence, she would have imposed a more lenient sentence. He urged this Court to set aside the sentence imposed on the appellant and find a sentence of 16 years imprisonment appropriate in the circumstances.

### **Respondent's submissions**

In reply, counsel for the respondent submitted that the learned trial Judge, in sentencing the appellant, considered all relevant circumstances and applicable principles, and therefore passed a lawful sentence. In counsel's view, the sentence was lenient considering the aggravating factors; the appellant aged 45 years was 37 years older than the victim; he was HIV positive and put the victim at risk of contracting HIV. According to counsel, the aggravating factors outweighed the mitigating factors.

It was further submitted that counsel for the appellant had wrongly construed the principles articulated in the **Aharikundira case (supra)**. Counsel referred to the authority of **Byaruhanga Okot vs. Uganda, Court of Appeal Criminal Appeal No. 78 of 2010 (unreported)** where it was held that while this Court is bound to follow the principle of "parity" and "consistency" while sentencing, it has to also bear in mind that the circumstances under which offences are committed are not necessarily identical. He then submitted that this Court has in previously decided cases, confirmed deterrent sentences, where the aggravating factors outweighed the mitigating factors. In **Bacwa vs. Uganda, Criminal Appeal No. 869 of 2014 (unreported)**, this Court confirmed a sentence of life imprisonment for aggravated defilement. In **Bonyo vs. Uganda, Supreme Court Criminal Appeal No. 07 of 2011 (unreported)**, the Supreme Court confirmed a sentence of life imprisonment for aggravated defilement, where the appellant was HIV positive. In **Kabazzi vs. Uganda, Criminal Appeal No. 268 of 2015 (unreported)**, this Court confirmed a sentence

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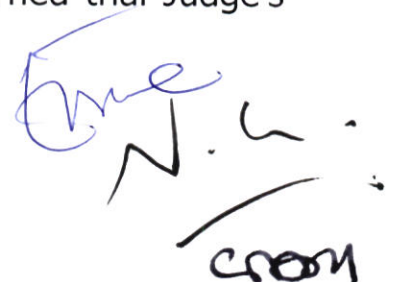
of 32 years imprisonment against an appellant who had defiled two girls. Counsel contended considering the aggravating factors referenced earlier, the appellant was a monster who deserved no leniency. He further contended that this Court has a duty to protect children and the public at large by incarcerating people like the appellant who commit such heinous crimes, for a longtime. He prayed that this Court upholds the sentence imposed by the trial Court.

### **Resolution of the Appeal**

We have conducted a careful examination of the record, and considered the submissions of counsel for either side and the law and authorities cited. Other relevant law and authorities that were not cited have also been considered. 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 considering 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 are also mindful 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 manifestly excessive in the circumstances of the case. **(See: Kakooza vs. Uganda, Supreme Court Criminal Appeal No. 17 of 1993 (unreported))**.

In the present case, counsel for the appellant submitted that the learned trial Judge imposed a sentence that was manifestly excessive, and this was because she failed to properly take into account the mitigating factors submitted for the appellant. We have considered the learned trial Judge's sentencing remarks, which were as follows:

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**"You were charged with aggravated defilement for which the maximum sentence is death. Since you have HIV and you never took precautions, this is the most appropriate sentence for you.**

**However, this Court will show you mercy and start from the starting point of 35 years. Aggravating circumstances are that you have HIV and you were aware of it. Regardless of this, you had sexual intercourse with a girl of 8 years without a condom. So I will add 15 years making it 50 years. Another aggravating factor is the age difference. The victim was 8 years while you, the convict was 45 years.**

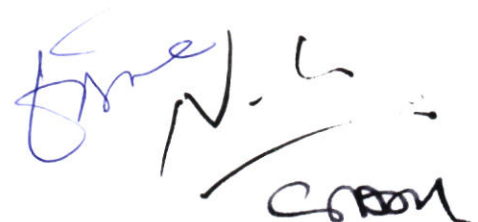
**Another 10 years making it 60 years. I will now consider mitigating factors. You are a first offender with no record of past convictions. I will reduce the sentence by 5 years leaving a balance of 55 years. The complainant indicated to Court that she had forgiven you. You are 48 years; you might die in prison. I'll remove 20 years leaving 35 years. I'm sentencing you to 35 years**

**Since you have been on remand from June 2015, which is 3 years less your sentence. You are accordingly sentenced to 32 years."**

From the above excerpt, it is clear that the learned trial Judge considered the key mitigating factors presented for the appellant; namely, the fact that he was a first offender and his advanced age of 48 years. We therefore, find no merit in the submissions of counsel for the appellant that the learned trial Judge failed to consider the mitigating factors submitted for the appellant.

The second argument by counsel for the appellant was that the learned trial Judge failed to apply the principle of consistency in sentencing. This rule which was most famously articulated in **Aharikundira vs. Uganda, Supreme Court Criminal Appeal No. 27 of 2015 (unreported)** is to the effect that a sentencing Court must impose sentences not too dissimilar to sentences imposed in similar previously decided cases. In **German vs. Uganda, Criminal Appeal No. 142 of 2010 (unreported)**, this Court imposed a sentence of 15 years imprisonment after setting aside a sentence of 20 years imprisonment imposed by the trial Court. The appellant, aged 35 years was found to have defiled a 5 year old girl.

In **Bacwa vs. Uganda, Criminal Appeal No. 869 of 2014 (unreported)**, this Court upheld a sentence of life imprisonment as





appropriate for aggravated defilement. The Court considered the sentence appropriate because the appellant was HIV positive, and had defiled and infected the victim a child of only 10 years.

In **Tiboruhanga vs. Uganda, Criminal Appeal No. 0655 of 2014 (unreported)**, this Court imposed a sentence of 22 years imprisonment in a case of aggravated defilement, where the appellant, who was HIV positive was found to have defiled a 13-year-old girl.

In **Ntambala 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.

As illustrated by the above cases, sentences from 14 years to life imprisonment have been imposed in previous aggravated defilement cases. In the Bacwa case, a sentence of life imprisonment was upheld because the appellant, an HIV positive man infected the victim. However, where the appellant, although HIV positive, did not infect the victim, the Court in **Tiboruhanga (supra)** imposed a sentence of 22 years imprisonment. In the present case, the appellant did not infect the victim. Subsequent tests showed that the victim was HIV negative. In those circumstances we think that the sentence of 32 years imprisonment was harsh and excessive in comparison to the sentence imposed in Tiboruhanga. We shall set that sentence aside.

We shall therefore proceed to determine an appropriate fresh sentence in exercise of the powers granted to this Court by **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."**

The following aggravating factors were submitted; that the appellant was HIV positive when he defiled the victim and had exposed her to the risk of

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contracting HIV; that there was a wide age gap of 37 years between the victim aged 8 years and the appellant aged 45 years. It was also submitted that the offence of aggravated defilement was a serious offence attracting the death sentence as its maximum sentence, and that incidents of commission of the offence were rampant in the area. The mitigating factors were as follows; the appellant was a first offender. It was also submitted that the appellant was had a family to look after. We have considered all factors and we find a sentence of 25 years imprisonment appropriate. From that sentence, we shall deduct the period of 2 years, 11 months and 19 days the appellant spent on remand from the date of arrest on 16<sup>th</sup> May, 2015 to the date of sentencing on 27<sup>th</sup> April, 2018. The appellant shall serve a sentence of 22 years and 11 days to run from the date of his conviction on 18<sup>th</sup> April, 2015.

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

**We so order.**

Dated at Kampala this 16<sup>th</sup> day of Sept 2022.

  
.....  
**Elizabeth Musoke**

Justice of Appeal

  
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**Christopher Gashirabake**

Justice of Appeal

  
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**Eva K. Luswata**

Justice of Appeal