

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA HELD AT JINJA**

*(Coram: Elizabeth Musoke, Barishaki Cheborion, & Hellen Obura JJA)*

**CRIMINAL APPEAL NO. 387 OF 2017**

5 **FRENDU ABUBAKER LOLEM ::: APPELLANT**

**VERSUS**

**UGANDA ::: RESPONDENT**

*[Appeal from the decision of the High Court of Uganda sitting at Moroto (Hon. Justice Stephen Mubiru) delivered on 30<sup>th</sup> September 2017 in Criminal Session Case No. HCT-CR-SC-123-2015]*

**JUDGMENT OF THE COURT**

The appellant was indicted with the offence of Aggravated Defilement contrary to section 129(3), (4) (a) and (b) of the Penal Code Act, convicted and sentenced to life imprisonment.

15 On 30<sup>th</sup> day of October, 2014 at Kaabong hospital female ward, Kaabong Town Council in Kaabong District, the appellant had unlawful sexual intercourse with Hamida Joan a girl under the age of 18 years while being HIV positive. To prove its case prosecution presented four witnesses and relied on documentary evidence which included police form 24A marked PEX1, police form 3A PEX 2 and police bond  
20 form PEX3.

The appellant pleaded not guilty to the indictment and gave sworn statement. He relied on the victim's statement made to the police which was marked DEX1. The learned trial judge convicted the appellant and sentenced him to life imprisonment.

25 During the hearing of the appeal, the appellant abandoned the other grounds in the supplementary memorandum of appeal and with leave of court granted under Section 132 (1) (b) of the Trial on Indictments Act, the appellant now appeals to the Court of Appeal against sentence only on the sole ground that:

*The learned trial judge erred in law and fact when he sentenced the appellant to a harsh and excessive sentence in the circumstances of the case.*

### 30 **Representations**

At the hearing of the appeal, Ms. Amojong Kevin represented the appellant on state brief while Ms. Babra Masinde a Chief State Attorney in the Office of the Director of Public Prosecutions (DPP), represented the respondent.

35 Due to the COVID-19 Pandemic restrictions, the appellant was not in court physically but attended the proceedings via video link to Prison. Both parties sought, and were granted leave to proceed by way of written submissions.

### **Appellant's submissions**

Counsel for the appellant faulted the trial judge for meting on the appellant a very severe sentence. He submitted that the seriousness of the offence in the instant case

40 was mitigated by a number of factors which didnot call for a life sentence issued by  
the trial Court.

Counsel further submitted that the sentence passed by the learned trial judge didn't  
conform to the consistency principle which requires sentences as much as  
circumstances may permit to be similar to those passed in previously decided cases  
45 having a resemblance of facts as the one in which sentence is being passed and the  
appellate court, may if called upon to do so, be justified in interfering with a sentence  
which contravene this principle. She cited **Aharikundira Yustina Vs Uganda, SCA  
No. 27 of 2015** where court held that *"It is the duty of this court while dealing with  
appeals regarding sentencing to ensure consistency with cases that have similar facts.*  
50 *Consistency is avital principle of a sentencing regime. It is deeply rooted in the rule of  
law and requires that the laws be applied with equality and without unjustifiable  
differentiation"*.

According to Counsel, the Court of Appeal has time and again reduced sentences  
that have come close to the starting point of 35 years imprisonment suggested by  
55 the sentencing guidelines as being harsh and excessive. She cited **Birungi Moses Vs  
Uganda C.A Crim. Appeal No. 177 of 2014** to support her argument.

She further submitted that this court has jurisdiction under Section 11 of the  
Judicature Act, cap 13 to determine a fresh sentence where one of the trial court is  
set aside for being harsh and excessive and prayed that the sentence of  
60 imprisonment for life be substituted with 11 years imprisonment.

### **Respondent's reply**

The respondent opposed the appeal and submitted that the trial judge arrived at the sentence basing on the facts and evidence before him. On the consistency of sentences, counsel cited **Katureebe Boaz & another Vs Uganda SCCA No.066 of**  
65 **2011** for the proposition that consistency in sentencing is neither a mitigating nor an aggravating factor to render a sentence passed illegal after considering the mitigating and aggravating factors. That sentencing lies in the discretion of Court which may consider sentences imposed in cases of a similar nature.

Counsel submitted for the respondent that the learned trial judge considered both  
70 the mitigating and aggravating factors. That he specifically noted that despite the mitigation, the circumstances of the case were sufficiently grave to warrant a deterrent custodial sentence. That one of the aggravating factors highlighted was that the appellant well knowing that he was HIV positive decided to have unprotected sex with the victim, manifesting a callous disregard for life. She contended that the  
75 aggravating factors far outweighed the mitigating factors and that the learned trial judge was justified to impose that sentence.

It was further submitted for the respondent that all the ingredients of the relevant offence were proved beyond reasonable doubt and that the trial court properly directed its mind to the facts, the evidence and the law and reached the correct  
80 conclusion. Counsel prayed that the appeal be dismissed, and the appellant's sentence of life imprisonment be confirmed.

In rejoinder, it was submitted for the appellant that although sentencing is at the discretion of court, the discretion ought to be exercised judiciously and should be guided by the Constitution sentencing guidelines.

85 Counsel further submitted that the learned trial judge focused only on aggravating factors and totally ignored the mitigating factors which included the appellant being a first time offender and a young man of 39 years

Counsel further submitted that paragraph 6(g) of the sentencing guidelines provides that court must take into account the circumstances prevailing at the time the  
90 offence was committed up to the time of sentencing. To the appellants counsel, the trial court never considered that the victim had dropped out of school for 3 years, that the prosecution was not certain of her age, that the victim was painted as being innocent yet she admitted to watching pornography and had capacity to lure any man into sexual acts and that at the time she testified, she had settled with the  
95 father of her child yet she was 17 years old.

Counsel further submitted that court is mandated to consider, before imposing a custodial sentence, the values, norms and aspirations of the people within the community per paragraph 9(b) of the guidelines. That marriage in Kaabong District at the age of 10 is an acceptable way of life among the people. She referred to the  
100 National population and Housing Census 2014 on Kaabong District.

## **Resolution**

We have carefully read the submissions of both counsel and the authorities cited.

105 We have also perused the record of appeal. As the 1<sup>st</sup> appellate court, it is our duty to reconsider all evidence that was adduced before the trial court and come to our own conclusions of fact and law while making allowance for the fact that we neither saw nor heard the witnesses. See **Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions, Baguma Fred Vs Uganda SCCA No. 7 of 2004, Kifumante**  
110 **Henry Vs Uganda SCCA No. 10 of 1997, and D.R Pandya Vs R [1957] EA 336.**

The complaint of the appellant was that the trial court ignored the principle of consistency and as a result passed a harsh and manifestly excessive sentence of life imprisonment for the offence of aggravated defilement. For that reason Counsel prayed that the sentence be substituted with 11 years imprisonment.

115 It is now settled that for the Court of Appeal, as a first appellate court, to interfere with the sentence imposed by the trial court which exercised its discretion, it must be shown that the sentence is illegal, or founded upon a wrong principle of the law; or that the trial Court failed to take into account an important matter or circumstance; or made an error in principle; or imposed a sentence which is harsh  
120 and manifestly excessive in the circumstances. See **Kamya Johnson Wavamuno Vs Uganda, Supreme Court Criminal Appeal No.16 of 2000 (Unreported); Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001 (unreported); Wamutabanewe Jamiru Vs Uganda, Supreme Court**

***Criminal Appeal No. 74 of 2007 and Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014.***

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It is trite that no two crimes are identical however Court should try as much as possible to have consistency in sentencing for the ends of justice to be met and as often said, for justice to be seen to have been done it is the duty of this Court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of sentencing regime. It is deeply rooted in the rule of law and requires that the laws be applied with equality and without unjustifiable differentiation See: **Aharikundira Yustin Vs. Uganda (Supra)**,

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The record does not show, that the learned trial judge took into consideration the principle of consistency. In our view, had the sentencing judge taken into account the uniformity principle probably would not have sentenced him to imprisonment for the rest of his life. The sentence of life imprisonment passed against the appellant was not a result of proper exercise of discretion because it failed to take into account decisions of the courts of judicature for similar offences. This resulted in the imposed sentences falling out of range with sentences imposed in cases of similar nature.

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In rejoinder counsel for the appellant introduced new aspects in her submission which were not raised by the respondent in reply. She submitted that the trial court never considered the mitigating factors, circumstances prevailing at the time the offence was committed up to the time of sentencing and values, norms and aspirations of the people within the community.

145 Page 42 of the record shows that the, defence counsel submitted in allocutus. In sentencing the appellant, the learned trial Judge stated that; *"I have taken into account the mitigating factors as elucidated by the convict and his counsel. Despite that mitigation, the circumstance of the case are sufficiently grave to warrant a deterrent custodial sentence...."*

150 It is clear that the learned trial judge took into consideration the appellant's mitigating factors and noted that the aggravating factors outweighed the mitigating factors.

Counsel submitted that the trial judge did not allow a reasonable period not exceeding seven days to determine the appropriate sentence for the offender as stipulated in paragraph 12 of the sentencing guidelines. In our view, sentencing the  
155 appellant on the same day he was convicted of the offence neither prejudiced the appellant nor occasioned a miscarriage of justice.

Regarding the non-consideration of circumstances prevailing at the time the offence was committed up to the time of sentencing as stipulated in paragraph 6 (g) of the  
160 Constitutional Sentencing Guidelines, the record shows that while sentencing the appellant the judge took into consideration the said circumstances when he stated that; *"... she as result lost her auntie`s scholarship and dropped out of school. Having been rejected and abandoned by her family, she took a desperate decision to engage in a sexual relationship with another man for sustenance and as a result she is now*  
165 *a child mother at the tender age of 17 years..."*



We find the appellant counsel's submission at this stage that the age of the victim was not ascertained and that the man who impregnated the victim was not prosecuted as afterthoughts. Be that as it may, we will re-evaluate the relevant evidence on record so as to ascertain the age of the victim.

170 The PW4 Hamida Joan, the victim gave oral evidence that she was 17 years at the time she was testifying which was in 2017, this means at the time the offence was committed she was 14 years.

PW2 Dr. Kenneth Nyombi who examined the victim on 15<sup>th</sup> October 2014 stated in his findings that the victim was estimated to be aged 15 years based on her dentition.

175 The assessors who saw the victim testify in court were of the view that she was aged 15 years at the time of commission of the offence and thus 18 years old at the time she testified.

PW3, Joyce Ilukori an Auntie to the victim testified that she was born in the year 1999. This placed her at the age of 15 years at the time the offence was committed.

180 While analyzing the ingredient of the age of the victim after referring to the above evidence the learned trial judge stated as follows;

*"I find that this ingredient has been proved beyond reasonable doubt. Hamida Joan was a girl under 18 years as at 13<sup>th</sup> October 2014."*

The learned trial observed the victim and was also in proper position to assess her  
185 age and he stated that the victim was below the age of 18 years at the time the  
offence was committed.

In our view, owing to the evidence analyzed on record, we find the evidence of the  
Auntie Joyce PW3, PW2 Dr. Kenneth Nyombi more believable. Coupled with the  
observation of the assessors, we are of the strong view that the victim was 15 years  
190 at the time the offence was committed. However, in as much as the victim was aged  
15 years, what was of essence in the instant case was that the victim was below the  
age of 18 years and the appellant was HIV positive which factor aggravated the  
offence from simple defilement to aggravated defilement as stipulated in section 129  
(3) of the Penal Code Act which provides;

195 **Section 129 (3) of the Penal Code Act provides;**

**Defilement of persons under eighteen years of age**

(3) Any person who performs a sexual act with another person who is below the age  
of eighteen years in any of the circumstances specified in subsection (4) commits  
a felony called aggravated defilement and is, on conviction by the High Court, liable  
200 to suffer death

4) The circumstances referred to in subsection (3) are as follows—

(a) where the person against whom the offence is committed is below the age of  
fourteen years;

(b) ***where the offender is infected with the Human Immuno deficiency Virus***

205 ***(HIV);***

(c) where the offender is a parent or guardian of or a person in authority over, the person against whom the offence is committed;

(d) where the victim of the offence is a person with a disability; or

(e) where the offender is a serial offender.

210 In light of the above provision, the learned trial judge was not required to ascertain whether the victim was below 14 years. What was sufficient was that she was below 18 years of age and there existed a factor that aggravated the case from simple defilement to aggravated defilement which was the fact that the appellant was HIV positive.

215 On the submission that the learned trial judge did not take into consideration the values, norms and aspirations of the people within the community of Kaabong while sentencing the appellant based on the National population and Housing Census 2014 Kaabong District, counsel for the appellant contended that marriage at the age of 10 is an acceptable way of life among the people of Kaabong.

220 In Uganda, the majority age for a man or woman to get married is 18 years and above as set forth in article 31 of the Constitution. In addition, under article 157 (1) (c), a child means a person under the age of 18 years. These constitutional stipulations cannot be watered down by values, norms and aspirations of the people within a

given community. Instead, communities should aspire to put into effect the  
225 aforementioned provisions so as to fight and bring to an end child marriages for the  
sake of the life, wellbeing and the future of the girl child. This Court cannot therefore  
condone or give effect to such values, norms and aspirations which are contrary to  
what the Constitution stipulates.

Relying on the principle of uniformity and consistency, in **Tiboruhanga Emmanuel**  
230 **vs Uganda, Court of Appeal Criminal Appeal No. 0655 of 2014**, this Court stated  
that the sentences approved by this Court in previous aggravated defilement cases,  
without additional aggravating factors, range between 11 years to 15 years. The  
Court considered the fact that the appellant was HIV positive as an additional  
aggravating factor because by committing a sexual act on the victim while HIV  
235 positive, the appellant exposed her to the risk of contracting HIV/AIDS. The Court  
imposed a sentence of 25years imprisonment.

In **Anguyo Siliva V. Uganda, Court of Appeal Criminal Appeal No.038 of 2014**,  
the appellant was 32 years old at the time he committed the offence of aggravated  
defilement of a girl aged 14 years. The appellant knew that he was HIV positive when  
240 he committed the offence. Having taken into account the period of 2 years, eleven  
months and 2 days that the appellant had been in lawful custody before sentence,  
this court sentenced him to serve 21 years and 28 days in prison.

In **Olara John Peter v. Uganda, Court of Appeal Criminal Appeal No.30 of 2010**,  
the appellant was convicted of aggravated defilement of a girl aged 14 years on his  
245 own plea of guilty. He was 29 years old and knew that he was HIV positive. He

250 appealed against a sentence of 16 years complaining that it was manifestly excessive in view of the fact that he pleaded guilty. This court considered that the victim was exposed to the danger of contracting HIV and confirmed that the sentence of 16 years' imprisonment was neither manifestly excessive nor harsh in the circumstance of the case.

**Decision:**

255 In view of the foregoing, the appeal against sentence succeeds. The sentence of the High Court of life imprisonment upon conviction for aggravated defilement is set aside. After taking into consideration all the aggravating and mitigating factors on record, the period which the appellant spent on remand and to ensure consistency in sentences. We substitute the sentence of life imprisonment with 20 years imprisonment to run from the date of conviction.

We so order.

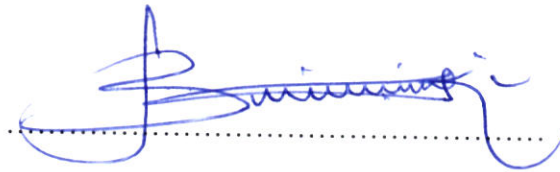
Dated at Jinja..... this ..... day of ..... 2022.

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Elizabeth Musoke

**JUSTICE OF APPEAL**



Cheborion Barishaki

**JUSTICE OF APPEAL**



Hellen Obura

**JUSTICE OF APPEAL**