THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Musoke, Gashirabake & Luswata, JJA]

CRIMINAL APPEAL NO. 0383 OF 2019

(Arising from Criminal Case No. 017 of 2018)

MUTEBI RONALD .....APPELLANT

VERSUS

UGANDA ....RESPONDENT

[Arising from the decision of Kaweesa Henry Isabirye, J of the High Court of Uganda sitting Mpigi in Criminal Case No. 017 of 2018 dated 26th September 2019]

JUDGMENT OF COURT.

Introduction.

The six-year-old victim lived with her grandmother at Lukonge village, Kayabwe in Mpigi district and the Appellant was their neighbour separated by only one house. On the 15th of October 2017 the victims' grandmother discovered that the victim was discharging an awful smell and was continuously falling sick. Upon inquiry, the victim's friends revealed to the grandmother that the victim had been defiled by the Appellant.

The victim indeed eventually revealed to her grandmother that the Appellant had defiled her and threatened to cut her if she revealed it to anyone. She stated that he took her to his house at around 1:00 pm as she returned from school, put her on his bed while telling her that her grandmother was inside his house. As soon as she entered, he put cello tape on her mouth and then defiled her. The grandmother reported to the matter to police and the Appellant was arrested. Results upon examination revealed that the Appellant was HIV positive and hence the charges

of aggravated defilement. He was tried and convicted by the High Court and now appeals the sentence of 23 years imprisonment as imposed by the trial court.

Dissatisfied with the finding of the trial court the Appellant filed this appeal on one ground that:

> "The learned Justice of the High Court of Uganda erred in law and fact in sentencing the Appellant to 23 years' imprisonment which sentence was deemed illegal, manifestly harsh and excessive in the circumstances"

Representation.

The Appellant was represented by Mr. Emmanuel Muwonge. The Respondent was represented by Ms. Nakafeero Fatinah , Chief State Attorney.

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.

Duty of this Court.

Under Rule 30 (1)(a) of the **Judicature (Court of Appeal Rules) Directives S.I 13-10, it was provided that** on any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may reappraise the evidence and draw inferences of fact. In **Kifamunte Henry V Uganda, S.C criminal Appeal No. 10 of 1997,** court held that;

> "The first appellate court has a duty to review the evidence of the case, to reconsider the materials before the trial judge and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."

This Court therefore has a duty to re-evaluate the evidence to avoid a miscarriage of justice as it mindfully arrives at its own conclusion. We will therefore bear these principles in mind as we resolve the grounds of appeal in this case.

Submissions by Counsel for the Appellant

Counsel for the Appellant submitted that the sentence on record was illegal, manifestly harsh and excessive. Counsel argued that the sentence did not also involve the reduction of the period the appellant spent on remand as required by the law.

Counsel cited **Kiwalabye Bernard vs. Uganda SCCA No 143 of 2001**, where it was held that the Appellate Court is not to interfere with the sentence imposed by the trial court which has exercised its discretion unless the sentence imposed is so low as to amount to a miscarriage of justice or where the sentencing judge proceeded on a wrong principle.

Counsel submitted that **Section 11 of the Judicature Act** grants the court of Appeal the same powers of sentencing as the trial Court if it considers invoking such powers is justifiable in the circumstances.

Furthermore, counsel submitted that **Paragraph 6(1) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) (Directions), 2013**, every sentencing Court must take into account any circumstances which the court considers relevant.

Counsel submitted that there were many mitigating factors in favour of the appellant, but the trial judge did not put them into consideration. Counsel averred that the Appellant was a first offender and had spent two and a half years in prison

on remand. He argued further that the trial judge did not take into consideration the allocutus of the Appellant who had spent two and a half years on remand before the matter was heard.

Counsel cited **Tamale Richard vs. Uganda CACA No 19 of 2012**, where this court interfered with the discretion of the trial court and reduced the sentence of 25 years imprisonment imposed on the Appellant to 18 years imprisonment because the trial court had not taken into account the mitigating factors of the Appellant.

Counsel further stated that the failure of the trial Court to take into consideration the period the Appellant had spent on remand amounted to an illegality and as such the sentence of 23 years' imprisonment was illegal, excessive and manifestly excessive in the circumstances. Counsel cited **Rwabugande Moses vs. Uganda Supreme Court Criminal Appeal No. 25 of 2014,** where the court held that in imposing an imprisonment sentence against the convict, the period spent on remand must be taken into account and it must be done in an arithmetic was.

Counsel prayed that the appeal be allowed and the sentence be set aside and substituted with a sentence in accordance with the law putting into consideration the mitigation factors of the Appellant.

Submissions by counsel for the Respondent.

Counsel for the Respondent opposed the appeal in part and conceded to the illegality of sentence concerned. Counsel cited **Kiwalabye vs. Uganda SCCA No. 143 of 2001**, cited by counsel for the Appellant and **Kamya Johnson Wavamunno CA No 16 of 2000.**

Counsel cited **Kyalimpa Edward vs. Uganda SCCA No 10 of 1995,** where court set out the principles to be followed when court is to interfere with a sentence imposed by the trial court. This court stated that:

> "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 to amount to an injustice"

Counsel cited **Nashimollo Paul vs. Uganda SCCA No.046 of 2017**, where this court held that in arriving at a sentence, the trial court must calculate the period the Appellant has sent on remand and subtract it from the proposed sentence, the Respondent concedes that this was not done by the learned trial judge.

Additionally, counsel submitted that this honourable court should exercise its powers vested under **Section 11 of the Judicature Act** and also in line with **Article 23(8) of the 1995 Constitution** of the Republic of Uganda to impose a legal sentence. Counsel relied on **Bulila Christiano and Anor vs. Uganda SCCA No. 61 of 2015**, where the Appellant had been convicted of murder and sentenced to 50 years imprisonment, this court set aside the sentence as illegal and substituted it with that of 25 years imprisonment but also erred and did not take into account the time spent on remand . The Supreme Court declared the 29 years sentence illegal, set aside and substituted it with one of 25 years and 1 month.

Counsel further cited **Nashimolo Paul** *(Supra)* where the Appellant had been convicted of murder by the High Court and sentenced to the mandatory death sentence which was later substituted with a life imprisonment sentence. He appealed to this court which set aside the life imprisonment sentence and substituted it with a 30 years imprisonment sentence. The Supreme Court set aside the sentence of the court of appeal on grounds that it was illegal having failed to adhere to the Rwabugande principle of sentencing and substituted it with 30 years and 6 months' imprisonment. Counsel invited this court to invoked section 11 of the Judicature Act(Supra)

Counsel submitted that there were aggravating factors in this case. Counsel submitted that the victim had known the Appellant as a neighbour for long and the Appellant heartlessly grabbed the 6 years old victim in this case and mercifully defiled her while threatening to cut her which was violent. The Appellant was HIV positive and aged 47 years well fit to be the victim's guardian. The victim suffered a serious infection and started discharging smelly pus from her genitals.

Counsel further submitted that offence of defilement was rampant defilement in the area. Further, the Appellant had been indicted for aggravated defilement C/S 129(3) and (4) of the Penal Code Act. The maximum penalty is death and under the **Constitution (Sentencing guidelines for courts of Judicature) (practice) Directions 2013,** the 3rd schedule, part one provides the starting point for Aggravated Defilement to be 35 years and the sentencing range is 30 years to death.

Counsel cited **Ojangole Peter** *(Supra)* where the Appellant sought the Supreme Court to reduce his sentence from 34 years advancing reasons that he had seven children to look after, that he was young among other factors. The Supreme Court noted, *"At this level, we would not be in position to re-consider the mitigating factors raised and also the aggravating factors raised by the prosecutor before awarding the sentence" the supreme court did confirm the 32 years' imprisonment sentence."*

Counsel submitted that the judge took into consideration the mitigating and aggravating factors. Counsel argued that based on the quoted authorities and the aggravating factors, the court should deduct the two and a half years spent on remand period and pass sentence of 20 years imprisonment.

Counsel further submitted that in accordance with Section 86(4) of the Trial on Indictment Act the learned Judge comprehensively took into consideration all the

factors before giving a sentence of 23 years imprisonment. Counsel cited **Sekitoleko Judah and Other Vs. Uganda SCCA No .33 of 2014 the SCCA**, court 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 the court is satisfied that the sentence imposed by the trial judge was manifestly so exercise as to amount to an injustice."

He submitted that the above position was taken into consideration by the Supreme Court in **Ojangole vs. Uganda SCCA NO 34 OF 2017.**

Regarding the issue of the Appellant having been a first offender and a father with children, he advanced to earn a more lenient sentence, counsel referred to the supreme court decision in **Ojangole** *(Supra)* the Supreme Court held'

> "The appellant here raising issues that do not relate to sentence imposed by the lower court, the fact that he has seven children to look after and that he has other family obligation could have been raised at the level of the trial court... at this level, we would not be in position to re-consider the mitigating factors raised and also the aggravating factors raised by the prosecutor before awarding the sentence"

The supreme court confirmed the 32 years imprisonment.

Counsel cited **Bukenya Joseph vs. Uganda SCCA No 17/2010,** where the Supreme Court confirmed a sentence of 20 years the Appellant had been indicted for aggravated defilement contrary to Section 129 (3) and (4) (a) of the Penal Code Act. The maximum penalty for aggravated defilement is under the Constitution (Sentencing guidelines for court of judicature) Practice Direction 2013, the 3rd schedule provides the starting point aggravated defilement to be 35 years and the

sentencing ranges is 30 years to death. counsel submitted that 23 years are not manifestly harsh.

Consideration of Court

This appeal is in respect of sentence only.

Counsel properly stated the principles upon which an appellate court may interfere with a sentence passed by the trial sentencing Court. This was considered in **Kyalimpa Edward versus Uganda, Criminal Appeal No. 10 of 1995,** where the Supreme Court referred to **R vs Haviland (1983) 5 Cr. App. R(s) 109** and held as follows:

> "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".

The above principles were also later applied in **Kiwalabye vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001.**

The offence of aggravated defilement for which the Appellant was convicted carries the maximum sentence of death.

We have carefully subjected the evidence adduced at the trial to fresh scrutiny. As to the aggravating factors, we note that the appellant who was a long time neighbour heartlessly grabbed the victim who was only 6 years old and yet the Appellant was 47 fit to be a father to the victim. Court also noted that the appellant/ convict did not show any remorse. It is also noted that the appellant was HIV

positive. The victim suffered a serious infection and started discharging smelly pus from her genitals.

As to the mitigating factors, this Court notes that the appellant was a first offender, and a bread winner of his children. The trial court on passing the sentence had this to say:

> "Court:
> The victim was 6 years. Accused was 42 years and HIV positive. This is very grave. However, accused is a first offender and is praying for leniency. In this case there is need for deterrence and also accused needs reform. The accused is to serve a custodial period of 23 years running from first date of admission on remand."

From the above portion, we noted that the trial Judge considered both the aggravating and mitigation factors while sentencing. The trial Judge, however did not consider the fact that the Appellant had been on remand for two years and six months, which is contrary to the provisions of the law under Article 23 (8) of the Constitution which provides that:

> "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."

Principle 15. of the Sentencing guideline (*Supra*) are instructive as well. The principle provides that:

> "Remand period to be taken into account.
> (1) The court shall take into account any period spent on remand in determining an appropriate sentence.
> (2) The court shall deduct the period spent on remand from the

> sentence considered appropriate after all factors have been taken into account."

Any sentence passed without taking into consideration the time spent on remand is illegal. We have accordingly come to the conclusion that the sentence of 23 years' imprisonment was illegal and cannot be sanctioned by this court. We set the same aside. See **Rwabugande Moses vs. Uganda** *(Supra)*

We also note that the sentencing regime has evolved . The Supreme Court on 3rd March 2017 **in Rwabugande Moses vs. Uganda** *(Supra)* set a precedent that the sentencing court ought to arithmetically take into account the period spent on remand. Court held there in that:

> "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 the period spirit in law in lawful custody prior to the trial must be specifically credited to an accused"

The position was short lived. The Supreme Court in **Abelle Asuman vs. Uganda Criminal Appeal No. 66 of 2016**, which was delivered on the 19th April 2018 nearly a year after **Rwabugande Moses vs. Uganda** *(Supra)* had been in force, held that the arithmetical deduction is not necessary because the sentencing judge has choice to either arithmetically deduct the sentence or not as a matter of style.

The position in **Abelle delivered in 2018 (supra)**, was also short lived as the position in Rwabugande was up held in **Segawa Joseph vs. Ug. Criminal Appeal No. 65 of 2016**, the Supreme Court on the 6th October 2021 held that:

> "This court is bound to follow its earlier decisions for the purpose of maintaining the principle of stare decisis. This court has the duty to decide which decision is to be followed. Our appreciation of Article 23(8) of the constitution is that the consideration by court of the period spent on remand by a convict is mandatory. A sentencing judge is under a duty to consider the exact period spent on remand in upholding the provisions of the Supreme law of the land. for avoidance of imposing ambiguous sentences, we hold that the period spent on remand must be arithmetically deduced. This renders justice to a convict. We therefore find that the **Rwabugande case** is the correct position of the law in matters where the Appellant challenged the legality of sentence in relation to whether or not court rightly considered the provisions of Article 23(8) of the constitution."

As noted above, the record shows that the trial judge did not take into consideration remand period of 2 years and 6 months as required under Article 23 (8) of the constitution.

It has to be noted that the sentence in question was delivered on the 26 of September 2019, by then the legal regime in force was the law in **Abelle** *(Supra)* where the sentencing court was at liberty to either arithmetically deduct the years or just take into consideration the period spent on remand. Hence in as far as arithmetic deductions of period spent on remand is concerned ,the trial court could not be faulted.

That said, pursuant to **Section 11 of the Judicature Act,** we proceed to exercise the powers of the trial Court by re-sentencing the Appellant by imposing a sentence in accordance with the Rwabugande guidance.

In arriving at the most appropriate sentence we have considered the mitigating and aggravating factors. It was submitted in mitigation for the Appellant that he was

the first time offender, he had spent 2 years and 6 months on record and he has children to take care of.

On the other hand, it was submitted against the Appellant that the victim was only six years and the Appellant was 47 years who ought to be the guardian of the victim. The offence is of a grave nature that attracts a maximum sentence of death. Counsel submitted that the Appellant was HIV positive and he was not remorseful. It was also averred that the offence is rampant in the region.

In consideration of the above factors and bearing in mind that the offence of aggravated defilement attracts a maximum sentence of death penalty, we came to the conclusion that a sentence of 23 years' imprisonment is appropriate in the instant case. According to Article 23(8) of the Constitution we deduct the two years and 6 months spent on remand. Hence the Appellant is sentenced to 20 years and 6 months' imprisonment from 26 September, 2019 the date of his conviction.

We so hold.

Dated at Kampala this 9th **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