THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT ARUA

[Coram: Musoke, Gashirabake & Luswata, JJA]

CRIMINAL APPEAL NO. 0471 OF 2020

(Arising from Criminal Case No. 045 of 2019)

TWAHERWA ALEX.....APPELLANT

VERSUS

UGANDA ....RESPONDENT

[Arising from the decision of Dr. Winifred N. Nabisinde, J of the High Court of Uganda sitting at Mpigi in Criminal Case No. 045 of 2019 dated 17th February 2020]

JUDGMENT OF COURT.

Introduction.

The brief facts of this case as admitted by the trial court were that the victim was aged 15 years at the time of the defilement. She was mentally retarded, and lived in the same village as the Appellant. On 07th April 2018, the Appellant found the victim at home slashing the compound and asked her to go with him. He then took her to a banana plantation and proceeded to forcefully have sexual intercourse with her. Thereafter the victim went back home and revealed to her grandmother what the Appellant had done to her. The victim was medically examined and her hymen found to have been freshly ruptured with tears and lacerations around her private parts. The Appellant was also examined and found to be between 24-26 years old and of a normal mental status. He was subsequently indicted for aggravated defilement contrary to section 129 (3), and 4(d) of the Penal Code Act. At the trial he pleaded guilty and was sentenced to 15 years and 3 months' imprisonment.

Dissatisfied with the above decision, the Appellant is appealing on one ground that:

"The learned trial judge erred in law and fact when he passed a harsh and excessive sentence against the Appellant, thereby occasioning a miscarriage of justice"

Representation

The Appellant was represented by Mr. Henry Kunya and Ms. Lydia Namuli. The Respondent was represented by Ms. Nabisenke Vicky.

Both counsel filed written submissions which court adopted at the hearing.

Submissions for counsel of the Appellant.

Counsel for the Appellant sought leave under Section 132 (1)(b) of the Trial on Indictments Act, to appeal against the sentence only.

Counsel submitted that it is now settled law that the Appellate Court is not to interfere with sentence imposed by the trial court which has exercised its discretion on sentence 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 cited **Kiwalabye vs. Uganda SCCA Appeal No. 143 of 2001 cited in Kimera Zaverio vs. Uganda (Court of Appeal Criminal Appeal No. 427 of 2014)**

It is counsel's submission that the learned trial judge did not take into consideration mitigating factors put to her, to wit that the Appellant is a first time offender with no previous criminal record, pleaded guilty on second thought and thus saved courts time and was only 26 years at the material time of committing of the said offence.

Consequentially, counsel submitted that the sentence meted down to the Appellant was harsh and excessive.

Counsel cited **Kabatera vs Uganda CACA No. 123 of 2001,** where the Appellant was convicted of defilement and sentenced to 10 years of imprisonment. On Appeal, this Honourable Court set aside the sentence of 10 years and substituted it with 5 years imprisonment, reasoning that the age of an accused person is always a material factor that ought to be taken into consideration before a sentence is imposed.

Counsel prayed that the sentence of 15 years be set aside.

Submissions by counsel for the Respondent.

Counsel for the Respondent submitted that they did not object to the Appellant's option to appeal against the sentence only. Counsel however opposed the appeal against the sentence of 15 years and 3 months as well as it being reduced.

Counsel cited **Rwabugande Moses vs. Uganda. SCCA No. 25 of 2014**, where the Supreme Court cited **Kyalimpa Edward vs. Uganda Criminal Appeal No. 10 of 1995,** where it was held that:

> "An appropriate sentence is a matter for the discretion of the sentencing judge, each case presents its own facts upon which the judge exercises his discretion. It is the practice that as an appellate court, this court will not 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 trail judge was manifestly excessive as to amount to an injustice"

Counsel submitted that the court in **Rwabugande** (*Supra*) was guided by its decision in **Kamya Johnson Wavamunno vs. Uganda Criminal Appeal No. 16 of 2000,** where it was held that:

> 'is well settled that the Court of appeal will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a material consideration, or an error in principle was made.

it is not sufficient that the members of the Court would have exercised their discretion differently."

Counsel further submitted that the trial judge considered all the aggravating factors advanced by the prosecution and the mitigating factors advanced by the Appellant himself.

Counsel submitted that the trial judge looked at the provisions of the Constitution of the Republic of Uganda 1995, the Penal Code Act and the Constitution (Sentencing Guidelines for Court of Judicature) Practice Directions, Legal Notice No. 8 of 2013 and conclude that a sentence of 17 years was befitting the nature of crime committed against the victim. The trial court then deducted the 1 year and 10 months and 5 days that the Appellant had been on pre-trial remand and finally sentenced him to 15 years and 03 months imprisonment.

Counsel therefore submitted that it was misleading for counsel for the Appellant to submit that the learned trial judge did not take into account the mitigating factors.

Furthermore, counsel submitted that the submission that the sentence was harsh and excessive is baseless given the circumstances under which the offence was committed. These circumstances included the fact that the victim was aged only 15 years old, she was mentally challenged and thus vulnerable and in need of protection and the sexual abuse left her with a ruptured hymen and bruises and lacerations in her private parts. On the contrary, the Appellant aged 26 years, and a village mate to the victim, ought to have known better than to abuse her vulnerability.

Counsel submitted that under paragraph 3 of the Constitutional Sentencing guidelines, whereas the objectives of the sentencing guidelines include providing a mechanism that promotes uniformity, consistency and transparency in

sentencing, another key objective is to provide a mechanism for considering the interest of victims of crime and the community when sentencing. Furthermore, the purpose of the sentencing guidelines is to promote rule of law in order to maintain a just, peaceful and safe society and promote initiatives to prevent crime. a critical review of paragraph 5(b) and (c) shows that among the aims of sentencing is to deter a person from committing an offence and to separate the offenders from society where necessary.

Additionally, counsel submitted that it follows therefore that court has a duty to protect the society and children from such persons as the Appellant by withdrawing them from the community for such durations as the court deems necessary. the trial judge thus embraced her duty to protect persons with disabilities, young girls and the community from actions of the Appellant.

Counsel cited **Baruku Asuman vs. Uganda Court of Appeal Criminal Appeal No. 0387 of 2014**, where this court discussed a number of authorities where it approved sentences ranging between 11 to 25 years for the offence of aggravated defilement.

And in **Biryomumisho Alex vs. Ug. CACA No 464 of 2016**, held that:

> "we must note that interfering with the sentence is not a matter of emotions but rather one law. unless it can be proved that the trail judge flouted any of the principles of sentencing, then it does not matter whether the members of this Court would have given a different sentence if they had been the one trying the Appellant"

Counsel submitted that this court finds that the sentence of 15 years and 3 months imprisonment was neither harsh nor excessive, and will accordingly dismiss the appeal for lack of merit.

Consideration of Court.

In resolving the issue raised in this appeal, this court is mindful of its duty as a first appellate court to re-evaluate the evidence presented before the trial court to reach its own conclusion. See **Pandya vs. R, (1957) EA 336 and Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997.**

The Appellants' complaint in this court is that the sentence meted out to him was harsh and excessive. That the learned trial judge did not take into consideration mitigating factors as put to her, that the appellant was a first time offender with no previous criminal record and that he later on pleaded guilty . He was only 26 years of age at the time of commission of the offence.

In sentencing the Appellant, the trial Judge stated:

> "Having taken all the above into consideration. I have taken cognizance of the
> circumstances under which this offence was committed; I have noted that the victim in this case was aged only between 15 years old at the time' but what aggravates this offence more is that she was mentally challenged The convict is an adult man, aged over 23 years old at the time the offence was committed and is of sound mental status The victim in this case was very vulnerable and could not take care for herself or make any informed decisions regarding her life because of her mental disability. She was also still a child who needed protection and care from everybody in society. The offence committed against her put her life at great risk of contracting HIV /AIDS' other STDs and unwanted early pregnancy. I have also cautioned myself of the evil of engaging underage girls in sexual activities and the court condemns the acts of the convict because of the impact it would have on the health of this young girl for the rest of her life, her family and the community generally.
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> It is also apparent that the convict is still a young man' however at his age; he

ought to know that the victim who lived in the same area as him was mentally challenged. The offence is also very rampant in this area and it is the duty of this court to protect persons with all kinds of disabilities such young girls from the likes of the convict. For that reason, the sentence should also serve to deter other people who may be tempted to do the same. It is apparent that in this case, the convict targeted the victim because of her mental disability.

Both the State Attorney and defence counsel agreed that there are no previous known records against the convict; this court will therefore treat him as a first offender. I have noted that in such a case, the maximum sentence would have been the death penalty. However I find that this sentence will not serve the ends of justice in this case and is too harsh in this particular case given that it is a plea of guilty. That being the case, I have also taken into account the age difference between the convict and the victim which is about 07 years. I have also checked the file to ascertain the time spent on pretrial remand ; it comes to 1 year and 10 months and 5 days.

While I believe that he deserves a second chance in life to mend his ways a very short sentence would only be a pat on the back and will not assist him to reflect and mend his ways. I therefore believe that he deserves a sentence that will give him enough time to reflect and mend his ways. The State prayed for a deterrent Sentence of 15 years imprisonment. while the defence suggested 13 Years imprisonment.

While the sentencing range in terms of years would be at least 35 years' imprisonment, taking into account all the circumstances of the case and the provisions of the law, I find that a sentence of 17 (seventeen) years imprisonment would have been justified. I have ,however ,deducted the period spent on pretrial remand. The final sentence he will serves is therefore 15 years and 03 months (fifteen years and three months) which I have found as appropriate taking into account the circumstances of this case."

From the above record, it is not true that the trial court did not take into consideration the mitigating factors as presented before court. The trial judge took cognisance of the fact that the Appellant was a first time offender and young in age that had an opportunity to reform. The trial Court having weighed the aggravating factors and concluded that the Appellant needed a deterring sentence.

According to **Section 129 (3) of the Penal Code Act Cap 120**, the maximum penalty for the offence of Aggravated Defilement is death. However, this maximum sentence is reserved for the most severe circumstances of perpetration of such an offence. In assessing this severity of the sentence the trial judge observed that the maximum sentence would not serve the ends of justice.

It is now an established position of the law that a sentencing court is bound by the principle of consistency. This principle is to the effect that the sentences passed by the trial Court must as much as circumstances may permit, be similar to those passed in previously decided cases having similar facts. See: **Aharikundira Yustina vs. Uganda, Supreme Court Criminal Appeal No. 27 of 2015.**

Guideline No. 6(c) of the (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 provides that:

> "Every court shall when sentencing an offender take into account the need for consistency sentencing an offender take into the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances"

In **Apiku Ensi vs. Uganda C.A Criminal Appeal No.751 of 2015,** this court was guided by the previous authorities and found that the sentence of 25 years imprisonment was out of range of the sentences in similar offences. In ***Ninsiima vs. Uganda, CACA No. 1080 of 2010,*** this Court found that the range of sentences

for similar offences of aggravated defilement is 15-18 years. In that case, this Court reduced a sentence of 30 years to 20 years imprisonment for the offence of aggravated defilement.

Considering both the mitigating and aggravating factors, and the authorities cited above a sentence of 15 years and 3 months after deducting the period spent on pre-trial remand is not harsh and excessive in the circumstances of this case. We therefore uphold the lower court sentence of 15 years and 3 months.

We so hold.

Dated at Kampala this 28th **Of** September **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