THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HELD AT MASAKA

(Coram: Barishaki Cheborion, Stephen Musota & Muzamiru M. Kibeedi, JJA)

CRIMINAL APPEAL NO. 483 OF 2014

KALEGA JOHN SSALONGO :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

[Appeal from the decision of the High Court of Uganda at Masaka (Hon. Lady Justice Margaret C. Oguli-Oumo) in Criminal Session Case No. 105 of 2005 delivered on May 20, 2014]

JUDGMENT OF THE COURT

BACKGROUND

Kalega John Ssalongo (appellant) was indicted, tried, and convicted of the offence of Aggravated Defilement contrary to Section 129(3) (4) (b) of the Penal Code Act and sentenced to 17 years' imprisonment.

The facts as established by the High Court are that on 18th of March 2011, the victim together with her two younger siblings went to sleep at around 7:00pm as their mother had taken one of the victim's younger sick sibling to hospital. The victim shared the same bed and blanked with her sister. Late in the night, the victim felt someone pulling her blanket and she thought it was her sister pulling it. Instead, her mouth was covered, her legs opened, and a sexual act performed on her. In the process of fighting the intruder, the victim got to know him as the appellant through his voice after he threatened to kill her if she shouted. Before the incident, the appellant was known to the victim who lived in their neighborhood.

The appellant ran out of the house as soon as the victim's younger sister woke up and started raising an alarm.

The following morning the victim reported to her mother what the accused had done to her. The appellant was arrested from among other men and the matter forwarded to Kalangala police station. The appellant was medically examined on Police Form 24 and found to be 33 years old, of

sound mental status and had Human Immunodeficiency Virus (HIV positive). The victim was likewise medically examined on Police Form 3 and found to be 14 years old at the material time.

As already stated, the appellant was then indicted, tried, and convicted of the offence of Aggravated Defilement contrary to Section 129(3) (4) (b) of the Penal Code Act and sentenced to 17 years' imprisonment. He was dissatisfied with the decision of the trial Court and appealed to this court against both the conviction and sentence.

GROUNDS OF APPEAL:

The appellant's appeal is based on the following grounds:

1. ***The learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on court record and decided that the prosecution had proved its case beyond reasonable doubt which decision occasioned a miscarriage of injustice.***
2. ***The learned trial Judge erred in law and fact when she failed to consider the Appellant's mitigating factors and sentencing principles and sentenced the Appellant to 17 years' imprisonment which sentence was illegal and harsh which occasioned a miscarriage of justice.***

REPRESENTATIONS:

At the hearing of the appeal, the appellant was represented by Mr. Alexander Lule while the respondent was represented by Ms. Vicky Nabisenke, Assistant Director of Public Prosecutions. The appellant followed the court proceedings via Video link to prison.

The parties proceeded by way of written submissions as directed by Court. However, Counsel for the parties briefly addressed court when the appeal was called for hearing. This judgment has therefore been prepared largely on the basis of the Written Submissions. However, the oral submissions have also been considered.

APPELLANT'S SUBMISSIONS:

Ground 1:

The Appellant faults the trial Judge for not properly evaluating the evidence on court record as regards the participation of the appellant in the commission of the offence, which resulted in the appellant being erroneously convicted. Counsel argued that the conditions for identification were not good for the victim to clearly identify the Appellant: That it was dark at 1:00am and there was no light at all when the incident happened. That the victim only recognized the voice which was deep and hoarse. Counsel argued that such evidence was not sufficient to identify the appellant without corroboration as the victim had known the appellant for only 8 months and the assailant made only three statements threatening to kill the victim during the encounter.

Counsel further submitted that the evidence of the victim in the sexual assault was untruthful, unreliable, and not cogent and that court erred to solely rely on it to convict the Appellant. Counsel referred to the defence exhibit "DEW1" (Police Statement of the Victim's Mother) which indicated that the victim did not know the person who had defiled her at the time she reported to her mother shortly after the occurrence of the incident.

Counsel prayed that the conviction be set aside.

Ground 2:

Counsel argued ground two in the alternative to ground one.

Counsel submitted that in case this Court upholds the conviction of the appellant by the trial court, then the sentence given by the trial Court be reconsidered for being harsh and illegal. Counsel argued that the trial Court disregarded material facts and sentencing principles which resulted in a harsh and illegal sentence being meted onto the appellant.

Counsel further submitted that whereas the trial Court stated the period spent on remand by the Appellant was 3 years and one month, it did not indicate anywhere in its record whether the period was considered while sentencing as required by Article 23(8) of the Constitution of the Republic of Uganda. Counsel argued that the failure by the trial Judge to arithmetically consider the period spent on remand by the appellant rendered the sentence illegal.

Counsel also argued that the sentence breached the principle of uniformity of sentences. Counsel referred to the case of Taremwa Wilson Vs Uganda, CACA No.125 of 2013, where this Court reduced the sentence of 25 years imprisonment to 10 years imprisonment.

Counsel concluded by praying that the appeal be allowed and the conviction and sentence of the trial court set aside.

RESPONDENT'S SUBMISSIONS IN REPLY:

Ground 1: Evaluation of Evidence

Counsel for the respondent stated that the main point of contention by the Appellant was his identification by the victim. That it was the appellant's contention that the victim could not have properly identified him as her attacker given the difficult conditions at the time of attack, that is to say, it was at night and the victim allegedly only identified her assailant by voice.

In reply, Counsel for the respondent submitted that the trial Judge was alive to the fact that there are factors that must be considered before deciding whether there was positive identification of the intruder, and that is why in her judgment, she went into detail while evaluating the evidence so as to establish whether there was correct or mistaken identification of the Appellant. The learned trial Judge found that the Appellant had been put at the scene of crime and went ahead to convict him as indicted.

Counsel submitted that the appellant's contention that conviction based on the uncorroborated testimony of a single identifying witness was erroneous. Counsel relied on the case of *Ntambala Fred Vs Uganda, Supreme Court Criminal Appeal No. 34 of 2015* where the Supreme Court held that a conviction can be solely based on the testimony of the victim as a single witness, provided the court finds her truthful and reliable. It was Counsel's argument that the victim knew the Appellant prior to the incident and was able to recognize his voice because of that prior knowledge.

Further, Counsel submitted that the conditions in this case favored correct voice identification by the victim of the Appellant as her assailant and that the learned trial Judge rightly found that the victim's testimony was sufficient to sustain the conviction of the Appellant.

Counsel therefore prayed that this court, upon re-evaluation of the evidence, finds that the Appellant was rightly convicted.

Ground 2: Harsh and Illegal sentence.

Counsel disagreed with the appellant's contention that the trial court disregarded material facts and sentencing principles and that the sentence is harsh and illegal.

Counsel submitted that the Record of Appeal shows that the trial Judge gave the sentence and its reasons by acknowledging the fact that the convict was a first offender with no criminal record, 36 years old, had been on remand for over 3 years, and was a widower catering for 10 children and 5 orphans. That she also considered the aggravating factors and found that there was a need for a deterrent sentence to end impunity and reckless behavior. That in the circumstances, the sentence of 17 years' imprisonment was not harsh as claimed.

As regards the contention by the Appellant's Counsel that the trial Judge did not indicate in the record whether the period spent on remand by the Appellant was considered or reduced from the overall sentence as required by the law, Counsel submitted that this was an issue of style and not a failure to consider the remand period. Counsel argued that in her judgment, the learned trial Judge first restated the mitigating factors raised by the Appellant and his Counsel which included the fact that the convict had been on remand for more than 3 years, then restated the aggravating factors raised by the prosecution and then went on to say: "consequently, the Appellant is sentenced to 17 years' imprisonment".

It was Counsel's submission that the use of the term "consequently" connotes consideration of all the raised factors by the learned trial Judge. Counsel accordingly argued that the trial Judge considered the period the Appellant spent on remand and that her style of delivering such sentence does not negate or render the sentence erroneous or illegal. For this submission, Counsel referred to the case of *Abelle Asuman V Uganda, Criminal Appeal No. 66 of 2016* where **the Supreme Court held that where a sentencing court has clearly demonstrated that it has taken** into account the period spent on remand to the credit of the convict, the sentence would not be

interfered with by the appellate court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand.

Counsel also submitted that the sentence complied with the requirement for uniformity and consistency in sentencing as set out in paragraph 3 of the Constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions, Legal Notice No. 8 of 2013. Counsel referred to the case of *Baruku Asuman Vs Uganda, Court of Appeal Criminal Appeal No. 0387 of 2014 [2020]*, where this Court reviewed several cases where an HIV+ Appellant had been convicted of Aggravated Defilement in circumstances where he had exposed the victim to HIV infection and found that the sentence of 20 years was the most suitable punishment for the appellant. Counsel concluded that the sentence of 17 years' imprisonment (after deducting the 3 years spend on remand) was consistent with, and within the ranges of sentences that have been confirmed by this Honourable Court in previous cases with similar circumstances.

Counsel accordingly prayed that the conviction and sentence be upheld, and the appeal be dismissed for lack of merit.

RESOLUTION OF THE APPEAL

We have carefully read the Record of Appeal. We have also considered the submissions of Counsel for both sides and the law and authorities cited therein. We have also considered other applicable laws and authorities not cited. As the 1st appellate court, it is our duty to reappraise 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 we neither saw nor heard the witnesses testify. See Rule 30(1)(a) of the Judicature (Court of Appeal) Rules; *Baguma Fred Vs Uganda, Supreme Court Criminal Appeal No. 7 of 2004; Kifumante Henry Vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997*; and *Pandya Vs R [1957] EA 336*.

We shall bear in mind the above principles when resolving the grounds of appeal in the order they were argued by the parties.

Ground 1 – Failure of the trial Court to evaluate the evidence

Ground one of the Appeal was couched as follows:

The learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on court record and decided that the prosecution had proved its case beyond reasonable doubt which decision occasioned a miscarriage of injustice.

The ingredients that the prosecution had to prove, to the prescribed standard, in order to secure a conviction for Aggravated Defilement in the instant matter were properly set out by the trial court as being: -

1) That the victim was below 18 years of age.
2) That a sexual act was performed on the victim.
3) That the appellant was at the time infected with the Human Immunodeficiency Virus (HIV+).
4) That it is the appellant who performed the sexual act on the victim.

However, from the submissions of the appellant, his complaint in ground one focuses on only one ingredient, namely: the evaluation of the evidence of participation of the appellant in the commission of the offence of Aggravated Defilement. It is the appellant's case that the evidence of the victim was not sufficient to identify the appellant without corroboration as the conditions for identification were not good for the victim to clearly identify the Appellant. Further, that the victim's evidence was untruthful, unreliable, and not cogent.

The respondent disagreed and submitted that the requirement for corroboration of the single identifying witness lacked legal basis. Further, that the trial Judge was alive to, and satisfied that the conditions were favourable for correct identification before she concluded that that the appellant was properly identified as the assailant.

The Supreme Court and this court have in a number of cases consistently held that a conviction can be solely based on the testimony of a single identifying witness, provided the court finds him/her to be truthful and reliable. That *"what matters is the quality and not quantity of evidence."* *(See: Sewanyana Livingstone vs. Uganda, Supreme Court Criminal Appeal No. 19 of 2006*; Basoga Patrick Vs Uganda, Court of Appeal Criminal Appeal No.42 of 2002; and *Section 133 of the Evidence Act*)

Further, that the same test applies in sexual assault prosecutions as it is in other offences. Hon. Lady Justice Tibatemwa- Ekirikubinza, JSC, stated it succinctly in the case of *Ntambala Fred Vs Uganda, Supreme Court Criminal Appeal No. 34 of 2015* thus:

> *"The evidence of a victim in a sexual offence must be treated and evaluated in the same manner as the evidence of a victim of any other offence. As it is in other cases, the test to be applied to such evidence is that it must be cogent."*

We have closely examined the Record of proceedings before the trial court. Central to the conviction of the appellant was the evidence of the victim who identified the appellant by way of his deep and hoarse voice which she was able to recognise during the incident when the appellant threatened to kill her. The Court of Appeal of Kenya sitting at Meru in the case of *Boniface Gitonga Vs Republic [2015] eKLR* stated the law on voice identification as follows:

> *"Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognised it and that there were conditions in existence favouring safe identification."*

In her evidence, the victim who testified as PW1 stated that in the night of 19.03.2011 she was at home with her 7-year-old sister (Tracy) and 4-year-old brother (Daudi). No adult was with them in the home as her "mother" (otherwise referred to by the English people as "Maternal Aunt") had taken their sibling to hospital and did not return. PW1 slept in the same bed with her sister Tracy and they shared the blanket. While sleeping, PW1 heard footsteps of someone with gum boots enter. The person removed the blanket and PW1 thought it was Tracy. She told her to stop playing. The person slapped her on the neck, pulled her knickers, tore it, slept on her, and started defiling her. PW1 felt pain and started fighting back. She shouted as she was pushing the intruder. The intruder said, *"don't shout as I will kill you"*. He got out a knife, placed it on her neck and asked her *"what is this?"* PW1 replied that it was a knife. He then told her not to shout or else he would kill her.

In the process of PW1 being threatened, her sister woke up. She wanted to shout but was likewise threatened by the appellant not to shout at him. The sister hid in the bed. Both PW1 and the sister made an alarm. The intruder ran away. The encounter lasted about 40 Minutes.

PW1 stated that much as the incident occurred in the night at around 1.00AM when it was dark, she could recognise the appellant's voice and the way he used to talk because they used to meet him regularly on their way to school and he used to talk to them. Further, he would sometimes come to their home to meet their mother. She had known him for about 8 months and could recognise his voice. It was deep and hoarse.

When the intruder ran away, PW1 and her siblings ran to Maama Nickel's home for sanctuary. It was about 100 Metres away from their home. They told her the story and spent the rest of the night there. On the following morning, they sent for their mother, and she returned home. They narrated the story to the mother. The mother examined PW1's private parts and sent for her husband, who was in the forest at Kitobo, to return home.

Upon return home from the forest, PW1's uncle together with other residents mounted a search for the appellant. They arrested him while he was burning charcoal. PW1 was present during the arrest and identified him. Thereafter the appellant was taken to Kasenyi to the Secretary for Women Affairs. PW1 also went along with the residents, and she narrated the defilement story to the Secretary of Women Affairs. PW1 was thereafter taken for medical examination.

PW2 was PW1's mother. In her testimony, PW2 confirmed that PW1 knew the appellant before the incident. That even on one occasion the appellant sent PW1 to buy him soap of 500/=.

In his unsworn testimony, the appellant stated that on the fateful night, he was at Munyola's place. Then during the day that followed, at around 3PM, while the appellant was at his workplace working with his friend, about ten men, two women and two children came. The crowd was big, and some people had sticks and pangas. That they asked the girls to identify the voice. The children did not recognise the voice. The group left. But they later returned with the father of the girls, the girls, and the Secretary for Women Affairs. That at that time they said that they had realised that the appellant was the person who had defiled the girl. That the men were very tough on the appellant. The girls' father who had a grudge with the appellant told them to arrest him.

When dealing with the issue of participation of the appellant, the trial Judge first set out the factors to be considered in determining whether there was positive identification of an accused at the

scene of crime as set out in the case of *Abdallah Nabulele and Others Vs Uganda [1979] HCB 77* namely:

1. The source of light for identification
2. The period the victim knew the accused before
3. The distance between the victim and the accused
4. The period the victim also observed the accused.

Thereafter, the trial Judge evaluated the evidence before her and concluded thus:

> *"After the hearing of the prosecution case, when [the accused/appellant] was told to make his statement in defence, the accused would first cough before he spoke in a bid to clear his voice but during this period there were a few times when he let his guard down and the deep and hoarse voice could be heard.*
>
> *The voice is one of the 5 senses and in this case where the victim had known the accused for about 6 months and conversed with him. The voice is good for identification in the following circumstances;*
>
> - *The victim knew the accused before*
> - *The distance between the victim and the accused is near enough for the victim to identify the accused.*
> - *The duration the victim had to observe the accused which was about 40 minutes in which the accused told the victim 3 times to keep quiet or he would kill her.*
>
> *Such words uttered at that time are [glued in] the mind of the victim and she can't forget them.*
>
> *It is my considered opinion that once the evidence of voice put [the accused] at the scene of the crime and the prosecution had proved the ingredient beyond reasonable doubt and I find the accused guilty and convict him as charged."*

Counsel for the Appellant sought to fault the evidence of PW1 by arguing that if indeed it was true that she had positively identified the appellant, she would have reported so to her mother and this would have been reflected in the Police Statement of the Victim's Mother which was recorded shortly after the occurrence of the incident.

We have reviewed the Police Statement of the Victim's Mother, PW2, which was admitted in evidence as "DEW1". In the Statement, PW1 stated that she received a report of the incident from one of her daughters, Nakyanzi, to the effect that an ***"unknown person"*** had broken into the

house and defiled her elder sister of 14 years while they were sleeping. But that they managed to recognize the voice of the suspect. Later in the Statement, PW2 stated that when they were searching for the culprit, the victim herself told her that *"the suspect was a common man around whom she knows by face ... and recognized the voice ..."*

Our understanding of the expression "unknown person" in the context of the Police Statement as a whole is that it meant that the culprit was at the time of the incident not known to the daughters by his names but was known by his face which was familiar. Ignorance of a person's names does not necessarily mean that one does not know that person and/or cannot identify him/her by other means. We are satisfied that by the time of the incident, the victim knew the appellant by face and voice and that by not knowing the appellant's names did not render her evidence untruthful.

Considering that the appellant was familiar to the victim, the time spent by the appellant with the victim during which the victim heard threats from the appellant from very close proximity, we are satisfied that the voice recognition was positive and free of error. We find that the appellant was positively placed at the scene by the evidence of the appellant. Consequently, the trial Court rightly convicted the appellant. Ground 1 fails accordingly.

Ground 2

Ground two of the appeal was couched in the following terms:

> ***The learned trial Judge erred in law and fact when she failed to consider the Appellant's mitigating factors and sentencing principles and sentenced the Appellant to 17 years' imprisonment which sentence was illegal and harsh which occasioned a miscarriage of justice.***

For this Court, as a first appellant court, to interfere with the sentence imposed by the trial court, 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 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

From the Record of Appeal, the prosecution's submissions in respect of the sentence were as follows:

> *"State:*
>
> *We do not have a record of the convict's previous record; so he could be a first offender. He has been on remand for 3 years and one month.*
>
> *The offence he has been convicted of carries a maximum sentence of death and it's aggravated by convict's HIV positive [status] at the time he was exposing the victim to acquiring the virus.*
>
> *We pray that Court gives the convict an appropriate sentence."*

In response, the appellant's Counsel made the following submission during the *allocutus*:

> *"Accused's Counsel – Mitigating:*
>
> *The convict is a first offender, and he is 36 years old. He appears remorseful and has been on remand for 3 months and one month.*
>
> *We pray for Court's leniency in passing sentence and a sentence which gives him chance to return to the community as a reformed member of the society."*

In addition, the appellant personally stated in mitigation as below:

> *"Accused's own mitigation:*
>
> *Though I am convicted, I did not commit the offence. I had gone to the forest to work for my children. I have 10 children of my own and 6 for my brother I was looking after."*

While sentencing the appellants, the trial court stated thus:

> "SENTENCE AND REASONS:
>
> *... The convict is first offender as there is no criminal record regarding him. He is 38 years and has been on remand for over 3 years. He is a widower with 10 children and 5 orphans he was catering for. Nevertheless, the offence with which he was convicted of carries a maximum sentence of death on conviction.*
>
> *The offence with which he was convicted is now rampant in this community and is being committed with impunity making the girl child vulnerable to HIV/AIDS and making the community unsafe for the girl child and court needs to put a deterrent sentence to end such impunity and reckless behavior.*
>
> *Consequently, Court sentences the accused to 17 years imprisonment."*

From the above, it is clear that the trial court considered both the mitigating and aggravating factors before coming to the sentence of 17 years imprisonment. What is not explicit is whether the period of three years spent on remand by the appellant was taken into account. The appellant's Counsel contends that the said remand period should have been deducted arithmetically in accordance with the decision of the Supreme Court in *Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No.25 of 2014.*

Article 23(8) of the Constitution provides:

> *"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 decision in the case *Rwabugande Moses v Uganda, (op cit)* which the appellant has relied upon for his submission that that ***"taking into account"*** the pre-trial remand period prescribed by Article 23 (8) of the Constitution was to be done arithmetically, was delivered on 03.03.2017. This was after the sentencing decision in the instant case had already been made by the trial Court on 20.05.2014. In those circumstances, the High Court was not bound to follow the decision in *Rwabugande* case which was non-existent at the time.

However, the Supreme Court subsequently clarified in its judgment *in Abelle Asuman Vs Uganda, Supreme Court Criminal Appeal No.66 of 2016* (delivered on 19th April 2018) thus:

> *"The Constitution provides that the sentencing Court must take into account the period spent on remand. It does not provide that the taking into account has to be done in an arithmetical way. The constitutional command in* ***Article 23(8) of the Constitution*** *is for the Court to take into account the period spent on remand…*
>
> *This Court [in the Rwabugande case] used the words to deduct and in an arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from the Constitution.*
>
> *Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court*

would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution."

From the above, it is crystal clear that resolution of the appellant's complaint about whether or not the trial Court complied with the mandatory terms of *Article 23(8) of the Constitution* revolves around analysis of the style and words used by the trial Court in making the sentencing decision.

We have already reproduced the sentencing decision of the trial Court in this judgment. It shows that the trial Judge while sentencing the appellant first set out several factors one of which was the fact that the appellant had spent three years on remand. Then the judge stated: "***Consequently, Court sentences the accused to 17 years imprisonment."*** *[Emphasis added]*

As an ordinary English word, the adverb ***"consequently"*** simply means "*as a result, in view of the foregoing, accordingly*" *(See: https://www.merriam-webster.com/dictionary/consequently"*

Accordingly, we are satisfied that from the style used by the trial Judge, it is apparent that the period spent on remand by the appellant was taken into account together with the other mitigating and aggravating factors as set out in the Sentencing decision of the trial Court.

We have also reappraised the sentence to establish whether it complies with the principle of "parity" and "consistency" as required by Sentencing Principle No.6(c) of the Constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions, 2013 – Legal Notice No.8 of 2013 and *Aharikundira Yustina Vs Uganda, Supreme Court Criminal Appeal No. 27 of 2015*.

In *Anguyo Siliva V. Uganda, Court pf Appeal Criminal Appeal No.038 of 2014*, the appellant who was 32 years old at the time he committed the offence was convicted of the offence of aggravated defilement of a girl aged 14 years. The appellant knew that he was HIV positive when 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 for aggravated defilement of a girl aged 14 years on his own plea of guilty. He was 29 years old and knew that he was HIV positive. He 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.

In *Dratia Saviour v Uganda, Court of Appeal Criminal Appeal No.154 of 2011*, the appellant was convicted of aggravated defilement of a girl who was between 12 and 13 years old and sentenced to 20 years' imprisonment. He knew that he was HIV positive before he committed the offence against the victim who was a niece to his wife, being the daughter of her sister. The appellant appealed against the 20 years sentence because the trial judge did not take into account the period of 17 months that he had spent in lawful custody before he was sentenced. Court considered the fact that the appellant was HIV positive but he did not exercise the responsibility of protecting his child from the possibility of infection with HIV but instead defiled her. This court set aside the sentence of 20 years for being contrary to Article 23(8) of the Constitution and instead imposed a sentence of 18 years in prison.

In *Tiboruhanga Emmanuel 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 in that he had, by committing a sexual act on the victim while HIV positive, exposed her to the risk of contracting HIV/AIDS. The Court imposed a sentence of 25years imprisonment.

In *Baruku Asuman Vs Uganda, Criminal Appeal No. 387 of 2014* of the Court of Appeal of Uganda sitting at Mbarara (decided on 13.10.2020), where the appellant was HIV+ and the victim was a girl aged 13 years, the sentence of the trial court of 30 years' imprisonment was reduced to 20 years' imprisonment. The fact that the appellant was HIV positive and had by his conduct exposed the victim to HIV justified the sentence of 20 years imprisonment.

In Bacwa *Benon Vs Uganda, Court of Appeal Criminal Appeal No. 869 of 2014* (delivered on 03.02.2021) this Court upheld the sentence of life imprisonment of the appellant for defiling a 10-

year-old girl and infecting her with HIV. The appellant was 38 years old at the time of commission of the offence and cohabiting with the victim's mother.

In the instant case, there was no evidence adduced before court to prove that the victim had contracted HIV after being defiled by the appellant. Accordingly, we find the sentence of the trial court of 17 years' imprisonment was within the range of sentences in previous similar cases decided by this court. Ground two accordingly fails.

DECISION:

The appeal is dismissed.

The conviction and sentence of the High Court are upheld.

Delivered at ~~.....~~ Kampala this 26th day of Oct 2022

BARISHAKI CHEBORION
JUSTICE OF APPEAL

STEPHEN MUSOTA
JUSTICE OF APPEAL

MUZAMIRU MUTANGULA KIBEEDI
JUSTICE OF APPEAL