THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

Coram: Buteera DCJ, Mulyagonja & Luswata, JJA

CRIMINAL APPEAL NO. 097 OF 2015

BAGUMA VICENT :: APPELLANT

AND

UGANDA :: RESPONDENT

(Appeal from the decision of Masalu Musene J., delivered on 7th April, 2011 in Nakawa High Court Criminal Session Case No. 162 of 2015)

Introduction

This is an appeal from the decision of the High Court at Nakawa, sitting at Kiboga in which the appellant was convicted of the offence of aggravated defilement contrary to section 129 (3) and (4) (c) of the Penal Code Act on his own plea of guilty and sentenced to a term of 18 years in prison.

Background

The facts which the appellant admitted were that the victim was 12 years old at the time that he committed the offence. That on the 28th March 2014 while the victim, a pupil at Kasambya Primary School, and her sister were going back home from the well, they met the appellant who was at his home eating jack fruit. That the appellant invited them to join him and the two girls agreed to do so. He ushered them into his house, purportedly to cut jack fruit. The appellant then further invited the victim into his bedroom and implored her sibling to stay in the sitting room and cut jack fruit.

While in the bedroom, the appellant undressed himself and forced the victim to have sexual intercourse with him causing her pain. As a result, she made an alarm but the appellant got off her and returned to the sitting room. When the victim's sister inquired why she made an alarm, the victim disclosed that the appellant forced her into sexual intercourse.

The two children decided to go back home but one Mukamunana saw them emerge from the appellant's house. When he enquired what they were doing in the appellant's house, the victim revealed what happened to her. And on getting home, the victim also told her mother what the appellant did to her. The victim's mother reported the incident to the police and investigations resulted in the arrest of the appellant. The victim was medically examined and the appellant was indicted with aggravated defilement.

The appellant entered into a plea bargain agreement and at his trial he pleaded guilty to the offence and was convicted. He was sentenced to 18 years' imprisonment. He appealed against the plea bargain agreement and the sentence to this court in one ground of appeal as follows:

1. The learned trial judge erred in law and fact when he confirmed a harsh and excessive sentence of 18 years' imprisonment arising from an irregular plea bargain agreement.

The appellant applied to be allowed to appeal against sentence only and his prayer was allowed. He proposed that his appeal be allowed and that his sentence of 18 years be reduced. The respondent opposed the appeal.

Representation

At the hearing of the appeal on 6th September 2022, Mr Muhumuza Samuel, learned counsel on State Brief, represented the appellant. Mr

Semalemba Simon Peter, Assistant Director of Public Prosecutions (DPP), represented the DPP.

Counsel for both parties filed written arguments before the hearing as directed by court. They each prayed that their arguments be adopted as their submissions and their prayers were granted. Counsel for both parties made brief arguments clarifying their written submissions at the hearing. This appeal was therefore disposed of on the basis of both oral and written submissions.

Determination of the Appeal

The duty of this court as a first appellate court is stated in rule 30 (1) of the Court of Appeal Rules. It is to reappraise the whole of the evidence before the trial court and draw from it inferences of fact. The court then comes to its own decision on the facts and the law but must be cautious of the fact that it did not observe the witnesses testify. (See **Bogere Moses & Another v Uganda, Supreme Court Criminal Appeal No. 1 of 1997**)

In resolving this appeal, we considered the submissions of both counsel and the authorities cited and those not cited that are relevant to the appeal.

Submissions of Counsel

Mr Muhumuza for the appellant contended that the plea bargain agreement which the trial judge relied upon to convict the appellant was irregular. He submitted that according to rule 4 of the Judicature (Plea Bargain) Rules, hereinafter referred as the Plea Bargain Rules, defines *"plea bargaining"* as a process in which an accused person agrees to plead guilty in exchange of the prosecutor dropping one or more charges, or the reduction of a charge to a less serious offence; or the recommendation of a particular sentence, subject to the approval of the court.

Counsel referred us to the decision in **Lwere Bosco v Uganda, Criminal Appeal No 531 of 2016,** where a plea bargain agreement was set aside and court held that rule 8 of the Plea Bargain Rules provides for the participation of court in the plea bargain negotiations. He stated that the rule requires the parties to inform court of the ongoing plea bargaining process, as well as to consult the court about its recommendations with regard to the possible sentence before the agreement is brought to court for approval and recording. That in **Lwere's case** (supra) the court scrutinised the record and found that the court did not participate in the bargaining process; neither was it consulted about its recommendation as to sentence. He asserted that the circumstances in the instant case are similar to those in **Lwere's case** because there is no indication on the record that the court participated in the plea bargain process. Further, that it was not enough for the prosecution to simply bring the agreement to court after all the negotiations for the court to endorse. He added that the absence of the court's involvement could not be blamed on the trial judge.

Counsel drew it to our attention that the plea bargain agreement was signed by counsel for the appellant on 9th March 2015 but the State Attorney did not sign it on the same day. Instead he signed it on the 17th March 2015, several days later and the appellant appeared in court on 19th March 2015 when he was convicted. He contended that this showed that there was no meeting of minds between the appellant's advocate, the prosecutor and the court. He further pointed out that the trial judge did not sign the agreement.

Counsel went on to submit that the court in **Lwere's** case (supra) held that the failure to follow the procedure in recording the plea bargain agreement by the court occasioned a miscarriage of justice. That because the procedure was not followed in that case, the court set the agreement aside. He prayed that this court sets the plea bargain

agreement aside as well as the sentence, which he contended was harsh and excessive.

Counsel further submitted that in the case of **Mbunya Godfrey v Uganda, Supreme Court Criminal Apeal No. 64 of 2011**, the court reduced the sentence imposed on the appellant from 25 years to 18 years' imprisonment. Court also considered the time that the appellant spent on remand. He prayed that this court sets aside the agreement and reduces the sentence to 10 years' imprisonment from the date of the appellant's conviction.

In reply, Mr Semalemba for the respondent conceded that the plea bargain agreement was irregular because the learned trial judge did not sign it before he sentenced the appellant. He also agreed with the submission of counsel for the appellant on the legal position espoused by the court in the case of **Lwere** (supra).

Counsel went on to submit that though it is clear from the record of proceedings that rule 8(1) of the Plea Bargain Rules was not followed, it is also apparent that the appellant was properly convicted on his own plea of guilt. He referred us to **Adan v Republic, EACA Criminal Appeal No 58 of 1973** to support his submission. He prayed that we be pleased to invoke our powers under section 11 of the Judicature Act and maintain the sentence of 18 years in prison. He referred us to the decision in **Candiga Swadick v Uganda, Court of Appeal Criminal Appeal No 3 of 2021** to support his submissions. He then prayed that the appeal to reduce the sentence of 18 years in prison be dismissed and the sentence upheld.

Resolution

We have carefully perused the plea bargain agreement which appeared at pages 11-19 of the record of proceedings. We observed that it

concluded with a section that was headed *"Court's findings and orders"* which were expressed in the following terms:

> **The court, having reviewed this form and any addenda, and having questioned (sic) the accused concerning accused's constitutional rights, finds that the accused has expressly, knowingly, understandingly, and intelligently waived and given up his or her constitutional and statutory rights. The Court finds that the accused's plea(s) and admission(s) are freely and voluntarily made with an understanding of the nature and consequences thereof, that any allegations as indicated in this form are true, and that there is a factual basis for the plea(s) and admission(s). The Court accepts the accused's plea(s). the Court orders that this form be filed and incorporated in the docket by reference as though fully set forth therein.**

At the bottom of this statement was a space for the signature of the judge but the trial judge did not sign it.

Rule 12 (5) of the Plea Bargain Rules provides as follows:

> **(5) A Plea Bargain Confirmation shall be signed by the parties before the presiding Judicial officer in the Form set out in the Schedule 3 and shall become part of the court record and shall be binding on the prosecution and the accused.**

The signature of the trial judge at the end of the plea bargain agreement was meant to signify that it became part of the record of the court. By his signature the trial judge confirms that the agreement is part of the record and that he has seen to it that the accused has fully understood its implications as far as his right to forgo a full trial is concerned.

As a result of the omission to sign the agreement, we find that the plea bargain agreement was void and that the trial judge erred in fact and law when he based his sentence upon it. We hereby set it aside.

Counsel for the appellant prayed that we reduce the sentence that was imposed on the appellant or impose our own sentence. He proposed that we sentence the appellant to a period of 10 years' imprisonment from

the date of conviction from which he prayed that we deduct the period of one year which the appellant spent on remand before his trial was concluded. For the prosecution, counsel prayed that we maintain the sentence of 18 years in prison.

In imposing a fresh sentence, we are bound by the provisions of section 11 of the Judicature Act to follow the same procedure that the trial court follows while sentencing the convict.

We note that the offence of aggravated defilement already has inbuilt aggravating factors. We need not consider them for they are self-explanatory. In mitigation of the offence, counsel for the appellant submitted that the appellant was a first time offender. He was 22 years old at the time that he was convicted and it was possible for him to reform, if given the opportunity. He pleaded guilty and did not waste the court's time. He prayed that we take into account the period of one year that he spent on remand and impose a sentence of 10 years in prison as a deterrent sentence.

We find it prudent to take into consideration sentences that have been imposed by this court for aggravated defilement before we come to a decision about a sentence that is appropriate in the circumstances of this case. In the case now before us, the appellant was convicted for defilement of a girl aged 12 years old. He was himself 21 years old at the time when he lured the girl into his house and forced himself upon her. In comparison, in **Kizito Senkula v Uganda; (Criminal Appeal No. 24 of 2001) [2002] UGCA 36,** where the victim of the offence was 11 years old this court held that a sentence of 15 years was appropriate in the circumstances.

In **Lukwago Henry v Uganda; Court of Appeal Criminal Appeal No 0036 of 2010) [2014] UGCA 34 (16 July 2014)**, the appellant was convicted of the offence of aggravated defilement and the victim was 13

years old. This court upheld a sentence of 13 years that was imposed on the appellant by the trial court.

In **Ogarm Iddi v Uganda; Court of Appeal Criminal Appeal No. 0182 of 2009,** in which the decision was handed down in 2016, the victim was 13 years old and this court upheld a sentence of 15 years' imprisonment for the offence of aggravated defilement.

And in **Ninsiima Gilbert v Uganda; Court of Appeal Criminal Appeal No. 0180 of 2010,** the appellant was charged with and convicted for the offence of aggravated defilement. The victim was 8 years old and the trial court sentenced the convict to 30 years' imprisonment. On appeal, this court reduced the sentence to 15 years' imprisonment.

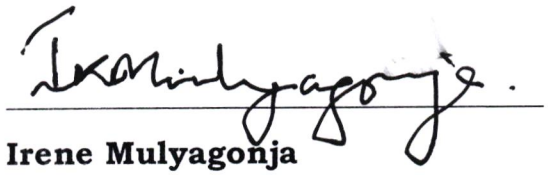
This court in **Kagoro Deo v Uganda; Criminal Appeal No 82 OF 2011,** handed down a sentence of 22 years' imprisonment in June 2019, of the appellant who defiled his 2 ½ years old granddaughter.

In view of the sentences that we have reviewed above, we think that a sentence of 15 years' imprisonment would serve the ends of justice in this case. Pursuant to Article 23 (8) of the Constitution, we are duty bound to take into account the period of one year that the appellant spent in lawful custody before his trial was completed. We therefore deduct one year from the proposed sentence and hereby sentence the appellant to serve a period of 14 years' imprisonment, from the 19th March 2015, the date on which he was convicted.

Dated at Fort Portal this 25th day of NOV 2022.

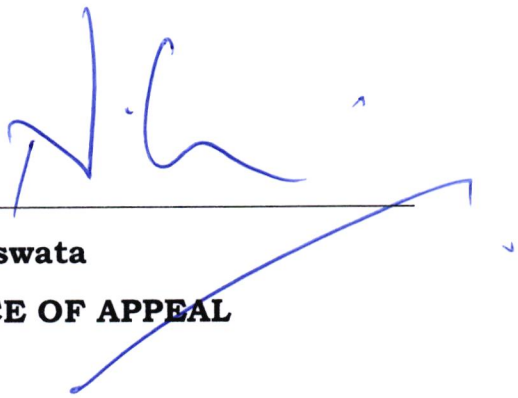
Richard Buteera

DEPUTY CHIEF JUSTICE



Irene Mulyagonja

JUSTICE OF APPEAL



Eva Luswata

JUSTICE OF APPEAL