THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

Coram: Buteera DCJ, Mulyagonja & Luswata, JJA

CRIMINAL APPEAL NO. 607 OF 2014

BETWEEN

KABAGAMBE OKELLO::APPELLANT

AND

UGANDA :: RESPONDENT

(Appeal from the decision of Batema, J. dated 4th November 2013 in Fort Portal High Court Criminal Session Case No. 106 of 2013)

JUDGMENT OF THE COURT

Introduction

This is an appeal from the decision of the High Court in which the appellant was indicted for the offence of aggravated defilement contrary to section 129 (3) and 4 (a) of the Penal Code Act. He was convicted on his own plea of guilty and sentenced to 36 years' imprisonment, less the period spent on remand.

Background

The facts that were admitted by the appellant were that on 28th October 2012, at Nyancwamba Village, Masaka Ward in Kamwenge Town Council, the appellant performed a sexual act on AE, an infant who was then three (3) years old. It was alleged that the appellant took the child into his house and then defiled her. That the mother found the child coming out of the house and saw blood flowing from her private parts. The appellant was then arrested. The victim was medically examined and Police Form 3 on which the results were recorded showed that she

had a raptured hymen. It was confirmed that she was only three (3) years old and could not resist the sexual assault.

The appellant was also medically examined and it was established that he was normal and of a sound mind. He was 18 years old at the time. At his trial, the appellant admitted that the facts that were read to him by the prosecution were true and correct. He was convicted on his own plea of guilty and sentenced to 36 years' imprisonment, *"less the period spent on remand."* He sought leave of this court under section 132 (1) (b) of the Trial on Indictments Act (TIA) and court allowed him to appeal against the sentence only. He now appeals on one ground of appeal as follows:

1. The learned trial judge erred in law and fact when he passed a manifestly harsh and excessive sentence of 36 years less the period spent on remand, against the appellant, thereby occasioning a miscarriage of justice.

The appellant prayed that his appeal be allowed and the sentence be set aside and substituted with a lesser sentence. The respondent opposed the appeal.

Representation

At the hearing of the appeal, the appellant was represented by Ms Angella Bahenzire on State Brief. The respondent was represented by Mr Naboth Atuhaire, State Attorney, from the Office of the Director of Public Prosecutions.

Counsel for both parties filed written submissions before the hearing as directed by court. They each applied that the court adopts them as their submissions in the appeal and their prayers were granted. This appeal was thus disposed of on the basis of the written submissions only.

Submissions of Counsel

In her submissions for the appellant, Ms Bahenzire stated that this court is empowered to interfere with the sentence imposed by the sentencing court under section 132 of the TIA. Further that the duty of this court as first appellate court is set out in rule 30 (1) of the Court of Appeal Rules, which requires the court to reappraise the evidence on record and draw its own inferences, allowing for the fact that it neither saw nor heard the witnesses testify. Counsel went on to submit that pursuant to section 132 (1) (d), (e) and (f), the court may reverse the conviction and sentence, confirm or vary the sentence, or confirm or reverse the acquittal of the accused person.

Counsel further referred us to the decision in **Kyalimpa Edward v Uganda, Criminal Appeal No. 10 of 1995**, for the principles that guide an appellate court with regard to interfering with the sentence of the trial court. She also drew our attention to the decision in **Anguipi Isaac alias Zako v Uganda, Criminal Appeal No. 281 of 2016** in which this court relied on the said principles, took into account the aggravating and mitigating factors and then reduced the sentence of 26 years' imprisonment that had been imposed on the appellant to 18 years and 8 months' imprisonment. That the court in that case, among others, considered that the appellant was a relatively young man aged 35 years old and capable of reforming, he pleaded guilty, was remorseful and prayed for leniency.

Counsel then prayed that this court considers that though the offence with which the appellant was convicted had the maximum sentence of death, this court reappraises the mitigating and aggravating factors and finds that the imposition of a sentence of of 36 years' imprisonment, less the period spent on remand, was manifestly harsh and excessive in the circumstances. She prayed that we set it aside and substitute it with a lesser sentence.

In reply, Mr Atuhaire submitted that the sentence was neither harsh nor excessive in the circumstances of the case. He pointed out that this court has previously confirmed long custodial sentences in cases of aggravated defilement. He drew it to our attention that in **Othieno John v Uganda, Criminal Appeal No. 174 of 2010**, this court considered the earlier decision in **Bacwa Benon v Uganda, Court of Appeal Criminal Appeal No. 869 of 2014** and **Bonyo Abdul v Uganda, Court of Appeal Criminal Appeal No.007 of 2011,** in which sentences of imprisonment for life for the offence of aggravated defilement were confirmed. He explained that in **Othieno's case (supra)** the victim was 14 years old and the appellant was HIV positive. He was sentenced to 29 years' imprisonment and this court confirmed the sentence.

The respondent's advocate went on to emphasise that the offence of aggravated defilement carries a maximum sentence of death. That according to the Sentencing Guidelines for the Courts of Judicature, Legal Notice No 8 of 2013, the starting point is 35 years' imprisonment. And that contrary to the submissions of counsel for the appellant, while sentencing the appellant, the trial judge considered both the aggravating and mitigating factors, as it is shown at page 8 of the record of appeal. That he also discounted the period that the appellant spent on remand. He concluded that in light of this, the trial judge exercised his discretion judiciously. There was no illegality proved in order to warrant the interference with the sentence by this court. He prayed that the appeal be dismissed and the sentence of 36 years' imprisonment be upheld.

Consideration of the Appeal

The principles upon which an appellate court may interfere with the sentence imposed by the trial court were stated by the Supreme Court in **Kiwalabye Bernard v Uganda,** where the court referred to **R v. Havilland (1983) 5 Cr. App. R(s) 109** and 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 court is satisfied that the sentence imposed by the trial judge was manifestly harsh and excessive as to amount to an injustice."

In her submissions, Counsel for the appellant inferred that the trial judge did not consider the mitigating factors. She asked us to reappraise them and come to an appropriate sentence on that basis. She relied on paragraphs 5 and 36 (c) of the Sentencing Guidelines for the Courts of Judicature.

Paragraph 36 of the Sentencing Guidelines sets out all the possible mitigating factors that courts may consider during sentencing for the offence of aggravated defilements as follows:

36. Factors mitigating a sentence for defilement.

In considering a sentence for defilement, the court shall take into account the following mitigating factors—

(a) lack of pre-meditation;

(b) whether the mental disorder or disability of the offender was linked to the commission of the offence;

(c) remorsefulness of the offender;

(d) whether the offender is a first offender with no previous conviction or no relevant or recent conviction;

(e) the offender's plea of guilty;

(f) the difference in age of the victim and offender; or

(g) any other factor as the court may consider relevant.

In the instant case, we note that counsel for the appellant during sentencing singled out the factors under clauses (c), (d) and (e) above as applicable in the circumstances of the appellant. The trial judge observed that he failed to understand why the appellant attacked the infant. He explained that he had taken some alcohol but he was not

drunk; he was *"sober and understanding."* He still pleaded guilty and prayed for a lenient sentence. The trial judge then handed down his sentence in the following short ruling:

> *"We all agree that having sex or performing a sexual act with a toddler of 3 years was beastly. The accused has no defence at all. He is sentenced to 36 years' imprisonment less by the period spent on remand. Right of appeal explained."*

The Supreme Court in **Moses Rwabugande v Uganda, Criminal Appeal No. 25 of 2014** distinguished the mitigating factors that are set out in paragraph 36 above from the requirements of Article 23 (8). The court referred to them as discretionary in the following excerpt of its judgment.

> *"Article 23 (8) of the Constitution (supra) makes it mandatory and not discretional (sic) that a sentencing judicial officer accounts for the remand period. As such,* ***the remand period cannot be placed on the same scale with other factors developed under common law such as age of the convict; fact that the convict is a first time offender; remorsefulness of the convict and others which are discretional (sic) mitigating factors which a court can lump together."***
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> *{Emphasis supplied}*

However, in its later decision in **Aharikundira Yustina v Uganda, Supreme Court Criminal Appeal No. 27 of 2015 [2018] UGSC 49,** delivered on 3rd December 2018, the Supreme Court found fault with this court and the trial court for failing to take into account the mitigating factors that were advanced in favour of the appellant's sentence at her trial.

This renders taking the mitigating factors advanced for the appellant into account far from discretionary; it seems it is mandatory to take all of them into account before sentencing, as the Supreme Court did in the case of **Aharikundira** (supra). It appears it is for that reason why the Second Schedule to the Sentencing Guidelines for the Courts of

Judicature, 2013, lays down a list of 23 factors that a sentencing court should take into account before passing sentence.

We therefore find that the trial judge erred when he omitted to take the mitigating factors that were advanced for the appellant into account before he imposed his sentence. The omission prejudiced him in the sentence that he imposed on the appellant and could have occasioned a miscarriage of justice.

We also observed that the trial judge did not impose a definite sentence on the appellant. He imposed a sentence of 36 years, ***"less the time spent on remand"*** but he did not state that period of time in his ruling. It is trite law that the court that imposes a sentence must impose a clear and definite sentence that will then be carried out by the prison. {**See Kibaruma John v Uganda, Criminal Appeal No. 225 of 2010; [2016] UGCA 52** and **Umar Sebidde v Uganda, Supreme Court Criminal Appeal No. 23 of 2002; [2004] UGSC 84**}.

In this case, the Warrant of Commitment, at page 17 of the record of appeal, read as follows:

> **"WHEREAS** on the 4th day of November 2013 **KABAGAMBE OKELLO** the prisoner in Criminal Session Case No. 0106 of 2013 was convicted before me **HON MR JUSTICE BATEMA N.D.A** of the offence of **AGG DEFILEMENT** contrary to sections 129 (3) and (4) (a) of the Penal Code Act and is sentence to 36 (**THIRTY-SIX**) Years imprisonment less by the period spent on remand."

Although this sentence was handed down on the 4th November 2013 before the decision of the Supreme Court in the often cited case of **Rwabugande** (supra), the trial judge tried to take the period spent on remand into account by deducting it from the sentence that he had imposed. However, he did not deduct the period of one year that the appellant spent on remand leaving the sentence standing as 36 years' imprisonment which was then stated in the Commitment Warrant. He

demonstrated that he had taken the period into account, as it was required of the courts before the regime that came into force after the decision of the Supreme Court in **Rwabugande (supra)** but his decision to do so had no effect. The sentence thus remained ambiguous.

In addition, paragraph 6 (c) of the Sentencing Guidelines requires a sentencing court to observe the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances. This court and the Supreme Court have time and again pointed out that consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation. [See **Aharikundira Yusitina v Uganda, Supreme Court Criminal Appeal No. 27 of 2015.]** The trial judge did not demonstrate that he addressed his mind to this important principle in sentencing either.

As a result, we have no option but to set aside the sentence of 36 years' imprisonment that was imposed by the trial judge and impose one of our own. The sentence is accordingly set aside. We now proceed to impose a fresh sentence pursuant to the powers vested in this court under section 11 of the Judicature Act.

Sentence

We note that the appellant was only 18 years old when he committed the offence. Much as it was a heinous offence committed against a defenceless child, the appellant had just become of legal age and attained the capacity to be tried as an adult. He was a young adult who admitted his wrong doing and prayed for leniency without wasting the court's time.

We note that paragraph 36 (f) of the Sentencing Guidelines refers to the difference in age between the victim and the accused as one of the factors that may mitigate the sentence. It may not be beneficial to the appellant here for the disparity between his age and that of the victim was huge. However, paragraph 36 (g) provides that the court may consider any other factor as the court deems relevant. We are of the view that the fact that the offender was youthful may be a relevant factor and this court has held so before.

In **Kabatera Steven v Uganda; Court of Appeal Criminal Appeal No. 123 of 2001**, this court held that the age of an accused person is a material factor that may act as a mitigating factor, especially where the convict is young. The court agreed with the submission that the trial judge should have considered the age of the appellant at the time he committed the offence before passing sentence. He was a young offender and a long period of imprisonment would not serve him to reform.

This court in **Atiku Lino v Uganda, Criminal Appeal No. 004 of 2009; [2016] UGCA 20,** considered the age of the appellant in relation to a long custodial sentence for the offence of murder. The court reviewed the decision in **Tumwesigye Anthony v Uganda, Criminal Appeal No 46 of 2012**, where a sentence of 32 years' imprisonment was substituted with one of 20 years' imprisonment, and while reviewing the sentence in that case the court observed that:

> *"We note that the fact that the appellant was a first offender, and a young man, aged only 19 years with a chance to reform, was a father of two children and supported two orphans, called for a lesser sentence than what the trial judge imposed."*

The court then set the sentence of 32 years' imprisonment aside and substituted it with 20 years' imprisonment. On that basis, we find that a sentence of 36 years' imprisonment for the offence of aggravated

defilement imposed on a young man who was 18 years old when he committed the offence was excessive and harsh in the circumstances.

As it is required of us by the Sentencing Guidelines for the Courts of Judicature and precedents of this court and the Supreme Court to observe consistency in sentencing, we reviewed sentences for the offence of aggravated defilement before coming to our decision on a sentence that would be appropriate for the appellant.

In **Baruku Asuman v Uganda, Court of Appeal Criminal Appeal No. 387 of 2014**, this court, while emphasising the importance of consistency, referred to the decision in **Naturinda Tamson v Uganda, SCCA No. 025 of 2015** in which the court upheld a sentence of 16 years' imprisonment for the offence of aggravated defilement of a 16-year-old victim.

In **Ederema Tomasi v Uganda; Court of Appeal Criminal Appeal No. 554 of 2014**, this court found that a sentence of 18 years' imprisonment was an appropriate sentence because the appellant was HIV positive and could have infected the victim.

In **Kamugisha Asan v Uganda, Court of Appeal Criminal Appeal No. 212 of 2017**, this Court sentenced an appellant who defiled a three-year-old girl to 23 years' imprisonment. This was reduced to 22 years upon deducting the one year that the appellant had spent on remand.

Having reviewed the sentences above, it needs to be emphasised that the appellant was still a young person when he committed the offence. He is therefore still capable of reforming and he pleaded guilty to the offence and did not waste the court's time. Therefore, we are of the view that a sentence of 18 years' imprisonment would serve the cause of justice in this case. We now deduct the period of one year that he spent in lawful custody before the completion of his trial and hereby sentence

the appellant to 17 years' imprisonment. The sentence shall run from 4th November 2013, the date on which he was convicted.

Dated at Fort Portal this 23rd day of December 2022

Richard Buteera
DEPUTY CHIEF JUSTICE

Irene Mulyagonja
JUSTICE OF APPEAL

Eva Luswata
JUSTICE OF APPEAL