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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT ARUA
CRIMINAL APPEAL NO. 533 OF 2015

(Arising from High Court Criminal Case No.0074 of 2012)

BETWEEN

10 **OGWAL DICKENS..... APPELLANT**

AND

UGANDA RESPONDENT

(Appeal from the judgment of the High Court of Uganda Holden at Lira, before DR. Winifred Nabisinde delivered on the 4th September 2014)

15 **Coram: HON. MR. JUSTICE CHEBORION BARISHAKI, JA**
HON. LADY JUSTICE MONICA MUGENYI, JA
HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA

JUDGMENT OF THE COURT

20 **Introduction**

The background of this Appeal is that the Appellant herein was charged, tried and convicted of the offence of aggravated defilement contrary to section 129(3) and (4) of the Penal Code Act. The facts of the case are that on the 10th day of March 2012 at Apuruku Village, Arwotmoi Parish, Aromo Sub County in Lira District, the
25 Appellant defiled a one Amule Juliet aged 3 years old.

The Appellant was convicted of the offence of aggravated defilement by the trial court and sentenced to a period of imprisonment of 30 years in prison. Dissatisfied with the decision of the trial court, the Appellant appealed on grounds that;

- 5
1. The learned trial Judge erred in law and fact when she sentenced the Appellant to serve a period of imprisonment of 30 years without taking into account the pre-trial remand period.
 2. The learned trial Judge erred in law and fact when she sentenced the Appellant to 30 years in prison which sentence is harsh and excessive in
- 10 the circumstances.

Representation

The Appellant was represented by Counsel Ms. Daisy Bandaru. The Respondent was represented by Ms. Immaculate Angtoko.

Both parties sought, and were granted leave to proceed by way of written

15 submissions.

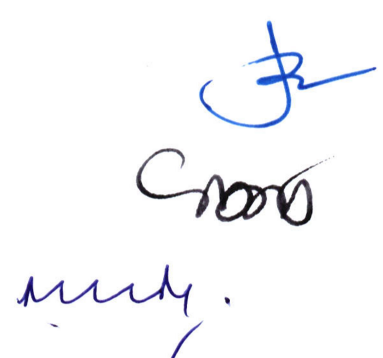
Submissions of Counsel for the Appellant.

Counsel for the Appellant handled the two grounds jointly. Counsel submitted that it is now a well settled principle laid down in **Ogalo S/O Owowa vs. R (1954) 24 EACA 270**, that in exercising its jurisdiction to review sentences , an appellate

20 court does not alter a sentence on the mere ground that if members of the appellate court had been trying the Appellant, they might have passed a somewhat different sentence, and that an appellate court will not ordinarily interfere with the discretion exercised by the trial judge unless it is evident that the judge acted upon some wrong principle or over looked some material or that the sentence is harsh and

25 manifestly excessive in view of the circumstances of the case.

Counsel for the Appellant submitted that the sentence of 30 years imprisonment was harsh and excessive in the circumstances and that while sentencing him, the trial court did not discount the 2 years and 6 months he had spent on pre- trial remand as required by law.



5 Article 23(8) of the Constitution provides as follows:-

“ 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 of her trial shall be taken into account in imposing the term of imprisonment”


10 Counsel submitted that the above requirement of the law is mandatory and any sentence passed by a court must comply with it or else the sentence will be rendered illegal. Counsel further submitted that the judge stated that she had taken into account the 2 years 6 months Appellant had spent on record but there is nothing on court record to show that she deducted the said period from the sentence she
15 deemed appropriate for the Appellant.

Counsel cited **Rwabugande Moses vs. Uganda; SC. Criminal Appeal No. 25 of 2014**, where the court held that;

20 “It is our view that the taking not 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. That period spent in lawful custody prior to the trial must be specifically credited to an accused.”

25 Counsel submitted that the court in Rwabugande (Supra) further held that any sentence couched in general terms is considered ambiguous. That this was because court could not unequivocally ascertain that the court accounted for the remand period in arriving at the final sentence.

30 Counsel for the Appellant further submits that the sentence of 30 years imprisonment for the aggravated defilement is harsh and excessive in the circumstances of the case. The said sentence is not in uniformity with decisions


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5 where the facts of those decisions have a semblance to the case under trial. Counsel
cited **Kizito Senkula vs. Uganda SC. Criminal Appeal No. 24 of 2001**, where the
Appellant, an adult male defiled a victim of 11 years, the Supreme Court found the
sentence of 15 years imprisonment appropriate but hard to reduce the same to 13
10 years because the judge was not specific in deducting the said years spent on
remand.


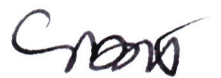

In **Kabwiso Issa vs. Uganda SC. Criminal Appeal No. 07 of 2002**, the Appellant
was convicted of defilement and sentenced to 15 years imprisonment on Appeal to
the court of Appeal, it was confirmed. On further appeal to the Supreme Court of
Appeal that found that the trial judge had not taken into account the period the
15 Appellant had spent on remand and reduced the sentence to 10 years years'
imprisonment.

In **Katende Ahamad vs. Uganda, SC Criminal Appeal No. 06 of 2004**; the
Supreme Court upheld a sentence of 10 years imprisonment for aggravated
defilement. The Appellant in that case was the father of the 9 year old victim.

20 Counsel for the Appellant conceded that the trial judge while passing the sentence
relied on the **Constitution (Sentencing Guidelines for Courts of Judicature)
Practice Directions, Legal Notice No. 8 of 2013**. Counsel however submitted that
the guidelines have to be applied while taking into account past precedents of court
decisions where facts are similar to the case under trial. That from the authorities
25 cited above, the sentences made in similar cases range from between 10 to 17 years
imprisonment based on the peculiar circumstances of each case.

Submissions of counsel for the Respondent.

It is the submission of counsel for the Respondent that it is settled law that
sentencing is a discretion of a trial judge and an appellate court will only interfere

5 with sentence imposed by the trial Court if it is evident that it acted on a wrong principle or overlooked some material fact or if the sentence is manifestly harsh and excessive in view of the circumstances of the case. See **Kiwalabye Bernard vs. Ug SCCA No. 143 of 2001**

10 Counsel submitted that the trial judge recorded detailed reasons for the sentence and she considered mitigating, aggravating factors and provisions of the sentencing Guidelines. Counsel further submitted that the Appellant was sentenced on the 4th day of September 2014, way before the decision in *Rwabugande Moses vs. Uganda SCCA No. 25 of 2014*. This requires arithmetic deduction of the period spent on remand. He argued that at the time the legal regime was guided by the position in
15 **Kizito Senkula vs. Uganda SCCA No. 24 of 2011**, where the Supreme Court held that:

20 “As we understand the provisions of Article 23(8) of the Constitution, they mean that when a trial court imposes term of imprisonment as sentence on a convicted person the court should take into account the period which the person spent in remand prior the court should take into account the period which the person spent in remand prior to his/ her conviction. Taking into account does not mean an arithmetical exercise.”

25 Counsel cited **Nashimolo Paul Kibolo v Uganda SCCA No.46 of 2017**, and **Abelle Asuman VS. Uganda SCCA No. 46 of 2017**, and submitted that the learned judge clearly demonstrated that she had taken into account the period spent on remand and since the sentence was awarded before the *Rwabugande* decision , she cannot be faulted when in fact she complied with the constitutional obligation in **Article 23(8) of the Constitution**.

30 On whether the sentence was harsh and excessive, counsel submitted that the offence of Aggravated defilement attracts a maximum sentence of death under

5 **Section 129(4) of the Penal Code Act.** That the victim in this present case was only 3 years old, a sentence of 30 years imprisonment in the circumstances was therefore appropriate and way below the maximum sentence. She additionally submitted that the sentence of 30 years is still within the sentencing range of the guidelines.

10 Counsel cited **Ntare Augustine vs. Uganda Criminal Appeal No. 053 of 2011**, where this court confirmed a sentence of 25 years as not being excessive. **Seruyange Yuda Tadeo vs. Uganda Criminal Appeal No. 080 of 2010**, this court reduced a sentence of defilement from 33 years to 27 years imprisonment for defiling a 09 year old victim. And in **Kizza Geoffrey vs. Uganda Criminal Appeal**

15 **No. 076 of 2010**, where the trial court sentenced the Appellant to 30 years and this court sentenced him to 28 years and 9 months upon deducting the period spent on remand.




Consideration of court

In resolving the issues raised in this appeal, this court is mindful of its duty as the

20 first appellate court to re-evaluate the evidence presented before the trial court to reach its own conclusion. See **Pandya vs. R (1957) E.A and Kifamunte Henry vs. Uganda SCCA No.10 (1997)**

It is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court. This obligation to reappraise the evidence is

25 founded in common law rather than rules of procedure. In so doing, the first appellate court must consider the evidence on any issue in its totality and not any piece thereof in isolation. Although in case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the

5 witnesses. See **Fr. Narsensio Begumisa and 3 other vs. Eric Kibebaga SCSA No.17 of 2002.**

The above principles will guide this court in the determination of the grounds of appeal as here below. It was the submission of counsel for the Appellant that the judge's sentencing was ambiguous because it did not arithmetically deduct the years
10 as required under the **Rwabugande Moses** case (*Supra*).




Under this **Rwabugande Moses** case (*Supra*) it was the finding of the Supreme Court that since the period of remand is known to precision, the period spent in lawfully custody should be arithmetically deducted. This position of the law has however been over taken by the decision of the Supreme Court in **Abelle Asuman**
15 **vs. Uganda SCCA No. 66 of 2016.** Where 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
20 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.”

This is the latest position of the law with regard to sentencing, it departs from the
25 position in **Rwabugande Moses** (*Supra*). In the instant case the trial judge held that:

“I have also taken into account the 2 years and 6 months the convict spent on remand

The trial court cannot be faulted because by the time trial judge passed the sentence
30 the Supreme Court had not passed the decision in the **Rwabugande Moses** (*Supra*).

5 The legal regime then was the position in **Kizito Senkula vs. Uganda SCCA No. 24 of 2011**, where the justices of the Supreme Court held that;

10 “As we understand the provisions of article 23(8) of the Constitution, they mean that when a trial court imposes a term of imprisonment as sentence on a convicted person the court should take into account the period which the person spent in remand prior to his / her conviction. Taking into account does not mean an arithmetic exercise.”

15 Additionally, the position of the law has drifted from the **Rwabuganda Moses (Supra)** back to the previous position, in that according to **Abelle Asuman (Supra)** the most recent position of the law, as long as it is evident that the sentencing judge took into account the period spent on remand, then they cannot be faulted. We therefore find that the trial sentencing judge adhered to the provisions of Article 23(8) of the Constitution even when she did not arithmetically deduct the years spent on remand.

With regard to harshness;

20 Aggravated defilement is a capital offence under the Penal laws of this country. **Guideline 19(1) of the Constitution (Sentencing Guideline)** (supra) provides guides for ranges of sentencing of capital offences. It provides that:

25 “The court shall be guided by the sentencing range specified in Part I of the Third Schedule in determining the appropriate custodial sentence in a capital offence.”

30 Under the third schedule of the **Constitution (Sentencing Guidelines)**, the sentencing range for murder is from 30 years imprisonment to death penalty which is the maximum penalty upon consideration of the mitigating and aggravating factors. It would be safe therefore to say that the trial Judge was within the prescribed range of sentencing by the sentencing guidelines.

5 Other than just the range in which to hand down the sentence court is also guided by the principle of consistency and uniformity when sentencing. This principle is to the effect that when sentencing the Judge must be guided by the precedents under the same offence. **Guideline No.6(c) of the Sentencing Guidelines** provides that;

10 “Every court shall when sentencing an offender take into account 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 *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 15 years imprisonment for the offence of aggravated defilement.

In *Ntambala Fred vs. Uganda, Criminal Appeal No. 34 of 2015*, the Supreme Court approved a sentence of 14 years’ imprisonment imposed on the Appellant by the trial Court and confirmed by the Court of Appeal, considering it appropriate for aggravated defilement. The victim of the offence was aged 14 years.

In *Byera Denis vs. Uganda, Court of Appeal Criminal Appeal No. 99 of 2012*, this Court substituted a sentence of 30 years imprisonment with one of 20 years imprisonment it considered appropriate in a case of aggravated defilement. The victim in that case was aged 3 years.

25 Mindful of the fact that the offence in this case carries a maximum sentence of death and it is rampant and having considered the mitigating and aggravating factors, the victim was only 3 years, this court finds it appropriate to substitute the sentence of 30 years imprisonment with 26 years imprisonment.

The appeal partially succeeds as regards to sentencing for the reasons stated above





5 We so order

Dated at Arua this 29th day of March, 2022

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CHEBORION BARISHAKI

JUSTICE OF APPEAL

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MONICA MUGENYI

JUSTICE OF APPEAL

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CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL