THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

Coram: Buteera ,DCJ, Mulyagonja & Luswata JJA.

CRIMINAL APPEAL NO 035 OF 2013

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KALAMURA ROBERT :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Appeal from the decision of Faith Mwondha, J (as she then was)
10 *delivered on 10th April, 2013 in Criminal Session Case No. 010 of 2013)*

JUDGMENT OF THE COURT

Introduction

The appellant was indicted for the offence of aggravated defilement contrary to
15 Section 129 (3) & (4)(a) of the Penal Code Act, Cap 120. He was convicted on his own plea of guilty and sentenced to 15 years' imprisonment.

Background

The victim was a pupil in nursery school who resided with her parents in Ntunda Village, Ntwete in Kiboga District. In November 2007, the appellant paid a visit
20 to his sister, the mother of the victim. On 6th December 2007 after the appellant and the victim's father returned from an evening out. During the night, the mother of the victim heard her crying. She woke up and lit a lantern and went to find out what made the victim cry, only to find the appellant holding the child on top of him. The mother alerted the victim's father who rushed to the scene in
25 order to rescue the victim. But upon examining the victim, they found semen

and blood in her private parts. The appellant on the other hand was completely naked. He was arrested and taken to the Police.

The victim was examined on Police Form 3 on 16th December 2007. It was established that she was four years old. There were signs of penetration of her vagina and the hymen had been raptured. She had other injuries in her private parts consistent with the fact that she was sexually abused. There were also signs of venereal disease from the smelly odour that emerged from her private parts. She was still in great pain.

The appellant was also examined and found to be approximately 31 years old and his mental condition was normal. He was therefore indicted for the offence of aggravated defilement. He pleaded guilty and was sentenced on his own plea of guilty as we have stated above. He now appeals against the sentence only, with leave of this court, on one ground of appeal as follows:

1. The learned Trial judge erred in law and fact when she passed an illegal and/or manifestly harsh and excessive sentence without due consideration of both the period spent on remand and mitigating factors.

Representation

At the hearing of the Appeal on 5th September, 2022, Mr. Chan Geoffrey Masereka represented the appellant on State Brief, while Ms. Angutoko Immaculate, Chief State Attorney from the Office of the Director Public Prosecutions, represented the respondent.

The parties filed written submissions before the hearing of the appeal as directed by court. Counsel for both parties applied that the court adopts their written

arguments as their submissions in the appeal and the prayers were granted. This appeal had thus been disposed of on the basis of written submissions only.

Determination of the Appeal

The duty of this Court as a first appellate court, is stated in rule 30 (1) of the Rules of this Court (SI 10-13). It is to reappraise the whole of the evidence adduced before the trial court and reach its own conclusions on the facts and the law. But in so doing the court should be cautious that it did not observe the witnesses testify.

We have therefore considered the whole of the record that was set before us, the submissions of counsel and the authorities cited and those not cited that were relevant to the appeal in order to reach our decision on the ground that was raised in the appeal.

Submissions of Counsel

In his written submissions, Mr Masereka for the appellant submitted that this court has the power to reduce a sentence under section 34(1)(c) of the Criminal Procedure Code Act. Further, that while sentencing, the time spent in lawful custody before conviction should be considered and deducted from the intended sentence pursuant to Article 23(8) of the Constitution. He relied on the decision in **Tukamuhebwa David Junior & Anor v Uganda, SCCA 59 of 2016,** where the court considered the 3 years and 7 months that the appellant therein spent on remand and reduced his sentence of 20 years to 16 years and 5 months' imprisonment. Counsel argued that in the instant case, the appellant had spent 6 years on remand but the trial judge merely mentioned the 6 years before proceeding to impose the sentence of 15 years' imprisonment upon him. Counsel went on to submit that the trial judge did not state whether the 6 years spent

on remand were in addition to the sentence of 15 years or whether that period was deducted from the sentence. He asserted that the sentence was unlawful because the trial judge did not deduct the period that the appellant spent on remand prior to his conviction and sentence.

The appellant's counsel then referred us to several authorities. He submitted that in **Rwabugande Moses v Uganda; SCCA 25 of 2014** the appellant's sentence of 23 years' imprisonment was reduced to 21 years after the considering the mitigating factors. He went on to refer to the case of **Feni Yasin v Uganda, CACA No. 736/2014,** where the appellant's sentence was reduced from 35 years to 20 years' imprisonment after this court considered the mitigating factors, and further reduced to 16 years' imprisonment after deduction of the 4 years that the appellant spent on remand. Counsel then implored this court to reduce the appellant's sentence as it was done in the cases that he cited. He concluded with the prayer that the appeal be allowed and the term of imprisonment of 15 years be substituted with a lesser sentence.

In reply, Ms Angutuko for the respondent submitted that sentence is within the discretion of the trial judge. She added that it is settled law that the appellate court will only interfere with a sentence imposed by the trial court if it is evident that it acted on a wrong principle or overlooked some material factor, or if it is shown that the sentence is manifestly harsh and excessive in the circumstances of the case. She relied on the decision in **Blasio Ssekawooya v Uganda, Criminal Appeal No. 107 of 2009** and **Kyalimpa Edward v Uganda; SCCA No. 10 of 1995** to support her submissions.

Counsel for the respondent went on to submit that aggravated defilement attracts a maximum sentence of death. Further that the parties submitted in

allocutus and that the trial judge took into consideration both the mitigating factors and the aggravating factors.

She further pointed out that the appellant was sentenced before the decision of the Supreme Court in the case of **Rwabugande** (supra) which requires sentencing courts to carry out an arithmetic deduction of the period spent on remand from the sentence that the court deems appropriate to impose on the convict. She further referred to the decision in **Kizito Senkula v Uganda; SCCA No. 24 of 2011** and pointed out that the appellant was sentenced in the previous regime where the requirement was that the court should *'take into account'* the period a person has spent on remand prior to his conviction or sentence, in accordance with Article 23 (8) of the Constitution. Further, that this position was clarified by the Supreme Court in **Nashimolo Paul Kibolo v Uganda, SCCA No. 46 of 2017,** where it was held that the position that was taken by the court in **Rwabugande** (supra) was to be followed from 3rd March 2017 when it was handed down. She also referred us to the decision of the Supreme Court in **Abelle Asuman v Uganda** where the court restated the principle that the appellate court will not interfere with the sentence of the lower court where it is shown that the sentencing court clearly demonstrated that it took into account the period spent on remand to the credit of the convict.

Counsel further contended that a sentence of 15 years is within the range of sentences imposed by this Court for the offence of aggravated defilement. She referred to **Kaserebanyi James v Uganda, SCCA No. 10 of 2014** where the appellant was convicted on his own plea of guilty for aggravated defilement of his 15-year-old daughter and sentenced to life imprisonment. The sentence was upheld by the Supreme Court. She also referred to **Ntare Augustine v Uganda, Criminal Appeal No. 053 of 2011** where this court upheld a sentence of 25 years for aggravated defilement; and **Seruyange Yuda v Uganda, Criminal**

Appeal No. 080 of 2010, where this Court found that a sentence of 27 years' imprisonment was appropriate for the appellant who had been convicted and sentenced to 33 years' imprisonment for defiling a 9-year-old girl.

Counsel invited us not to interfere with the discretion of the trial court because the sentence that was imposed was legal and the court considered all the material factors before imposing it. She prayed that the appeal be dismissed and that the conviction and sentence be upheld.

Resolution of the appeal

It is a well settled principle that this Court is not to interfere with a sentence imposed by a trial court exercising its discretion unless the sentence is illegal or this Court is convinced that the trial judge did not consider an important matter or circumstance which ought to be considered when passing sentence. Further, that the court may interfere if it is shown that the sentence was manifestly excessive or so low as to amount to an injustice. [**See Livingstone Kakooza v Uganda SCCA No. 17 of 1993]**

We note that counsel for the appellant raised two issues about the sentence for this court to address with regard to the sentence of 15 years' imprisonment being illegal, harsh and excessive; viz: i) that the trial judge did not consider the period spent on remand and ii) that she did not consider the mitigating factors. We shall address them in that order.

While sentencing the appellant, the trial judge observed and held thus:

> *"Convict is a first offender. He is (sic) guilty instantly without any witness in Court. He has been on remand for close to 6 years. However, the victim he wronged is so small in fact was a toddler or a child of his sister. I take serious (sic) view of this offence as it is rampant in this area. Taking all the above into consideration. Accused has been sentenced to 15 years' imprisonment."*

Even though the Trial judge did not state the date on which the sentence was to begin, it can be inferred from page 8 of the Record of Appeal that this sentence was passed on 10th April, 2013 and so it is the commencement date of the sentence.

With regard to the submission that the sentence was illegal because the trial judge did not subtract the period spent in lawful custody, just like it was done in the case of **Turyamuhebwa** (supra), the requirement to take the period spent on remand into account is Constitutional. It is provided for by Article 23(8) of the Constitution as follows:

> **(8) Where a person is convicted and sentenced to a term of imprisonment for any 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 trial judge in her ruling on sentence stated that the appellant had been on remand for close to 6 years. She later noted that this, among other things, had been taken into consideration as she passed the sentence of 15 years' imprisonment. Relying on the decision in **Tukamuhebwa** (supra) the appellant's counsel asserts that the trial judge ought to have deducted/subtracted the time spent on remand or in lawful custody before his trial was completed while sentencing the appellant.

There have been various modes of applying the principle that is set out in Article 23 (8) of the Constitution. Before the Supreme Court came to its decision in **Rwabugande** (supra), the court observed that:

> *"The principle enunciated by the Supreme Court in* ***Kizito Senkula vs. Uganda SCCA NO. 24 of 2001; Kabuye Senvewo vs. Uganda SCCA No. 2 of 2002; Katende Ahamad vs. Uganda SCCA No.6 of 2004 and Bukenya Joseph vs. Uganda SCCA No. 17 of 2010*** *is to the effect that, the words "to take into account" does not require a trial court to apply a mathematical formula by*

deducting the exact number of years spent by an accused person on remand from the sentence to be awarded by the trial court."

The court then emphatically stated that it had found it right to depart from its previous decisions above that did not require a sentencing court to apply an arithmetical formula while considering the time spent on remand before sentence. It was then held that:

"It is our view that the taking into 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.

We must emphasize that a sentence couched in general terms that court has taken into account the time the accused has spent on remand is ambiguous. In such circumstances, it cannot be unequivocally ascertained that the court accounted for the remand period in arriving at the final sentence. ***Article 23 (8) of the Constitution (supra)*** *makes it mandatory and not discretional 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 mitigating factors which a court can lump together. Furthermore, unlike it is with the remand period, the effect of the said other factors on the court's determination of sentence cannot be quantified with precision.*

We note that our reasoning above is in line with provisions of ***Guideline 15*** *of the* ***Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*** *..."*

In **Abelle Asuman v Uganda** (supra) the Supreme Court reviewed its decision in **Rwabugande** (supra). The court emphasised that the application of the principle in Article 28 (3) of the Constitution as it ws enunciated in the case of **Rwabugande** (supra) would remain binding on sentencing courts, but it was also observed that:

"What is material in that decision is that the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according

*to the case of **Rwabugande** that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This Court 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."

The court then concluded on that point and held that:

*"This Court and the Courts below before the decision in **Rwabugande (supra)** were following the law as it was in the previous decisions above quoted since that was the law then.*

*After the Court's decision in the **Rwabugande case** this Court and the Courts below have to follow the position of the law as stated in **Rwabugande (supra).**"*

We therefore must follow the precedent that was set by the Supreme Court in its decision in **Rwabugande** (supra) and emphasised in **Abelle Asuman** (supra).

However, we observed that the appellant's sentence was handed down on 10th April 2014 and he was sentenced on the same day. At the time he was sentenced, the position of the law as espoused in **Kizito Senkula v Uganda** (supra), that taking into account the period spent on remand did not necessitate a sentencing court to apply a mathematical formula; that is to subtract the period from the sentence imposed. In the instant case, the trial judge demonstrated that she was alive to the fact that the appellant had already spent close to 6 years in prison and she stated that she had taken it into consideration. We therefore find that the sentence that was imposed on the appellant was a legal one and we will not interfere with it.

With regard to the omission to take the mitigating factors into consideration, counsel for the appellant relied on the decisions in **Rwabugande** (supra) and in **Feni Yasin** (supra) to contend that the trial judge did not consider the mitigating factors advanced by and therefore she imposed an illegal sentence. The record of appeal shows, at page 7, that counsel for the appellant advanced the following as mitigating factors in favour of the appellant:

> *"The convict is a first offender who has pleaded guilty and is remorseful and repentant. He has been in prison for close to 6 years and his right to fair and speedy trial was infringed upon. We pray for a lenient sentence. He is capable of reforming."*

We observed that the trial judge demonstrated that she was alive to the fact that the convict was a first time offender, that he had spent close to 6 years on remand and that he had pleaded guilty instantly without any witness in court. She categorically stated that she had taken all the factors stated in mitigation into consideration before sentencing the appellant to 15 years' imprisonment. In the circumstances, we have no reason to disturb the sentence imposed by trial judge for that reason.

With regard to the contention that the sentence of 15 years' imprisonment was harsh and excessive in the circumstances of the case, counsel for the appellant did not demonstrate why he raised this issue. He ought to have assisted court by demonstrating that in previous decisions of this court with similar facts, convicts were sentenced to lesser terms of imprisonment than that imposed upon the appellant. We must therefore, on our own, consider sentences that have been handed down by this court and the Supreme Court for the offence of aggravated defilement in order to arrive at our decision on this issue.

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. The court also referred to the decision in **Ederema Tomasi v Uganda; Court of Appeal Criminal Appeal No. 554 of 2014** where this court imposed a sentence of 18 years' imprisonment as an appropriate sentence because the appellant was HIV positive.

In **Tiboruhanga Emmanuel v Uganda, Court of Appeal Criminal Appeal No. 655 of 2014**, after reviewing the sentences approved in previously decided cases of aggravated defilement by the Supreme Court and the Court of Appeal, this court found that the sentences imposed by the Court of Appeal for aggravated defilement in previous cases fell within the range of between 11 years to 15 years. However, the court was not bound by that decision since sentencing is within the discretion of the sentencing court. It sentenced the appellant therein to 25 years' imprisonment for aggravated defilement because he was also found to be HIV positive and had exposed the victim to the risk of contracting disease.

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 considered the sentences handed down in previous decisions that we have reviewed above, we do take cognisance of the fact that the appellant readily pleaded guilty to the offence and did not waste the court's time. However, the defilement of a little girl of only 4 years, inside her parents' house and by a relative was indeed a grave offence. In view of the fact that the maximum sentence for the offence of aggravated defilement is death, we are of the view

that the trial judge *did* exercise mercy on the appellant by sentencing him to only 15 years' imprisonment; this was justified by his plea of guilty.

In view of the fact that the appellant did not prove any other extenuating factor before us in order that we exercise our discretion to reduce or set aside the sentence, we have no alternative but to uphold it.

Therefore, this appeal substantially fails. The appellant shall continue to serve his sentence of 15 years' imprisonment that was imposed upon him by the trial court.

Dated at Fort Portal this 24th day of August, 2022

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Richard Buteera

DEPUTY CHIEF JUSTICE

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Irene Mulyagonja

JUSTICE OF APPEAL

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Eva Luswata

JUSTICE OF APPEAL