THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

CONSOLIDATED CRIMINAL APPEALS NOs. 0261 & 0305 OF 2016

(Coram: Elizabeth Musoke, Cheborion Barishaki, and Hellen Obura, JJA.)

MAGORO HUSSEIN :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mbale before Wangutsi, J. delivered on the 28th day of July 2016 in Criminal Session Case No. 030 of 2013)

JUDGMENT OF THE COURT

Introduction

This is an appeal against the decision of the High Court (Wangutsi, J.) delivered on 28th July 2016 by which the appellant was convicted of the offence of aggravated defilement contrary to section 129 (3), and (4) (a) of the Penal Code Act, Cap. 120 and sentenced to 20 years' imprisonment.

Background to the Appeal

The background facts of this case as per the record are that on the 18th day of February 2012 at Gangama, Mbale District, the appellant unlawfully performed a sexual act on KS a child aged 5 years. The prosecution led evidence to prove that while the victim was playing with her sister, the appellant called them and took them to the shops to buy sweets. After the appellant took the sisters to Gangama and in a bush, he forcefully removed the knickers of the victim, lay on her, and had sexual intercourse with her while her sister watched on the

roadside. After the sexual act, the appellant instructed the victim to clean her private part and he added her more sweets. The victim went home and narrated to her mother what had happened to her. The matter was reported to the Police and the appellant was arrested. He was indicted, tried, and convicted of the offence of aggravated defilement and sentenced as aforementioned.

Being dissatisfied with the decision of the trial Court, the appellant appealed to this Court on the following grounds;

1. *"That the learned Judge erred in law and fact when he concluded that the appellant had committed aggravated defilement yet the prosecution failed to disprove his defence of alibi by way of investigation.*
2. *The learned trial Judge erred in law and fact when he failed to accord the appellant time to present his witnesses thus clogging the appellant's right to a fair hearing.*
3. *That the learned trial Judge erred in law and fact when he sentenced the appellant to a harsh and excessive sentence in the circumstances of the case.*

The appellant prayed that this Court allows the appeal, vacates, and replaces the sentence with 5 years' imprisonment, inclusive of time already served in lawful custody. The respondent opposed the appeal.

Representation

At the hearing, Ms. Kevin Amujong represented the appellant on State Brief whereas Ms. Ainebyona Happiness, Chief State Attorney from the Office of the Director Public Prosecutions represented the respondent. The appellant could not physically be in court due to the restrictions on the movement of inmates following the Standard Operating Procedures put in place to avert the spread of the Coronavirus 2019. However, he was facilitated to participate in the court proceedings from Jinja Main Prison using zoom technology. Counsel for both sides, with leave of Court, filed written submissions which have been considered in this judgment.

Appellant's submissions

When the appeal came up for hearing, counsel for the appellant sought leave of this Court to abandon grounds 1 and 2 of the appeal. She also sought and was granted leave to proceed with the appeal on sentence only as contained in ground 3 of the appeal.

On Ground 2, counsel submitted that the sentence of 20 years that was imposed on the appellant was harsh and excessive and occasioned a miscarriage of justice. Counsel stated that the learned trial Judge failed to take into consideration the mitigating factors namely that; there was no injury to the victim; the appellant was a first offender, and the appellant was a man with a lot of responsibility which included taking care of 2 wives and 8 children. He further submitted that the learned trial Judge failed to follow uniformity and consistency in sentencing which requires that offenders of offences with similar circumstances be given uniform sentences. He referred this Court to the case of ***Aharikundira Yustina vs Uganda; Court of Appeal Criminal Appeal No 33 of 2008*** where it held that;

> *"it is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. 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."*

He cited ***Rugarwana Fred vs Uganda; Supreme Court Criminal Appeal No 39 of 1995*** where the Supreme Court upheld a sentence of 15 years as not being excessive in a case where a 5-year-old victim was defiled in a latrine by the appellant who was an adult. He also cited ***German Benjamin vs Uganda; Court of Appeal Criminal Appeal No 142 of 2010*** where a sentence of 20 years was substituted for one of 15 years. The victim was a 5-year-old child who sustained serious injuries in her private parts. The court was merciful to the 35-year-old appellant who was a first offender and showed signs of reform. Counsel also relied on ***Wanzala Simon vs Uganda; Court of Appeal Criminal Appeal No 46 of 2009*** where this Court upheld a sentence of 15 years as not being excessive where a 13 year old victim

was defiled in a banana plantation. He further cited ***Owinji William vs Uganda; Court of Appeal Criminal Appeal No.106 of 2013*** where a sentence was reduced to 17 years. The victim was 12 years of age. She had been defiled and the appellant thereafter threatened her with a knife and promised to give her money if she kept the sexual act a secret.

He invited this Court to also look at the case of ***Tiboruhanga Emmanuel vs Uganda; Court of Appeal Criminal Appeal No.655 of 2014*** where it was held that 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 since the appellant exposed the victim to the risk of contracting HIV/AIDS. This Court imposed a sentence of 25 years imprisonment.

Counsel argued that from the foregoing, this case has no existing aggravating factor. He therefore, urged this Court to interfere with the sentence that was passed and substitute the same with 10 years.

Respondent's submissions

In response, counsel submitted that the sentence of 20 years' imprisonment is not excessive for the appellant who was 32 years old at the time of committing the crime. She cited the case of ***Kyalimpa Edward vs Uganda; Supreme Court Criminal Appeal No.10 of 1995*** and ***Tigo Stephen vs Uganda; Supreme Court Criminal Appeal No.8 of 2009***. In the ***Tigo Stephen case***, the Supreme Court confirmed a sentence of 20 years imprisonment for aggravated defilement. In the instant case, the learned trial Judge considered both the mitigating and aggravating factors and found that the aggravating factors outweighed the mitigating factors. The learned trial Judge observed that the appellant had two wives but still defiled a 5-year-old child. He then took into account the period the appellant had spent on remand and sentenced him to 20 years imprisonment for having acted beastly. Counsel urged this Court

to find that the sentence of 20 years imposed by the learned trial Judge is appropriate in the circumstances.

Resolution by Court

We have carefully studied the court record, considered the submissions of both parties, the law and authorities cited therein as well as those not cited but are applicable to the present case. The duty of this Court as the first appellate Court is to re-evaluate all the evidence on record and make its findings. In so doing, it should subject the evidence to fresh and exhaustive scrutiny. See ***Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10*** and ***Kifamunte Henry vs Uganda; Supreme Court Criminal Appeal No. 10 of 1997; Pandya vs R (1957) EA 336***. Alive to the above stated duty, we shall proceed to resolve the ground of appeal as argued by both counsel.

Counsel for the appellant submitted that the learned trial Judge erred in law and fact when he sentenced the appellant to a harsh and excessive sentence in the circumstances of the case.

The law on the role of an appellate court in reviewing the sentence of the trial court was articulated in the case of ***Kyalimpa Edward vs Uganda*** *(supra)* where the Supreme Court referred to ***R vs De Haviland (1983) 5 Cr. App. R(s) 109*** and held as follows;

> *"An appropriate sentence is a matter for the discretion of the sentencing Judge. Each case presents its 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 trial judge unless the sentence is illegal or unless the Court is satisfied that the sentence imposed by the trial Judge was manifestly so excessive as to amount to an injustice. See:* ***Ogalo s/o Owousa vs R (1954) 21 E.A.C.A. 270*** *and* ***R vs Mohammed Jamal (1948) 15 E.A.C.A. 126****"*

This Court also reiterated this position of the law on the role of an appellate court in interfering with the sentencing discretionary powers of a trial Judge in ***Aharikundira Yustina vs Uganda*** *(supra)* which was cited by counsel for the appellant where it held that;

"Interfering with the sentence of the trial court is not a matter of emotion but rather one of law. Unless it can be proved that the trial judge flouted any of the principles in sentencing, then it does not matter whether the members of this court would have given a different sentence if they had been the one trying the appellant. In the instant case, he found that the most appropriate sentence was death. Without proof that this discretion was biased or unlawful, this court would have no lawful means of interfering with the same".

The sentencing regime in Uganda is further guided among others; by the ***Penal Code Act, Cap. 120*** which stipulates the various offences and the punishments to be handed down to persons found guilty of those offences and by the ***Constitutional (Sentencing Guidelines for the Courts of Judicature) (Practice) Directions Legal Notice No. 8 of 2013*** (the Sentencing Guidelines). The purpose of the Sentencing Guidelines is inter alia; to provide principles and guidelines to be applied by courts in sentencing; to provide sentencing ranges and other means of dealing with offenders; to provide a mechanism for considering the interests of victims of crime and the community when sentencing and to provide a mechanism that will promote uniformity, consistency, and transparency in sentencing.

The submission on consistency principle is to the effect that the sentences passed by the trial court must as much as circumstances may permit, be similar to those passed in previously decided cases having a resemblance of facts as the one in which sentence is being passed; and the appellate Court, may if called upon to do so, be justified in interfering with the sentences which contravene this principle. **(*See: Aharikundira Yustina vs Uganda* *(Supra))*.**

The Sentencing Guidelines in the 3rd schedule provides that in aggravated defilement, the starting point should be 35 years while the maximum point should be death.

We will now move to consider the sentences passed in previous cases of aggravated defilement. Counsel for the appellant cited, ***Rugarwana Fred vs Uganda*** *(Supra)* and

German Benjamin vs Uganda *(supra).* In both cases, the victims were 5 years and with no other aggravating factors a sentence of 15 years was found appropriate.

In the case of ***Tigo Stephen vs Uganda (Supra)*** cited by counsel for the respondent, the Supreme Court confirmed a sentence of 20 years' imprisonment for aggravated defilement of a 6-year-old victim.

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. The victim, in that case, was aged 3 years.

We observe that in cases where the aggravating factors outweigh the mitigating factors, the courts have given higher sentences. For example in ***Tiboruhanga Emmanuel vs Uganda*** *(Supra)* cited by counsel for the appellant, this Court considered the fact that the appellant was HIV positive as an additional aggravating factor and imposed a 25-year imprisonment.

The record of proceedings in the instant appeal shows that the learned trial Judge in imposing a sentence of 20-years' imprisonment had this to say;

> *"The accused is a first-time offender, he has been on remand for the past four years. These are mitigating factors. That notwithstanding, the offence of aggravated defilement is grave. It is committed against a child below14 years. In this case, it was worse because it was committed on a child of 5 years. Such an act cannot be glossed over. I find the accused acted beastly and cannot be treated with gloved fingers. He had two wives but still, they were not enough to keep him away from a child of 5 years. I have taken into account the long remand period and the fact that he is a first-time offender and he is sentenced to a 20 years imprisonment term."*

We observe that the sentence of 20 years' imprisonment is below the minimum limit of what is stipulated by the Sentencing Guidelines; however, it is within the range of sentences imposed in the cases cited above. We therefore, find no fault with the learned trial Judge's sentencing decision. From the foregoing ground 3 of the appeal fails for lack of merit.

In conclusion, we dismiss this appeal for the reasons stated hereinabove and uphold both the conviction and sentence.

We so order.

Dated at **Jinja** this 28th day of February 2022

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Hon Lady Justice Elizabeth Musoke

JUSTICE OF APPEAL

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Hon Mr. Justice Cheborion Barishaki

JUSTICE OF APPEAL

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Hon Lady Justice Hellen Obura

JUSTICE OF APPEAL