THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

[*Coram: Egonda-Ntende, Bamugemereire, Madrama, JJA*]

CRIMINAL APPEAL NO. 686 of 2014

(*Arising from High Court Criminal Session Case No 021 of 2012 at Kabale*)

BETWEEN

Nkurunziza Geoffrey ==========Appellant

AND

Uganda==========Respondent

(*An appeal from the Judgement of the High Court of Uganda [Kwesiga, J] delivered on 23rd May 2013)*

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted and convicted of the offence of aggravated defilement contrary to sections 129 (3) and (4) (a) of the Penal Code Act. The particulars of the offence were that the appellant on the 17th day of October 2010 at Gatyazo village Nyakinama sub-county in Kisoro district performed a sexual act on a girl aged 4 years. The learned trial judge sentenced the appellant to 20 years' imprisonment. Dissatisfied, the appellant appealed against the sentence only on the following grounds:

> '1. The Learned Trial Judge erred in law and fact in failing to take into account the appellant time spent on remand and hence sentence being illegal.
>
> 2. The learned trial Judge erred in law and facts inn imposing the sentence of 20 years of imprisonment on

the appellant which sentence was manifestly excessive and harsh on the appellant.'

[2] The respondent opposed the appeal.

[3] At the hearing, the appellant was represented by Mr. Andrew Byamukama and the respondent by Ms. Akasa Ritah. The parties opted to adopt their written submissions on record.

Submissions of Counsel

[4] Counsel for the appellant submitted that the learned trial judge did not take into consideration the 3 years that the appellant spent on remand while sentencing the appellant which was contrary to Article 23(8) of the Constitution. Counsel relied on Rwabugande v Uganda [2017] UGSC 8 where it was held that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with the mandatory provisions of the Constitution. He contended that the period spent on remand must be arithmetically subtracted from the sentence imposed against the appellant after considering relevant factors.

[5] On the other hand, counsel for the respondent contended that the learned trial judge took into account the period that the appellant spent on remand. She contended that at the time of sentencing, the law did not require an arithmetic deduction of the period that the appellant spent on remand as was stated in Rwabugande v Uganda (supra), court had only to take into consideration the period spent on remand. Counsel referred to Kizito Senkula v Uganda [2002] UGSC 36, Bukenya Joseph v Uganda [2010] UGCA 32 and Lubanga v Uganda [2014] UGCA 9. Ms. Akasa contended that the learned trial judge could not be expected to follow a law that was non-existent at the time of sentencing.

[6] Regarding ground 2, counsel for the appellant contended that the sentence of 20 years' imprisonment was harsh and excessive. He argued that there is need to maintain consistence in sentencing regarding cases of a similar nature. Counsel cited Ntambala v Uganda [2018] UGSC 1 where the Supreme Court confirmed a sentence of 14 years' imprisonment for the offence of aggravated defilement. Counsel prayed that this court finds the sentence against the appellant harsh and excessive upon consideration of the mitigating factors. He prayed that this court exercises its power under

section 11 of the Judicature to impose an appropriate sentence against the appellant.

[7] In reply, counsel for the respondent stated the principles upon which an appellate court can interfere with a sentence imposed by a trial court. She relied on Senkula v Uganda [2002] UGSC 36, Ogalo s/o Owowa v R (1954) 24 EACA 270, James v R (1950) 18 EACA 147 and Kyalimpa Edward v Uganda Supreme Court Criminal Appeal No. 10 of 1995 (unreported). Counsel for the respondent contended that the learned trial judge took into account the time that the appellant spent on remand, the appellant defiled a young girl of only 4 years, a relative whom he owed a duty of protection. She further contended that the case of Ntambala v Uganda (supra) is distinguishable from this instant case because the victim in that case was 14 years. Counsel stated that in Tindifa Moses v Uganda [2013] UGCA 4, this court upheld a sentence of 20 years' imprisonment where the appellant defiled a girl of 9 years. Counsel prayed that this court dismisses the appeal.

Analysis

[8] As an appellate court, we can only interfere with a sentence imposed by the trial court where it is either illegal, or founded upon a wrong principle of the law, or a result of the trial court's failure to consider a material factor, or where it is harsh and manifestly excessive in the circumstances of the case. See Kakooza v Uganda [1994] UGSC 1, Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No.143 of 2001 (unreported).

[9] The facts of this case are that on the 17th day of January 2010 while the victim was at home, the appellant who was a neighbour came and carried her to his home to visit a one Catherine. At his home, the appellant removed his trousers and forced her to remove her clothes and then forced her to have sexual intercourse with him. The victim felt a lot of pain and cried. She thereafter went home and when her mother came back shortly from the garden, she found the victim crying and asked her what happened. The victim narrated to her what the appellant had done to her. The victim's mother physically examined her and found that she had been sexually abused. She reported the matter to police and the appellant was arrested. A medical examination was carried out on the victim, and it was found that there were signs of vaginal penetration, her hymen was also

found to have raptured. The appellant was also examined and found be of sound mind.

Ground 1

[10] In ground 1, the trial Judge is faulted for not taking into account the period the appellant had spent on remand. While sentencing the appellant, the learned trial judge stated:

> '**Court:** I have considered the fact that the Accused has been on remand for about three years. He however, committed a very grave offence, defiling a child of four (4) years is defilement of extreme nature and he doesn't merit any lenience. The child was his relative, he had the duty to protect the child which he failed to do and chose to sexually exploit the child. This is the greatest violation of the child's right.
> This court has a duty to protect the girl child by keeping the criminals who prematurely exploit them. For this reason and considering the extreme age of four (4) years I am left with only one option to sentence the Accused to Twenty (20) years imprisonment.'

[11] Considering the period spent on remand while sentencing a convict is a mandatory constitutional requirement. See Rwabugande v Uganda [2017] UGSC 8. Article 23(8) of the Constitution states:

> '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 or her trial shall be taken into account in imposing the term of imprisonment.'

[12] The Supreme Court in Abelle Asuman v Uganda [2018] UGSC 10 while interpreting its decision in Rwabugande Moses vs Uganda (supra) where it had held that taking into account the period spent on remand while determining the appropriate term of imprisonment should be an arithmetical exercise stated:

> '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.'
>
> It appears to us that whether a court adopts the arithmetical approach or the non-arithmetical approach to complying with the aforesaid constitutional provision it is incumbent on the court to ascertain first the exact period the convict has spent in lawful custody and then choose whether to apply Rwabugande Moses v Uganda (the arithmetical formula) or Asuman Abelle v Uganda (the non- arithmetical approach). When this period is not ascertained it cannot be possible to correctly take it into account.'

[13] From the record, the appellant was arrested on 18th October 2010 and convicted on 23rd May 2013. He spent about 2 years and 8 months on remand. While sentencing the learned trial judge stated that he had considered the fact that the appellant had been on remand for about 3 years. In light of the above decision, the approach that the learned trial judge adopted is acceptable. We find that the learned trial judge took into account the period that the appellant spent on remand while sentencing.

[14] Ground 1 therefore fails.

Ground 2

[15] Under this ground, the learned trial judge is being faulted for meting out a harsh and excessive sentence. The appellant's mitigating factors during the sentencing proceedings were that he was a first offender, a young person and relative of the victim. He was remorseful and that the family had attempted to forgive him. The aggravating factors were that he was convicted of a grave offence whose maximum punishment is death. He defiled an innocent child of only 4 years of age.

[16] In Aharikundira v Uganda [2018] UGSC 49, the Supreme court stated:

> 'There is a high threshold to be met for an appellate court to intervene with the sentence handed down by a trial judge on grounds of it being manifestly excessive. Sentencing is not a mechanical process but a matter of judicial discretion therefore perfect uniformity is hardly possible. The key word is "manifestly excessive". An appellate court will only intervene where the sentence imposed exceeds the permissible range or sentence variation.'

[17] Courts are enjoined to consider the need for consistency while imposing sentences for similar offences committed in similar circumstances. See Guideline No. 6(c) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 and Kakooza v Uganda (supra).

[18] In Ninsiima v Uganda [2014] UGCA 65, this court reduced a sentence of 30 years' imprisonment to 15 years' imprisonment for the offence of aggravated defilement. The appellant had defiled a girl of 8 years, while in Candia v Uganda [2016] UGCA 27, this Court upheld a sentence of 17 years' imprisonment for the offence of aggravated defilement. The appellant was a stepfather of the 8-year-old victim.

[19] In German Benjamin v Uganda [2014] UGCA 63, the appellant defiled a 5 years old. The appellant was 35 years old. The appellant had spent 4 ½ years on remand and was a first offender who showed signs of reform. This Court set aside the sentence of 20 years' imprisonment and substituted the same with one of 15 years' imprisonment.

[20] In Birungi v Uganda [2014] UGCA 51, the appellant had been convicted of defilement of a girl under 18 years of age. He detained the girl for 2 days in his house during which he repeatedly defiled her. He was sentenced to 21 years of imprisonment. On appeal, this sentence was found to be harsh and excessive. It was substituted with a sentence of 12 years.

[21] In Byera v Uganda [2018] UGCA 61, the appellant was convicted of aggravated defilement and sentenced to 30 years' imprisonment. The victim was 3 ½ years, a stepdaughter to the appellant who was 39 years old. This court found a sentence of 20 years' imprisonment appropriate. The appellant was then sentenced to 18 years 4 months' imprisonment upon reducing the period spent on remand.

[22] In Apiku Ensio v Uganda [2021] UGCA 15, the appellant was convicted of aggravated defilement and sentenced to 25 years' imprisonment. The victim was under 14 years, dumb and with mental disability. This court found a sentence of 20 years' imprisonment appropriate. Upon reducing the period spent on remand, the appellant was sentenced to 17 years and 1-month imprisonment.

[23] In Ntambala v Uganda [2018] UGSC 1, the Supreme Court confirmed a sentence of 14 years' imprisonment imposed on the appellant for the offence of aggravated defilement.

[24] The learned trial judge took into account the period of 3 years that the appellant spent in pre-trial custody to arrive at a sentence to be served of 20 years. The learned judge took the view that a 23-year sentence of imprisonment was the appropriate sentence in this case. Having considered the mitigating and aggravating factors and parity in sentencing as shown in the above authorities, we find that the sentence of 23 years of imprisonment is harsh in the circumstances of the case. We shall therefore interfere with the sentence of the trial court. Ground 2 succeeds.

Decision

[25] In the circumstances of this case a sentence of 18 years' imprisonment would be appropriate. We deduct therefrom the period of 2 years and 8 months that the appellant spent on remand. **The appellant is to serve a**

term of 15 years and 4 months of imprisonment from the 23rd May 2013, the date of conviction.

Signed, dated and delivered at Mbarara this 3rd day of March 2022.

Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Christopher Madrama
Justice of Appeal