

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT MBARARA**

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

**CRIMINAL APPEAL NO. 0131 of 2014**

*(Arising from High Court Criminal Session Case No.0277 of 2007 at Mbarara)*

**BETWEEN**

Nshemeire Denis =====Appellant

**AND**

Uganda=====Respondent

*(An appeal from the Judgement of the High Court of Uganda [Kwesiga, J] delivered on 24<sup>th</sup> June 2010)*

**JUDGMENT OF THE COURT**

**Introduction**

[1] The appellant was indicted and convicted of the offence of defilement contrary to section 129 (1) of the Penal Code Act. The particulars of the offence were that the appellant on the 3<sup>rd</sup> day of April 2007 at Ndeija sub county headquarters in Mbarara district had unlawful sexual intercourse with a girl under the age of 18 years. The learned trial judge sentenced the appellant to life imprisonment.

[2] Dissatisfied with the decision of the trial court, the appellant appealed against the sentence only on the following ground:

‘1. The learned trial judge erred in law and fact in imposing the sentence of life imprisonment on the Appellant which is manifestly excessive and harsh in all circumstances.’

- [3] The respondent opposed the appeal.
- [4] During the hearing of this appeal, the appellant was represented by Mr. Sam Dabangi while the respondent was represented by Mr. Oola Sam, Assistant Director of Public Prosecutions. The parties opted to rely on their written submissions filed earlier in this matter.

### **Submissions of Counsel**

- [5] Counsel for the appellant contended that the sentence of life imprisonment is equivalent to the death penalty given the interpretation of the Supreme Court in Tigo Stephen v Uganda [2011] UGSC 7. He argued that such a sentence does not give an opportunity to the convict to reform. Mr. Dhabangi submitted that the appellant was a first offender, 30 years at the time of conviction, was remorseful and had been on remand for 3 years and 21 days. He left behind a helpless family. Counsel cited Guloba Rogers v Uganda [2021] UGCA 16 where this court was of the view that all the above factors should have been taken into consideration while sentencing.
- [6] Counsel for the appellant then relied on Kyalimpa Edward v Uganda Supreme Court Criminal Appeal No. 10 of 1995 (unreported), Ogalo s/o Owoura v R (1954) 21 EACA 270, Kamyia Johnson Wavamuno v Uganda Supreme Court Criminal Appeal No. 16 of 2000 (unreported) for the principles upon which an appellate court can interfere with a sentence imposed by a trial court. He contended that there is need for consistence in sentencing, relying on Ainobushobozi Venancio v Uganda [2014] UGCA 50 and Aharikundira v Uganda [2018] UGSC 49. Counsel cited Ayebare Bangye v Uganda [2018] UGCA 97 where this court found a sentence of 12 years' imprisonment appropriate for the offence of defilement of a victim of 11 years.
- [7] Further, Mr. Dhabangi cited Ntambala v Uganda [2018] UGSC 1 where the Supreme Court upheld a sentence of 14 years' imprisonment for aggravated defilement. The victim was 14 years old. He also relied on Bashir Ssali v Uganda [2005] UGSC 21 where the Supreme Court

reduced the appellant's sentence from 16 years to 14 years' imprisonment upon taking into consideration the period spent on remand.

- [8] Mr. Dhabangi submitted that a sentence of 12 years' imprisonment would be appropriate in the circumstances of the case.
- [9] On the other hand, Mr. Oola cited Rwabugande v Uganda [2017] UGSC 8 for the principles under which an appellate court can interfere with the sentence imposed by the trial court. He contended that the aggravating factors outweighed the mitigating factors in this case. Counsel referred to a number of cases where a sentence of life imprisonment was imposed on the offender for the offence of aggravated defilement. He cited Bacwa Benon v Uganda Court of Appeal Criminal Appeal No. 869 of 2014 (unreported) where the appellant, aged 38 years was sentenced to life imprisonment for defiling a 10-year-old girl. He also relied on Bonyo Abdul v Uganda Supreme Court Criminal Appeal No. 07 of 2011 (unreported) where the Supreme Court upheld a sentence of life imprisonment. The appellant was HIV negative, and the victim was 14 years old. Counsel also relied on Kaserebanyi James v Uganda [2014] UGCA 89, where the appellant was sentenced to imprisonment for life. He was the father to the victim who was 15 years old. The appellant had repeatedly defiled the daughter and impregnated her.
- [10] Counsel contended that the victim in this case was only 5 years old hence the circumstances were more grievous than those in the cases mentioned above. He submitted that the sentence of life imprisonment was appropriate in this case. He prayed that this court upholds the sentence against the appellant and dismisses the appeal.

### **Analysis**

- [11] The facts of this case are that on 3<sup>rd</sup> April 2007 at around 1:00 pm while the victim was on her way home from school via Ndejja sub county headquarters, she met the appellant who carried her to a nearby banana plantation and had sexual intercourse with her. The victim started bleeding in her private parts. When she went home, she did not tell her grandmother with whom she was staying until the grandmother found her washing bloody knickers behind the house. When she inquired as to why the water was bloody, the victim revealed to her that the appellant had

had sexual intercourse with her. The victim's grandmother reported the matter to the LC1 chairperson who arrested the appellant. The victim identified the appellant as the man who had sexual intercourse with her. The victim was subjected to medical examination, and it was established that her private parts had been penetrated. It was found that the hymen was bruised, swollen and actively haemorrhaging with significant tenderness over the *introitus*. The injuries were found to be consistent with force having been used sexually. The appellant was also medically examined and found to be a 28-year-old male of sound mind.

[12] As an appellate court, we can only interfere with a sentence 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 the sentence 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).

[13] The appellant contended that the learned trial judge imposed a harsh and manifestly excessive sentence against him. While sentencing the appellant, the learned trial judge stated:

**'SENTENCING**

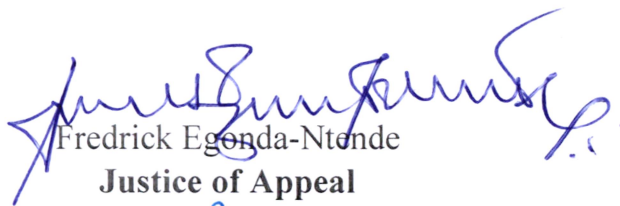
I have carefully listed to the submissions of both State and defence Advocates. The accused aged 30 years and has been on remand for 3 years. I have also considered the brutal damage the accused caused to a child of only 5 years which cannot be compensated. She was deprived of the innocence which can never be restored. The vice of defilement is so rampant that it threatens the future of our society. The public and particularly the parents are left permanently worried about the safety of the child who must be protected by the law. This court has a duty on behalf of society, not to handle defilers with lenience because it would perpetuate this evil. It is my duty to protect the children by keeping the defilers out of circulation long enough for them to learn and to warn others. Defiling a child of 5 years is brutal and total lack of respect for children. I am not impressed by the accused request to be allowed to go back to protect his children while he destroyed a child. The only lenience I find for him is not to sentence him to death. I find the option of Life imprisonment appropriate. He is accordingly sentenced.'

- [14] The defence while mitigating the sentence stated that the appellant was a first offender, had been on remand for 3 years and 21 days, he was 30 years old with a wife and two children dependant on him. The appellant prayed for a lenient sentence. The aggravating factors were that the offence of aggravated defilement carries the maximum penalty of death, defilement is rampant, the victim's future was shattered, the victim's rights were abused by the reckless and inhuman acts of the respondent. The state prayed for a deterrent sentence.
- [15] The sentencing order as laid out above does not reflect consideration of the fact that the appellant was a first offender, a mitigating circumstance that ought to have been taken into account by the trial court. Much as the sentencing order mentions the fact the appellant was 30 years old it is not clear that the trial court took it into account and that the appellant may have been capable of reform, if given the opportunity. The court concentrated on the aggravating factors. This error is sufficient to compel us interfere with the sentence of the trial court.
- [16] It should be noted that there is 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).
- [17] In Candia v Uganda [2016] UGCA 27, this court declined to interfere with a sentence of 17 years' imprisonment imposed against the appellant on the ground that it was too lenient given the circumstances of the case. The appellant was a stepfather to the 8-year-old victim. In Owinji v Uganda [2016] UGCA 16, this court reduced a sentence of 45 years' imprisonment to 17 years' imprisonment for the offence of aggravated defilement. The appellant was 37 years while the victim was 12 years old. The appellant was a relative to the victim and had used threats and violence while committing the crime.
- [18] In Kobusheshe vs Uganda [2014] UGCA 5, the appellant who was 30 years old at the time the offence was committed was convicted of defilement of a 5 years old girl and sentenced to 17 years' imprisonment. On appeal against severity of sentence, this court upheld the sentence. It


was of the view that the sentence of 17 years' imprisonment was not harsh and excessive in the circumstances of the case.

- [19] In Ninsiima v Uganda [2014] UGCA 65, the appellant was convicted of the offence of aggravated defilement of a girl aged 8 years old and was sentenced to 30 years' imprisonment. On appeal to this Court, the sentence of 30 years' imprisonment was set aside and substituted with a sentence of 15 years' imprisonment. The appellant was 29 years old while the victim was 8 years. This court took into consideration the fact that the appellant was a first offender and he had family responsibilities and dependants.
- [20] In Babua v Uganda [2016] UGCA 34, the appellant was convicted of the offence of aggravated defilement and sentenced to life imprisonment. The appellant aged 32 and was a husband to the victim's aunt. The victim was 12 years old. On appeal, this court set aside the sentence and substituted it with a sentence of 18 years' imprisonment. In Okello Geoffrey v Uganda [2017] UGSC 37, the Supreme Court confirmed a sentence of 22 years imprisonment for the offence of aggravated defilement.
- [21] In Ederema Tomasi v Uganda [2019] UGCA 203, this court set aside a sentence of 25 years' imprisonment and substituted it with one of 18 years' imprisonment for the offence of aggravated defilement. This court took into consideration the fact that the appellant was a first offender, had a dependent child and was remorseful. In Apiku Ensio v Uganda [2021] UGCA 15, the appellant was tried and convicted of the offence of aggravated defilement contrary to section 129 (3) (1) (4) (a) of the Penal Code Act and sentenced to 25 years' imprisonment. The victim was 14 years, dumb and with mental disability. This court found a sentence of 20 years' imprisonment appropriate.
- [22] In light of the foregoing we find that a sentence of 18 years' imprisonment would be appropriate in the circumstances of this case from which we deduct the 3 years and 21 days that the appellant spent on remand.
- [23] We therefore sentence the appellant to a term of imprisonment of 14 years, 11 months and 9 days from 24<sup>th</sup> June 2010, the date of conviction.


Signed, dated and delivered this 3<sup>rd</sup> day of March 2022.



Fredrick Egonda-Ntende  
**Justice of Appeal**



Catherine Bamugemereire  
**Justice of Appeal**



Christopher Madrama  
**Justice of Appeal**