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THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
CRIMINAL APPEAL NO. 186 OF 2014

*(Coram: Egonda-Ntende, Bamugemereire & Madrama, JJA)*

10 NUWESHABA ASAPH} ..... APPELLANT

VERSUS

UGANDA} ..... RESPONDENT

*(Appeal from the decision of the High Court of Uganda at Mbarara in  
Criminal Session Case No. 330 of 2012 sitting at Mbarara before V.T*

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*Zehurikize, J delivered on the 12<sup>th</sup> of August, 2013)*

**JUDGMENT OF COURT**

The Appellant was charged with Aggravated Defilement contrary to section 129 (3) & (4)(a)(c) of the Penal Code Act, Cap. 120 laws of Uganda. He was tried and convicted as charged and sentenced to 15 years' imprisonment. The appellant was aggrieved and appealed against sentence only.

The facts accepted by the trial judge are that the Appellant on 10<sup>th</sup> June 2012 at Rwabaramira Cell in Ntungamo District had unlawful sexual intercourse with A J. Medical evidence showed that the girl was 14 years old and had had sexual intercourse and was pregnant. The appellant was her teacher at Universal Nursery Primary School. The appellant lured the victim into sexual intercourse under the guise of assisting her in revising social studies by going through past examination papers. The victim of the offence got pregnant and in a bid to hide the fact, the appellant decided that they leave the area. He went to Nyaihanga where he rented a room and lived with the victim as husband and wife. Four days later the appellant was arrested by the police. He found the appellant guilty of aggravated defilement contrary to section 129 (3) (4) (a) (c) of the Penal Code Act and sentenced the Appellant to 15 years' imprisonment.

5 Being dissatisfied with the decision of the High Court, the Appellant  
appealed against sentence only on the sole ground that:

**The learned trial Judge erred in law and fact in imposing the  
sentence of 15 years' imprisonment on the Appellant which is  
manifestly excessive and harsh in all circumstances.**

10 He prays that the sentence be set aside and substituted with a lesser and  
more appropriate sentence.

At the hearing of the appeal, the Appellant was represented by Mr.  
Dhabangi Samuel on state brief while the respondent was represented  
by Mr. Ddungu Martin, Chief State Attorney for Director of Public  
15 Prosecutions.

Both counsel addressed the court in written submissions. Mr. Dhabangi  
invited the court to consider the record which he reproduced in the  
submissions as well as the ruling on sentence and submitted that the  
issue for determination is whether the sentence of 15 years'  
20 imprisonment for aggravated defilement imposed on the appellant was  
harsh and excessive. In the sentencing proceedings, the learned trial  
judge listened to the aggravating factors submitted by the state and the  
mitigating factors submitted for the accused. He considered the fact that  
the appellant was a first offender, a young person at the age of 21 years  
25 at the time of sentencing and was repentant. He also took into account  
the period of 3 years that the appellant spent in pre-trial detention. He  
invited the court to reappraise the background and development in the  
case and reduce the sentenced to 12 years from the date of conviction.  
He referred the court to a string of authorities on the issue of sentence  
30 that we have taken into account.

In reply Mr. Ddungu submitted that it is settled law that sentencing is at  
the discretion of the trial judge and an appellate court will only interfere  
with a sentence imposed by the trial court if it is evident that it is based  
on the wrong principle or that the trial judge overlooked some material  
35 fact or if the sentence is manifestly harsh and excessive in the  
circumstances (see **Kiwalabye Bernard v Uganda; SCCA No 143 of 2001,**  
**Kato Kajubi Godfrey v Uganda SCCA No 20 of 2014,** and **Kyalimpa Edward**  
**v Uganda: SCCA No 10 of 1995).**

5 With reference to the sentencing notes of the learned trial judge, the  
respondent's counsel submitted that it is clear that the trial judge  
considered both the aggravating and mitigating factors. He considered  
all facts and circumstances of the case and deducted the period of one  
10 sentence of 15 years' imprisonment. The appellant did not refer to any  
material factor or circumstances that the trial judge did not take into  
account in passing sentence. In addition, counsel submitted that the  
peculiar circumstances of the case are that the convict introduced his  
15 pupil to early sex and there was need to discourage teachers from taking  
advantage of their position. The learned trial judge intended to protect  
the public from teachers who use their positions to take advantage of  
innocent young girls by exposing them to early sex. He submitted that it  
was important for the sentencing judge to take into account the right of  
20 the victims and the public interest while sentencing a convict (see **Busiku  
v Uganda; SCCA No 33 of 2011**). The respondents counsel opposed any  
sentence below 15 years whose likely consequence would be to expose  
the public and young school going girls to early sex by their own  
teachers.

He invited the court to consider several other decisions in similar cases  
25 for consistency as held in **Mbunya Godfrey v Uganda; SCCA No 004 of  
2011**. He referred to several cases where sentences of defilement ranged  
between 11 years to 15 years with aggravated defilement being at the top  
end of 15 years. He prayed that this court confirms the sentence and  
dismisses the appeal.

### 30 **Resolution of appeal**

We have carefully considered the appellant's appeal which is on the sole  
issue of sentence.

It is trite law that an appellate court may interfere with a sentence  
imposed by the trial court if the trial court acted on a wrong principle or  
35 misdirected itself or overlooked a material factor. The court may also  
interfere with a sentence that is manifestly excessive or too low as to  
amount to an injustice (See **Ogalo s/o Owoura v R (1954) 21 EACA 270**,

5 **James v. R, (1950) 18 EACA 147**). These principles have been emphasised over and over again and we need not belabour them in this appeal.

The sole ground of appeal is that: "The learned trial judge erred in law and fact in imposing a sentence of 15 years on the appellant which is manifestly excessive and harsh in all circumstances." As far as the  
10 ground of appeal is concerned, the question is whether 15 years' imprisonment for aggravated defilement is manifestly harsh and excessive given the circumstances. In the ruling of the learned trial judge, he stated that:

I have considered submissions by both counsel and the convict's  
15 prayer. I have noted that the convict is a young teacher of 24 years old.

He appears repentant and would like to look after his child the product of this offence. He has been on remand for one year and one month.

20 On the other hand, he has committed a serious offence by introducing his pupil into early sex. He misused his position. I have nevertheless noted that the victim is still at school and the offence was committed without any form of violence to the victim who was then 14 years old.

25 Considering all the witnesses of this and in a bid to discourage teachers from taking advantage of their position and having deducted the record of 1 year and one month spent on remand, I sentence the convict to a term of 15 (fifteen) years imprisonment.

We have carefully considered the record. The appellant was charged with  
30 aggravated defilement contrary to section 129 (3) (4) (c) of the Penal Code Act. There are however some inconsistent facts relating to the age of the victim. The summary of the case which was signed by the Resident State Attorney and dated 7<sup>th</sup> November 2012 shows that on 10<sup>th</sup> June 2012 the victim was 15 years old at the time of the offence. The medical report  
35 includes form 3 exhibit P1 shows that the victim was 14 years old as told by the father. The form was signed by a doctor and there was no attempt to show that the doctor considered the age of the victim worth

5 investigating. The medical examination report of Universal Healthcare Home in Ntungamo dated 13<sup>th</sup> of June 2012 reads as follows on the remarks:

For purposes of litigation this 14-year-old was defiled. She is pregnant 20 weeks.

10 PW1 Asaph Nkuba, the father of the victim testified that she was around 16 years old on the date of the testimony on 4<sup>th</sup> July 2013. The offence took place on 6<sup>th</sup> June 2012 which suggests that the victim was about 15 years old. However, the record shows that the victim testified on 4<sup>th</sup> July 2013  
15 when she was 15 years old suggesting that she could have been 14 years old. There is inconsistency in the testimony of the father about the age of the victim. Section 129 (3) (4) (c) makes it an offence of aggravated defilement where the victim under 18 years is defiled by a parent or guardian who has authority over the person against whom the offence is committed. The appellant was a teacher of the victim and used his  
20 position to lure her into sex. They even started living together and the evidence suggested that this was to elude detection. It is the father of the victim who traced the appellant and found him in a neighbouring town where the victim and her teacher (the appellant) were living together as "husband and wife".

25 The learned trial judge considered all the material factors and even stated that the purpose of the sentence was to act as a deterrence. The victim and the appellant have a child but this does not excuse the offence. We agree with the respondent that sentencing is at the discretion of the judge. The learned trial judge deemed it fit to pass a deterrent sentence  
30 in light of the relationship of a teacher/student.

In passing sentence, the learned trial judge stated that he had considered submissions by both counsel and the prayer of the convict. The state attorney had submitted that he had no previous record of the convict who had been on remand for one year and one month. He then went on to  
35 indicate the aggravating factors. On the other hand, as far as mitigation is concerned, the respondent's counsel submitted that the convict was 25 years, was not married and had no children but had two old parents whom he was looking after. He had apologised to the victim and her

5 parents for the trauma they had gone through and that he was misled by relatives that is why he did not plead guilty.

The learned trial judge clearly took into account all the material factors and did not have to expressly state that he had considered the fact that the convict had no previous record of conviction. He stated that he took  
10 into account the submissions of the counsel. The learned trial judge exercised his discretion powers and sentenced the appellant to a deterrent sentence within the range of sentences for cases of aggravated defilement.

Last but not least, the sole ground of the appeal is that the learned trial  
15 judge passed a manifestly harsh and excessive sentence. We have considered the duty of this court as well as the High Court as a court exercising original jurisdiction to promote reconciliation between parties as stipulated in article 126 (2) (d) of the Constitution. The victim and the appellant were living together as husband and wife and the victim  
20 delivered a baby on 14<sup>th</sup> December 2012. PW1, the father of the appellant stated that he was annoyed because the appellant had gotten his daughter pregnant. Secondly, the appellant had disappeared with his daughter and was renting premises in a neighbouring town. The appellant had disappeared from the school where he was a teacher. The appellant  
25 was remorseful and indicated that he wanted to take care of his baby girl whom he loves. Secondly, the victim of the offence continued with her schooling. The appellants counsel submitted that the court should consider the interest of the child.

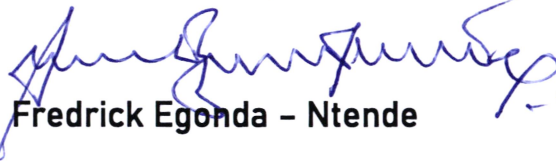
We find that this is one of those rare cases where reconciliation between  
30 the parties ought to have been promoted to create peace. The appellant should be given a chance to take care of his daughter. On that basis we find that a sentence of 15 years' imprisonment would be harsh and excessive in the circumstances. We hereby set aside.

The appellant's counsel prayed that the court sentences the appellant to  
35 12 years' imprisonment. On the other hand, the respondents counsel submitted that a sentence of 15 years' imprisonment would be appropriate in the circumstances of the case.

5 Having considered all the above factors, we think that the issue at hand  
is that the victim and the appellant were living together. Secondly, there  
was room for reconciliation between the two families and the victim  
continued with her schooling. Thirdly there is a child who deserves to be  
taken care of by parents. The appellant was remorseful. He expressed a  
10 desire to take care of his only child. In the premises, exercising the  
jurisdiction of this court under section 11 of the Judicature Act, we find  
that a sentence over 10 years' imprisonment would have been  
appropriate in the circumstances and would promote reconciliation  
between the parties. From that sentence we take into account the period  
15 of one year and one month that the appellant spent in pre-trial detention  
before his conviction. We accordingly allow the applicant's appeal against  
sentence which we have set aside. We sentence the appellant to 8 years  
and 11 months' imprisonment which sentence shall commence on the  
date of his conviction on 5<sup>th</sup> July 2013.


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Dated at Mbarara the 3<sup>rd</sup> day of March 2022

  
**Fredrick Egonda - Ntende**

**Justice of Appeal**

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**Catherine Bamugemereire**

**Justice of Appeal**

  
**Christopher Madrama**

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**Justice of Appeal**