THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 266 OF 2015

Coram: (Richard Buteera DCJ, Elizabeth Musoke and Cheborion Barishaki, JJA)

MWANJE GODFREY:: APPELLANT

VERSUS

UGANDA ::: RESPONDENT

(Appeal from the sentence of the High Court of Uganda at Entebbe before Elizabeth Jane Alvizida, J dated 20th July, 2015 in High Court Criminal Case No.059 of 2014)

JUDGMENT OF THE COURT

The appellant was indicted and convicted on two counts of the offence of aggravated defilement contrary to section 129 (3) and 4 (a) and (c) of the Penal Code Act and was sentenced to 22 years imprisonment on his own plea of guilty.

The facts giving rise to this appeal and as stated by the prosecution in the trial court are that;

On the 10th of April 2012, the victim Yesu Araseceze wrote a note and left it on the mother`s bed. In the note, she stated that her teacher, the appellant told her to remove her knickers and slept on top of her. That she felt a lot of

pain after which she cleaned her vagina with a handkerchief and she saw blood like things. The following day the mother decided to inform the head master of the school where the victim studied about the incident who in turn reported to Naluvulye police post. Investigations were carried out and it was learnt from the victim that on a certain day in March when other children had gone to class at about 0700hrs, the appellant called the victim into their dormitory, told her to remove her knickers and lay her down, blinded folded her using her sweater and had sex with her. The appellant cautioned her not to make any noise lest he would beat her and after the act he wiped her off using a piece of cloth. That the same act happened again another time during the night when elder girls had escorted the day scholars to go back. That it was until she went home for Easter season that she wrote her mum a note narrating what had befallen her.

A medical examination indicated that she had a ruptured hymen with inflammations on the vaginal walls. The appellant was arrested and upon examination, he was found to be of normal mental status. He was indicted, convicted and sentenced to 22 years imprisonment on his own plea of guilty.

Being dissatisfied with the said sentence, the appellant sought leave of court to appeal against sentence only under section 132 (1) (b) of the trial on indictment Act, which was granted.

The sole ground of appeal states;

That the learned trial Judge erred in law and fact when she subjected the appellant to a sentence that was harsh and manifestly excessive in the circumstance of the case.

At the hearing of the appeal, Mr. Mutange Ian Derrick appeared for the appellant while the respondent was represented by Ms Nakafero Fatina Chief State Attorney.

It was submitted for the appellant that the learned trial Judge omitted to consider previous cases and precedents to ensure consistency while imposing the sentence. Counsel cited **Owinji William versus Uganda Criminal Appeal No. 106 of 2013 relying on German Benjamin versus Uganda Criminal Appeal No. 142 of 2010** for the position of the law that court will only interfere with a sentence imposed by a trial court where it is either illegal or founded on a wrong principle of law or overlooked a material factor.

Counsel also cited **Ninsiima Gilbert versus Uganda CACA No. 0180 of 2010** to say that the guidelines have to be applied taking into account past precedents of court decisions where the facts of these decisions have a resemblance to the case under trial. He also referred court to Guidelines 6 (c) of the constitution sentencing guidelines to support the said proposition.

He submitted that the learned trial Judge made no reference to previous cases in which a similar offence was committed and accused persons sentenced but instead sentenced the appellant to 22 years imprisonment without considering previous judicial precedents. He cited **Mbunya Godfrey vs Uganda SCCA No. 004 of 2011** for the position although no two crimes are

identical, courts should try as much as possible to have consistency in sentencing.

Counsel referred court to the decision in **Jackson Zita vs Uganda SCCA No. 019 OF 1995** where court upheld the sentence of 7 years imprisonment imposed on the appellant for aggravate defilement. That In **German Benjamin v Uganda** Supra, court set aside the sentence of 20 years and substituted it with one of 15 years imprisonment. He implored court to apply the principle of uniformity to find that the sentence of 22 years imprisonment was excessive.

Counsel for the appellant further submitted that the appellant was a first time offender, was youthful, he pleaded guilty, had family responsibilities, was remorseful and asked forgiveness from the complainant. That these mitigating factors were sufficient to earn the appellant a lower sentence than 22 years imprisonment. He prayed that the sentence of 22 years be set aside.

In reply, it was submitted for the respondent that in arriving at the sentence of 22 years imprisonment, the learned trial Judge considered both aggravating and mitigating factors as advanced by the appellant`s lawyer. Counsel cited **Sekitoleko Yudah & Ors versus Uganda SCCA No. 33 of 2014** for the proposition that an appropriate sentence is a discretion of the sentencing Judge and the appellate court will only interfere with the discretion of the sentencing judge if court is satisfied that the sentence imposed was manifestly so excessive as to amount to an injustice.

Regarding the appellant being remorseful and young which could have earned him a lenient sentence, counsel cited **Ojangole versus Uganda SCCA No. 20 of 2019** where court noted that; *"the fact that the appellant had family obligations could have been raised at the level of the trial court...At this level we would not be in position to re consider the mitigating factors raised by the appellant and aggravating factors raised by the prosecutor before awarding the sentence. The court went ahead to confirm a sentence of 32 years imprisonment."*

Regarding the principle of consistency, counsel submitted that each case presents its own facts upon which court exercises its discretion and referred to **Muwonge Fulgensio v Uganda CACA No. 0586 and Kaddu Kavulu Lawrence v Uganda SCCA No. 72 of 2018** where court appeared to cast doubt on the application of the principle of consistency when it ignored counsel`s argument on the weight to be attached to precedents while sentencing. That the sentence meted out against the appellant was a deserving one and should be upheld.

As a first appellate Court, we are required to re-appraise the evidence adduced and make our own inferences. ***See Rule 30(1) of the Rules of this Court and Kifamunte Henry V Uganda, Supreme Court Criminal Appeal No.10 of 1997***

The learned trial Judge is faulted for having failed to consider the principle of consistency and uniformity in sentencing and the mitigating factors; that the appellant was a first time offender, youthful, pleaded guilty, had family responsibilities, was remorseful and asked forgiveness from the complainant.

The circumstances when an appellate court can interfere with the sentence imposed by a trial Judge are well settled. In ***Kyalimpa Edward v Uganda, SCCA No 10 of 1995*** the Supreme Court made reference to the case of ***R v De Havilland (1983) 5 Cr. App (R) s 109*** and held that;

> *"An appropriate sentence is a matter for the discretion of the sentencing Judge. Each case presents its own facts upon which a Judge exercises his discretion. It is a practice as an appellate court; this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice."*

During allocutus the respondent submitted that the victim was a first time offender, there was premeditation since he defiled twice, he was in place of authority as a teacher of the victim, he was 20 years and the victim 11 years, he instilled fear in the victim never to mention the act to any one and that the offence was rampant.

In mitigation, it was submitted by counsel that the appellant was a first time offender, remorseful, pleaded guilty and had not wasted court`s time, spent 3 years on remand, was a misguided youth and had learnt a lot from prison.

The appellant himself stated that he was a football coach, he prayed for forgiveness from the complainant and that he had learnt a lot from prison. He prayed for mercy.

In sentencing the appellant, the learned trial Judge stated as follows;

"The maximum sentence for aggravated defilement is death. Accused has pleaded guilty and has saved court`s time and resources from the state. Therefore, I will start from 25 years imprisonment instated of 35 years imprisonment and add or reduce according to the mitigating factors. The convict is remorseful and he is a first time offender. He has indicated to court that he has family responsibilities. He is remorseful and even asked the complainant and the victim to forgive him when they came to testify in court. Therefore those are factors which can convince court to be lenient.... I also take note of the fact that this was a repeated act by the accused it was not a onetime incident and the way you were committing the act you would make the girl remove her knickers, blindfold her with a sweater, it was kind of de humanising. Therefore considering all these facts. I sentence you to 22 years imprisonment."

From the above sentencing decision, it evident that the learned trial Judge took into account the fact that the appellant was a first time offender, he pleaded guilty and did not waste court`s time , he was remorseful and prayed for forgiveness before sentencing the appellant to 22 years imprisonment.

Regarding consistency and uniformity in sentencing, The Supreme Court has in ***Mbunya Godfrey V Uganda*** Supra, emphasized the need to maintain consistency while sentencing persons convicted of similar offences. Court stated that *"We are alive to the fact that no two crimes are identical. However, we should try as much as possible to have consistency in sentencing."*

Guideline 6 (c) of the Constitution sentencing guide lines (Practice Directions) 2003 provides that every court shall when sentencing an offender

take into account the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances

A look at some of the sentences in aggravated defilement shows that;

In ***Okello Geoffrey versus Uganda, Supreme Court Criminal Appeal No. 34 of 2014*** where court upheld a sentence of 22 years imprisonment against the appellant for aggravated defilement. The appellant was a person of authority at Latai primary School and the victim was a girl below 18 years.

In ***Tigo Stephen V Uganda, Supreme Court Criminal Appeal No.8 of 2009***, the appellant defiled a 6 year old girl. On second appeal to this Court, the sentence of 20 years imprisonment was upheld.

Taking into account the above authorities, we are of the view that the sentence of 22 years meted out against the appellant was neither harsh nor excessive and hereby uphold it.

The appeal fails and the appellant should serve the sentence of 22 years imprisonment starting from the date of conviction.

We so order.

Delivered at Kampala this 14th day of March 2022.

Richard Buteera

DEPUTY CHIEF JUSTICE

Elizabeth Musoke

JUSTICE OF APPEAL

Cheborion Barishaki

JUSTICE OF APPEAL

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