THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 073 OF 2010

Coram: (Richard Buteera DCJ, Cheborion Barishaki & Muzamiru M. Kibeedi JJA)

TWINAMASIKO PETER:: APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the sentence of the High Court of Uganda at Mpigi before Elizabeth Ibanda Nahamya, J dated 11th May, 2010 in High Court Criminal Case No.077 of 2010)

JUDGMENT OF THE COURT

The appellant was indicted and convicted of the offence of aggravated defilement contrary to section 129 (3) and 4 (c) of the Penal Code Act and was sentenced to 34 years imprisonment.

The facts giving rise to this appeal are that on the 28th day of February 2009 at 1:00pm, Babirye Victo was at home, seated outside their house weaving a mat while in custody of her 2 young children, and another named Lydia Namyalo who was Madina Bukirwa`s daughter. Babirye`s child went to sleep and she took her inside the house. No sooner had she done that than Lydia Namyalo also fell asleep and she also took her inside the house as her mother was not around. When she returned to weave her mat, she had Lydia crying

and decided to go back inside the house to find out why she was crying. On reaching the house, Babirye found the appellant having sexual intercourse with the child, he had put his penis into the child`s private parts. Babirye informed people who were around and when Lydia`s mother returned, Lydia told her that her Dad the appellant, had put his penis in her private parts.

Police was called, the appellant was arrested, indicted of aggravated defilement, convicted and sentenced to 34 years imprisonment.

Being dissatisfied with the said sentence, the appellant sought and was granted leave to appeal against sentence only under section 132 (1) (b) of the Trial on indictments Act.

The sole ground of appeal states;

That the learned trial Judge erred in law and fact by imposing a manifestly harsh sentence on the appellant.

At the hearing of the appeal, Ms. Awelo Sarah appeared for the appellant while the respondent was represented by Mr. Edward Muhumuza, Chief State Attorney.

It was submitted for the appellant that this Court in **Abaasa Johnson v Uganda Criminal Appeal No. 33 of 2010** stated 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. Counsel submitted that the learned trial Judge omitted to consider the fact the appellant was a first time offender. Counsel

prayed that the sentence be reduced from 34 years to 10 years imprisonment which was sufficient to reform the appellant and be useful to the community.

Counsel cited **Katende Ahamad Senkula v Uganda SCCA6/2004** where the appellant defiled his own daughter aged 9 years and on the second appeal to the Supreme Court he was sentenced to 10 years imprisonment after taking into account the period of 2 and a half years the appellant had spent on remand. Counsel added that in **Kizito Senkula v Uganda CACA No. 24 of 2001**, the appellant had defiled a child aged 11 years and court sentenced him to 15 years imprisonment.

Counsel further relied on the case of **Lukwago Henry v. Uganda, CACA No. 36 of 2010** where the appellant had been convicted of aggravated defilement of a 13 year old girl. Court upheld the sentence of 13 years imprisonment.

Counsel prayed that the appeal be allowed and the appellant be sentenced to 10 years imprisonment.

In reply, it was submitted for the respondent that 35 years imprisonment in the circumstances of this case was justifiable. Counsel submitted that it's not evident that the learned trial judge acted upon a wrong principle or overlooked some material factor or that the sentence was harsh and manifestly excessive in view of the circumstances of the case as warranted in **Kizito Senkula versus Uganda Supra.** Counsel contended that interfering with a sentence is not a matter of emotions but rather one of law and that unless it can be proved that the trial judge flouted any principles in sentencing, then it does not matter whether members of the appellant court would have given a different

sentence if they had been the one trying the appellant. He referred court to **Ogalo s/o Owousa vs. [1959] 24 EACA 270**

Counsel further submitted that **guideline 19 of the constitution (sentencing guidelines for courts of judicature) (Practice) Directions 2013** 3rd schedule Part 1 provides the sentencing range for aggravated defilement to be 30 years up to death and the starting point is 35 years. He contended that the trial court in the instant case considered both aggravating and mitigating factors before passing a sentence of 34 years and noted that the action of the appellant on a victim of 4 years deserved deterrence. That the appellant needed to be kept away from defiling young girls and spreading HIV. He prayed that the sentence be upheld and the appeal dismissed.

This being a first appeal, we are required by law to re-evaluate the evidence at the trial and come up with our own decision on all matters of law and fact. This requirement is set out in Rule 30(1) of the Rules of this Court. **See also: Fr. Narcensio Begumisa & others vs Eric Tibebaaga Supreme Court Civil Appeal No. 17 of 2002, Kifamunte Henry vs Uganda Supreme Court Criminal Appeal No. 10 of 1997 and Bogere Moses vs Uganda Supreme Court Criminal Appeal No. 1 of 1997.**

We have carefully perused the court record and considered the submissions of both learned counsel as well as the law and authorities cited to us.

The learned trial Judge is faulted for not considering the appellant`s mitigating factor that he was a first offender.

The appellate Court is not to interfere with the sentence imposed by a trial Court which has exercised its discretion unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial Court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle. ***See Kiwalabye Bernard V Uganda, Criminal Appeal No.143 of 2001 and Livingstone Kakooza V Uganda, Supreme Court Criminal Appeal No.17 of 1993 (unreported).***

During allocutus it was submitted for the respondent that the victim was 4 years, convict 25 years, he was a father to the victim, he knew he was HIV positive but had sexual intercourse with his daughter who he infected, he betrayed his wife`s trust, defiled their daughter in his home and needed a deterrent sentence.

In mitigation, it was submitted for the appellant that he was a first time offender, aged 26 years, had been on remand for a year, prayed for leniency. The appellant himself stated that he was poor, a father of 2 children with a wife. He prayed for leniency.

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

> *"...It is a very serious offence and a person convicted of it is liable to suffer death. The offence is on the rise and there is public outcry against it particularly due to AIDS. I have considered the aggravating factors submitted by the prosecution. The victim was only 4 years and the*

appellant 26 years, he was HIV +.....The accused is a first time offender who has been on remand for a short time approximately a year. I have heard his family woes but he must serve a deterrent sentence.....Taking into account both aggravating and mitigating factors, this court has already taken into account the one year spent on remand, otherwise he deserved 35 years so that he is kept out of circulation for most of his productive life. I therefore, hereby, sentence you to a term of imprisonment for 34 years."

From the record it evident that the learned trial Judge was alive to and took into account the fact that the appellant was a first time offender before sentencing him to 34 years imprisonment. We find no reason to fault her.

The victim was aged 4 years, consequently, the offence committed by the appellant was aggravated defilement as defined by Section 129 (3) and (4) (a) of the penal Code.

The maximum sentence for aggravated defilement is death. The **Constitution (Sentencing guidelines for Courts of Judicature) Practice Directions, 2013** in the **3rd schedule part 1** state the sentencing range in capital offences is from 30 years to death and the sentence of 34 years imprisonment is below that sentencing range.

We also note that there is need to maintain consistency while sentencing persons convicted of similar offences. **See Mbunya Godfrey V Uganda, *Supreme Court Criminal Appeal No.4 of 2011 and Abaasa Johnson and Anor versus Uganda CACANo.33 of 2010***

The case cited by the appellant`s counsel of **Senkula versus Uganda** *(Supra)* is distinguishable from the present case. In that case the offence was **simple defilement**, the appellant was aged 29 years had defiled a 15 year old girl although he pleaded guilty and was sentenced to 5 years imprisonment. Be that as it may, In ***Anyolitho Robert versus Uganda, Criminal Appeal No. 22 of 2012*** the appellant aged 14 years was a paternal uncle of the victim whom he had defiled 3 times. He was convicted of aggravated defilement and sentenced to 18 years imprisonment. On appeal, the sentence was confirmed by the Court of Appeal.

In ***Livingstone Sewanyana V Uganda, Supreme Court Criminal Appeal No.019 of 2006,*** the appellant defiled his biological daughter several times. He was convicted and sentenced to 18 years imprisonment. This sentence was confirmed by both the Court of Appeal and the Supreme Court.

In ***Kasibante Semanda Moses versus Uganda, CACA No. 068 of 2015 (unreported)*** court upheld the sentence of 20 years that had been meted out against the appellant for defiling a 7 ½ year girl on his own plea of guilty.

We find that the sentence of 34 years' imprisonment imposed upon the appellant by the learned trial Judge was harsh and manifestly excessive and we hereby set it aside. Pursuant to section11 of the judicature Act cap 13 we invoke the powers granted to this court to sentence the appellant afresh.

Taking into account both aggravating and mitigating factors and the principle of consistency and uniformity of sentences, we find that a sentence of 26 years imprisonment would meet the ends of justice. From that sentence, we deduct the period of 1 year that the appellant spent on remand. He will therefore

5 serve a sentence for a period of 25 years imprisonment starting from 11th May, 2010, the date of his conviction.

We so order.

Delivered at Kampala this 15th day of March 2022.

Richard Buteera

DEPUTY CHIEF JUSTICE

Cheborion Barishaki

JUSTICE OF APPEAL

Muzamiru Mutangula Kibeedi

JUSTICE OF APPEAL