

At the hearing of the appeal the appellant was represented by Mr. Vincent Turyahabye for Messrs Ngaruye Ruhindi, Spencer & co. Advocates on state brief while the Respondent was represented by Mr. Peter Rubarema Zeurukize a Resident State Attorney-Isingiro, in the Office of the Director
5 of Public Prosecutions. The Appellant appeared online from Mbarara Government Prison. Both counsel filed written submissions prior to the hearing date.

Counsel for the Appellant sought leave of this court to validate the Memorandum of Appeal, which was filed out of time to which opposite
10 counsel did not object hence court validated the same. Counsel also sought leave of court to amend the Memorandum of Appeal to include another ground which court also granted.

The Appellant's Case

On Ground No. 1, Counsel for the Appellant referred to **Article 23 (8) of
15 the Constitution** which requires court while sentencing a convict to take into account the period the person has spent in lawful custody. Counsel submitted that from the record of appeal, the committal proceedings started on 7th December 2012 and the appellant was continually remanded until committal to the High Court on 30th May 2013. He added that the
20 hearing at the High Court started on 1st July 2014 and the appellant was sentenced on 9th July 2014. It was counsel's argument that the Trial Judge simply stated that he had considered the period spent on remand but didn't state whether he had reduced that period or not.

Counsel cited **Tukamuhebwa David Junior v Uganda SCCA No. 59 of 2016** where the Supreme Court supported a Court of Appeal finding that; *'The Trial Judge simply acknowledged that he had considered the period spent on remand. We find the same short of complying with Article 23 (8) of the constitution.'*

Counsel added that the Trial Judge only considered 20 months as the period spent on remand yet the appellant was in lawful custody from 7th December 2012 to 9th July 2016, totalling up to 3 years, 7 months and 2 days on remand. It was counsel's contention that a sentence, which does not take into account the period spent on remand is an illegal sentence. The prayed that this court set it aside and pass an appropriate sentence.

On Ground No. 2, counsel submitted that the sentence of 15 years though legal was manifestly harsh and excessive in the circumstances. He added that the appellant pleaded guilty to the offence and court did not go through a full trial, he had been on remand for a long time and had little children aged 3-4 years depending on him. He referred to **Kalibobo Jackson v Uganda CACA No. 45 of 2001** where the sentence of 17 years was reduced to 7 years where the appellant raped an old woman and had gone through a full trial.

Counsel prayed that this court should consider the principle of uniformity and also consider the mitigating factors in favour of the appellant and hand him a lenient sentence.

The Respondent's Case

In reply to Ground No. 1, counsel for the respondent argued that the sentence of the appellant was not delivered on 9th July 2016 as alleged by counsel for the appellant. He added that the date of 9th July 2016 was a clerical and typing error but the ruling on sentence was delivered on 9th July 2014. Counsel contended that when the issue of the date was brought to the attention of the Court of Appeal registry, it was clarified that the year 2016 was a clerical error. Counsel prayed that this Court finds that the correct date of sentence was 9th July 2014 and that the appellant did not spend 4 years on remand.

10 It was counsel's further submission that the learned Trial Judge considered the time spent on remand as required by the Constitution where he indicated that he took into account the 20 months spent on remand.

He referred to **Paul Kibolo Nashimolo v Uganda SCCA No. 754/2014** where the Supreme Court stated that the arithmetic deduction of time spent on remand as directed in **Rwabugande Moses v Uganda SCCA No. 25 of 2014** is limited to cases which were handled after the decision on 3rd March 2017.

Counsel contended that the Trial judge having concluded this matter before the said date correctly applied the law when he considered the 20 months spent on remand and other aggravating and mitigating factors.

Counsel also contended that the sentence of 15 years handed down to the appellant is consistent with sentences of rape considering the violent way

it was carried out with a panga cutting the victim in the process. He cited **Adiga Adinani v Uganda CACA No. 635 of 2014 and No. 757 of 2015 (consolidated)** where the appellant convicted of rape and sentenced to 18 years in person having deducted the period of 2 years and 8 months spent
5 on remand, was sentenced to 15 years and 3 months' imprisonment.

It was counsel's submission that the Trial Judge did not act on any wrong principle, never overlooked any material factor and judiciously exercised his discretion in deciding that the sentence of 15 years was appropriate, thus this court should uphold the sentence and dismiss the appeal.

10 **Consideration of the Court**

This being a first appeal, this court is required to re-evaluate the evidence and make its own inferences on all issues of law and fact. In this regard Rule 30(1) (a) of the Rules of this court stipulates as follows;

15 *(1) "On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may-*

(a) Reappraise the evidence and draw inferences of fact. (See; Bogere Moses v Uganda SCCA No. 1 of 1997 and Henry Kifamunte v Uganda SCCA No. 10 of 1997)

20 Section 11 of the Judicature Act, Cap 13 recognises the jurisdiction of the Court of Appeal. It states as follows:

"For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."

In the instant scenario, the Appellant was a first offender who pleaded guilty to the offence and did not waste Court's time through a trial. In *allocutus* he pleaded that he had 2 children aged 3-4 years and was 20 years at the time of committing the offence. These factors were considered
5 by the trial Judge. The Appellant was convicted and sentenced to 15 years' imprisonment.

On appeal the appellant only appealed against sentence. However, on a thorough examination of the proceedings, we found that some inescapable errors were committed during process of the plea-taking
10 which made it untenable for us to proceed with the grounds of appeal as had been earlier stipulated. In **Adan Vs R (1973/ EA 445** the East African Court of Appeal (as it then was) set out the correct way to take plea:

**When a person is charged with an offence, the charge and the particulars thereof should be read out to him, so far as possible
15 in his own language, but if that is not possible in the language which he can speak and understand. Thereafter the Court should explain to him the essential ingredients of the charge and he should be asked if he admits them. If he does admit his answer should be recorded as nearly as possible in his own words and
20 then plea of guilty formally entered. The prosecutor should then be asked to state the facts of the case and the accused be given an opportunity to dispute or explain the facts or to add any relevant facts he may wish the court to know. If the accused does not agree with the facts as**

stated by the prosecutor or introduces new facts which, if true might raise a question as to his guilt, a change of plea to one of not guilty should be recorded and the trial should proceed. If the accused does not dispute the alleged facts in any material
5 respect, a conviction should be recorded and further facts relating to the question of sentence should be given before sentence is passed.

We note that the Appellant was indicted for the offence Rape contrary to section 123 and 124 of the PCA. The age of the victim was never disclosed
10 although in rendering the facts of the case the victim AA was referred to as a child. The facts were that *on the 15th of November 2012 the victim AA left her home to fetch firewood in the company of other children. The appellant who was a porter at the parish headquarters chased after the children. AA tripped on her sweater and fell. The appellant grabbed her*
15 *and had sexual intercourse with her.* The facts do not state the age of the child. The issue of force mentioned in passing. It is therefore unclear whether the appellant did have sexual intercourse with the victim against her will or whether the victim was a child below the age of 18years and therefore the issue of consent did not arise.

20 While the grounds of appeal were only against sentence, a tooth-comb pick of the proceedings reveals that a material ingredient of the offence was not attested to by the facts which the appellant pleaded guilty to. There are three sides to this grave loophole. The first is the question why the prosecution did not charge the appellant with the offence of

defilement if the child was clearly under the age of 18 years? We have noted the tendency of persons being charged with the offence of rape when the facts prove that it was defilement. Where a child is under the age of 18 years the issue of consent does not arise. By charging assailants with the offence of rape the prosecution appears to be looking for acquittals. This is unethical if the facts clearly reveal that the victim was a child.

The other strand is the one where the offender is charged with the offence of rape but the victim is described as a child. Is this a deliberate mistake introduced in the summary of case with intention of attracting sympathy for the error and an acquittal for the appellant?

The final strand could be that the officers who charge or indict the accused person do not have sufficient knowledge of what constitutes the offences of rape and defilement and therefore lack capacity to determine when to proffer a particular charge. This speaks to need for training.

Be that as it may, whether the above mistake is advertent or inadvertent it has the effect causing so much convolution that the only option is for the court to acquit the appellant. This is unacceptable and unethical conduct on the part of the Respondent/ Prosecution. Had the trial Judge had a careful review of the facts, he would have found that the facts neither disclosed the offence of defilement contrary to s.129(1) or 129(4) of the PCA nor that of rape contrary to s.123 and s.124 of the PCA. For purposes of clarity and for avoidance of doubt we shall provide full citation of the offences of defilement and rape.

129. Defilement of persons under eighteen years of age

(1) Any person who performs a sexual act with another person who is below the age of eighteen years, commits a felony known as defilement and is on conviction liable to life imprisonment.

5 (2) Any person who attempts to perform a sexual act with another person who is below the age of eighteen years commits an offence and is on conviction, liable to imprisonment not exceeding eighteen years.

10 (3) Any person who performs a sexual act with another person who is below the age of eighteen years in any of the circumstances specified in subsection (4) commits a felony called aggravated defilement and is, on conviction by the High Court, liable to suffer death.

15 (4) The circumstances referred to in subsection (3) are as follows—
(a) where the person against whom the offence is committed is below the age of fourteen years;

(b) where the offender is infected with the Human Immunodeficiency Virus (HIV);

20 (c) where the offender is a parent or guardian of or a person in authority over, the person against whom the offence is committed;

(d) where the victim of the offence is a person with a disability; or

(e) where the offender is a serial offender.

Having regard to the offence of defilement the necessary ingredients in general are that the victim must be below the age of 18 years but ought 14
25 years or above; there must be proof of sexual intercourse and the proof that it is the accused who performed it. There are specific ingredients that aggravate and elevate it to a capital offence. These include; where the person against whom the offence is committed is below the age of fourteen years; where the offender is infected with the Human
30 Immunodeficiency Virus (HIV; where the offender is a parent or guardian of or a person in authority over, the person against whom the offence is

committed; where the victim of the offence is found to be a person with a disability and finally where the offender is a serial offender. Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence.

- 5 The offence of rape is set out under s. 123 and 124 of the PCA.

123. Definition of rape

Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind
10 or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, commits the felony termed rape.

124. Punishment for rape

A person convicted of rape is liable to suffer death.

- 15 For the offence of rape to be proved the victim must be a woman or girl. The offence does not exclude the victim as a girl. On that ground alone a person can be charged with the rape of a girl. **Ochiti Lagol Patrick v Uganda Supreme Court Criminal Appeal 15 of 1998** it was held that charging the appellant with rape was not fatal. **Ochiti Lagol** is yet to be
20 departed from in spite of the reverberations and the commentary found in **Uganda v Kusemererwa High Court (Fort Portal) Criminal Appeal 15 of 2014**.

It should be noted however, that for rape to be proved there must be proof either of lack of consent or evidence that the consent was induced or

forced. Clearly the law makes no provision for a situation where it is found that a man is raped whether by a man or woman. Apart from the ingredient of gender; the other ingredients for rape include proof of carnal knowledge and that the accused rapes the female *without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband and the final ingredient which must be proved in all offences is that it is the accused who did it. Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence.*

The distinction between rape, simple defilement, and aggravated defilement has been explained above.

On the one hand, the offence of defilement created in the 1990s, prohibits sexual intercourse or attempting sexual intercourse with a girl under 18 years of age and carries a maximum penalty of life imprisonment.

Defilement is considered, on the other hand, aggravated if the girl is under 14 years old, the offender has HIV/AIDS, the offender is the victim's parent or guardian, the girl has a disability, or the offender is a serial offender, and it carries a maximum penalty of death. There is no consent requirement for defilement because children cannot consent to sexual intercourse. The Penal Code section prohibiting rape describes it

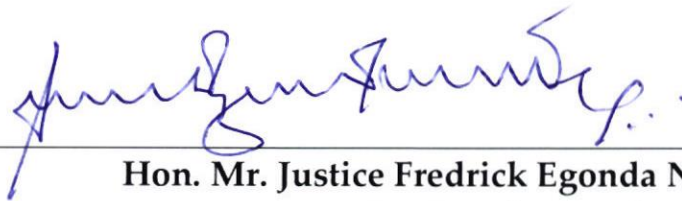
as “unlawful carnal knowledge of a **woman or girl** without her consent” (emphasis added) or if consent is obtained through any force, threat, or intimidation. The maximum penalty for rape is death.

Upon carrying out a thorough review of the above file, we find that
5 although the appeal was only against sentence there was no satisfactory establishment of the ingredients of the offence of rape enough to confirm a plea of guilty on the facts as were adduced.

In the circumstances the conviction and sentence for rape are hereby quashed. The accused is immediately set at liberty unless held on other
10 lawful charges.

Dated and Signed this 23rd day of March 2022

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Hon. Mr. Justice Fredrick Egonda Ntende
Justice of Appeal

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Hon. Lady Justice Catherine Bamugemereire
Justice of Appeal

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Hon. Mr. Justice Christopher Madrama
Justice of Appeal