

**THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT MASAKA  
CRIMINAL APPEAL NO. 535 OF 2016**

*(Coram: R. Buteera, DCJ; C. Bamugemereire & E. Luswata, JJA)*

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**LWANYAGA JOSEPH ::::::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**UGANDA ::::::::::::::::::::::::::::::::::::::: RESPONDENT**

10 *(Appeal from the sentence of the High Court of Uganda at Masaka, Flavian Zeija, J, dated 20/ 12/ 2016 in Criminal Case No. HCT-06-CR-SC-102 of 2016)*

**JUDGMENT OF COURT**

**INTRODUCTION**

15 The appellant was convicted of the offence of Aggravated Defilement contrary to **Sections 129 (3) & (4) (c) of the Penal Code Act, Cap 120**, and sentenced to 25 years' imprisonment.

**Brief Facts**

20 It was the prosecution's case that the victim, N.S, aged 7 years old, was staying with her parents at Kyamukama village, Makondo Parish, Ndagwe Sub - County in Lwengo District. While she was playing with other children near the appellant's shop, she was seen entering his shop at around 7: 00p.m.

25 That the victim was ordered by the appellant to lay on his bed where he forcefully had sexual intercourse with her. After the sexual act, the appellant gave the victim a sweet and fifty shillings not to reveal to anyone. The victim revealed to her friends and later to her mother about her ordeal. The matter was reported to Kiwangala Police Post.



The medical report of the victim revealed that her hymen had ruptured and she had virginal warts. The appellant was arrested and accordingly charged with aggravated defilement.

5 The appellant was convicted on his own plea of guilty and sentenced to 25 years' imprisonment. Being dissatisfied with that decision, he filed this appeal. He prayed that the Appeal is allowed; and the sentence of 25 years set aside.

### **Ground of Appeal**

10 **THAT** the learned trial Judge erred in law and fact when he sentenced the appellant to 25 years' imprisonment, which sentence is harsh and manifestly excessive in the circumstances.

### **Representation**

15 At the hearing of the Appeal, the appellant was represented by Ms. Margaret Nansubuga, on state brief, while the respondent was represented by Ms. Happiness Ainebyoona, Chief State Attorney from the Chambers of the Director of Public Prosecutions.

### **Case for the appellant**

20 Counsel for the appellant argued that the learned trial Judge sentenced the appellant to a harsh sentence and did not take into account the period he had spent on remand. She noted that the appellant having been arrested in 2013 and sentenced in 2016, he had spent about 3 years on remand.

### **Case for the respondent**

25 Counsel for the respondent submitted that the sentence was neither illegal nor manifestly harsh and excessive and prayed that this Court rejects the appellant's contention thus.



She pointed out that the maximum penalty for the offence with which the appellant as charged was death and as such, 25 years' imprisonment was not manifestly harsh and excessive.

5 She also submitted that the trial Judge considered all the mitigating factors adduced by the appellant. That however, the period spent on remand was not one of the factors adduced in the allocutus at trial. She prayed that Court invokes the powers of the original court of jurisdiction and takes into account the period of three years that the appellant had spent on remand and upholds the sentence of 25 years imposed by the trial court less the period he had  
10 spent on remand before sentence.

### **Court's consideration**

It is our duty as the first appellate court to re-appraise the evidence at the trial court and come to our own conclusion. See **Rule 30 (1) (a) of the Judicature (Court of Appeal) Rules**. However, we have to bear in mind that  
15 we did not have the opportunity to see and hear the witnesses as they testified. See **Selle and Another vs Associated Motor Boat Co; [1968] EA 123, Pandya vs R; [1957] EA 336, Ruwala vs R [1957] EA 570, and Kifamunte Henry vs Uganda; Criminal Appeal No. 10 of 1997 (Supreme Court)**.

20 The sole ground of appeal herein revolves around the failure of the trial Judge to deduct the period that the appellant had spent on remand. Counsel for the respondent conceded to that fact and prayed that this Court finds the sentence appropriate and only deducts the period that the appellant had spent on remand.

25 The circumstances under which an appellate court may interfere with the trial court's sentencing discretion are well settled. See **Kyalimpa Edward v Uganda; S.C. Appeal No. 10 of 1995**.



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To establish whether or not the trial Judge considered the time the appellant had spent on remand, would require looking at the sentencing notes. In sentencing the appellant, he stated as follows:

*'Court sentence:*

5 *This offence is on the rise in this region. Over 80% of the cases in this court are on defilement. The convict has pleaded guilty hence showing some remorse. However, he did so after the prosecution had closed its case and evidence was overwhelming. In the result, I sentence the convict to 25 years in prison given that he pleaded*  
10 *guilty. Had he not wasted court's time and pleaded guilty from the beginning, I could have considered a lighter sentence.'*

The above excerpt shows that the learned trial Judge did not consider the period that the appellant had spent on remand. That far, this sentence is illegal in as far as it contravenes **Article 23 (8)** of the Constitution. It is hereby  
15 set aside.

This, therefore, is one of the instances under which this Court may exercise its powers under Section 11 of the Judicature Act, and sentence the appellant. In so doing, we are mindful of the fact that the maximum punishment for the offence of aggravated defilement is death. Whereas there is need for  
20 consistency and uniformity, yet each case presents unique facts and circumstances.

In the case of **Bacwa Benon v Uganda; CACA No. 869 of 2014**, this Court confirmed a sentence of life imprisonment upon the appellant who pleaded guilty to aggravated defilement.

25 In **Bonyo Abdul v Uganda; SCCA No. 07 of 2011** which was cited with approval in the **Bacwa Benon** case (supra), the Supreme Court confirmed a life imprisonment sentence for the appellant who was HIV positive and was convicted of aggravated defilement.



In **Anguyo Siliva v Uganda; Court of Appeal Criminal Appeal No. 0038 of 2014**, the appellant was sentenced to 27 years' imprisonment for the offence of aggravated defilement. This Court took into consideration all the relevant factors, deducted the period of three years that the appellant had spent on remand and reduced the sentence to 21 years and 28 days.

In the instant case, we find that the sentence of 25 years' imprisonment is appropriate, given the circumstances of the commission of the offence.

Indeed, there is need to impose sentences that will send a strong message that the young girls ought to be protected and not violated.

From that sentence of 25 years, we deduct the period of three years that the appellant had spent on remand and sentence him to 22 years' imprisonment. This sentence shall begin to run from 20<sup>th</sup> December 2016, the date of his conviction.

This Appeal, therefore, succeeds.

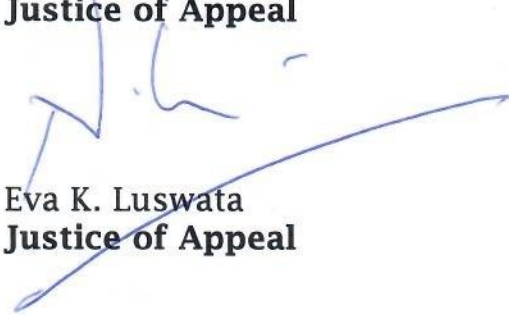
Dated at Masaka this ..... 7<sup>th</sup> ..... day of ..... June ..... 2023



Richard Buteera  
**Deputy Chief Justice**



Catherine Bamugemereire  
**Justice of Appeal**



Eva K. Luswata  
**Justice of Appeal**