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**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT JINJA**

[Coram: Geoffrey Kiryabwire, Muzamiru M. Kibeedi, Monica Mugenyi, JJA]

**CRIMINAL APPEAL No. 193 OF 2012**

(Arising from High Court Criminal Session Case No 073 of 2011 at Jinja)

**BETWEEN**

**BAMUWAIRA FRED... ..APPELLANT**

**AND**

**UGANDA .....RESPONDENT**

(An Appeal from the Judgment of the High Court of Uganda Lady Justice Flavia Senoga Anglin Delivered on 19<sup>th</sup> July, 2012)

**JUDGMENT OF THE COURT**

The Appellant Bamuwaira Fred, was indicted with the offences of Aggravated Defilement contrary to section 129(3) and (4) (a) of the Penal Code Act. He pleaded guilty and was convicted and sentenced to life imprisonment

**The Brief Facts**

The facts as can be discerned from the Summary of the Case filed at the trial Court are that the Appellant 47 years at the time on the 28th of December, 2010, met Nabwire Janati, the victim, then aged 10 Years, along the way at the hill of Bugiri District who was walking with her brother Issa Wandera. The Victim was carrying yams on her head which the appellant removed, took her into a nearby bush and had sexual intercourse with her. The Victim's brother made an alarm which attracted people including the OC Prison of Bugiri who arrested the Appellant as he attempted to flee the scene of crime.

**Decision of the Trial Court**

At the trial, the Appellant admitted all the facts and pleaded guilty for which he was convicted on his own plea and was sentenced to imprisonment for life.

*H.*  
*Mugenyi*

### **Leave to Appeal on Sentence only**

At the hearing the Appellant applied for leave under Section 132 (1) (b) of the Trial on Indictment Act. The Respondent did not object and Court granted leave to the Appellant to appeal sentence only.

Both parties also sought the leave of Court to adopt their written submissions as their legal arguments in this Appeal which leave was granted.

### **Representations**

At the hearing, the Appellant was represented by Mr. Ishaq Dhakaba and the Respondent by Ms. Nabaasa Carolyn Hope, Principal Assistant State Attorney.

### **Powers of an Appellate Court**

We are alive to the duty of this court as a first appellate court as decided in the case of **Kifamunte Henry V Uganda** SCCA No 10 of 1997 to reappraise all the evidence at trial and come up with our own inferences of law and fact.

The basis for setting aside a sentence imposed by a trial court was generally set out in **Ogalo s/o Owoura v R** (1954) 21 EACA 270. In that appeal, the appellant appealed against a sentence of 10 years' imprisonment with hard Labour which had been imposed for the offence of manslaughter. The East African Court of Appeal in that appeal held that: -

*"...The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the court had been trying the Appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v R, (1950) 18 EACA 147, "it is evident that the Judge has acted upon wrong principle or overlooked some material factor". To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. An appropriate sentence should be proportionate to the offence with the gravest offences attracting the most severe penalties and lesser offences in terms of aggravation attracting less severe penalties. Courts have also added another principle of consistency in terms of equality before the law so that offences committed under similar circumstances*

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*with similar degree of gravity should attract the same range of sentences therefore precedents of the appellate courts are a relevant guiding actor..."*

In **Kiwalabye versus Uganda Criminal Appeal No. 143 of 2001 (SC)** it was held: -

*"The appellant court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentence 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 circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle"*

Furthermore, this Court in **Alex Biryomunsi V Uganda CACA No 464 of 206** (following **Katureebe Boaz V Uganda SCCA No 066 of 2011**) it was held: -

*"Consistency in sentencing is neither a mitigating nor an aggravating factor, the sentence imposed lies in the discretion of the court which in exercise thereof may consider sentences imposed in other cases of a similar nature"*

### **Arguments of the Appellant**

Counsel for the Appellant argued that the sentence imposed on the Appellant was manifestly harsh and excessive.

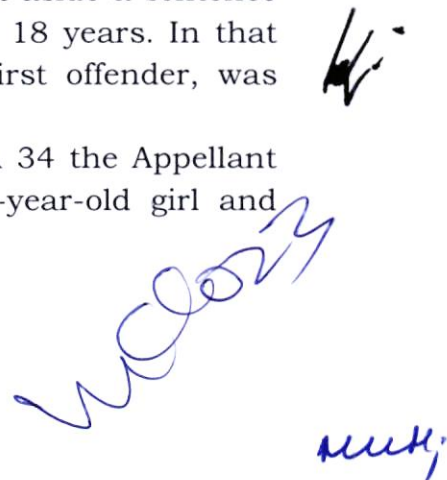
In this regard, Counsel submitted that the Appellant pleaded guilty, was remorseful and therefore did not waste court's time. He further argued that the Appellant was a first time offender in addition to being a married man with young children.

Counsel further submitted that the Appellant appeared to have mental problems even though he was ultimately found to be of sound mind.

Counsel prayed for a custodial sentence as imprisonment for life did not afford the Appellant an opportunity to reform.

Counsel referred us to the following cases to support his arguments. In **Ederema Tomasi V Uganda** [2019] UGCA 203 this Court set aside a sentence of 25 years for aggravated defilement and substituted it for 18 years. In that matter, Court took into account that the Appellant was first offender, was remorseful and had a dependent child.

In another matter of **Babua Roland V Uganda** [2016] UGCA 34 the Appellant aged 32 was charged with aggravated defilement of a 12-year-old girl and



convicted to life imprisonment. This Court set aside the sentence and substituted it with a sentence of 18 years.

He then prayed that this Court uphold the appeal and reduce the Appellant's sentence be reduced to 18 years or less as the Court may deem fit.

### **Arguments of the Respondent**

Counsel for the Respondent opposed this Appeal.

She submitted that the law prescribes a maximum sentence of death for aggravated defilement and so the current sentence cannot be regarded as manifestly harsh and excessive.

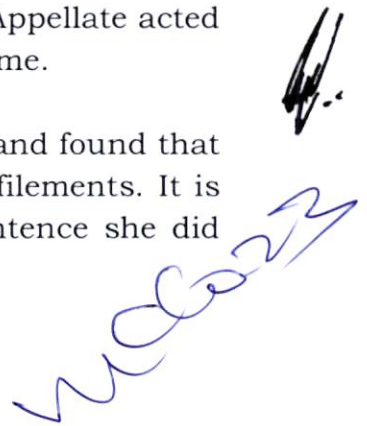
In this regard, we were referred to the case of **Kaserebanyi James Vs Uganda** SCCA No.10 of 2014, while confirming Life imprisonment where the appellant had pleaded guilty for a defilement of a 15-year-old victim, the Justices of Supreme Court held that: -

*"... a complaint about the harshness of sentence was without basis since the maximum penalty prescribed by law for offence of defilement before the Penal Code Act, Cap 120 as amended was death.... The learned trial judge, after considering the mitigating and aggravating factors gave the appellant the next severe punishment that is life imprisonment. The sentence of life imprisonment is therefore, legal and not harsh. The learned trial judge properly exercised his discretion in reaching that sentence and the court of appeal was right not to interfere with it."*

Counsel further submitted that whereas there was "a plethora" of appellate decisions reducing sentences on similar grounds, each case had to be decided on its own facts.

Counsel dismissed the arguments that the Appellate was remorseful and had not wasted court's time as devoid of merit. She argued that the Appellate acted in a cunning and calculated manner in the commission of the crime.

She further argued that the psychiatrist evaluated the Appellate and found that he knew what he was doing and even confessed to 22 other defilements. It is these antecedents that forced the trial Judge to render the sentence she did



because the Appellant was a danger to other potential victims. In this regard she referred us to the decision of this Court in **Bachwa Benon V Uganda** CACA No 869 of 2014 and **Bonyo Abdul V Uganda** CACA No 07 of 2011 where the sentence of Life Imprison was upheld and confirmed.

Counsel for the State therefore prayed that the sentences imposed in this Appeal be up held.

### **Decision of the Court**

This appeal is against sentence only. We have carefully considered the submissions of both Counsel, the record and authorities availed to us; for which we are grateful.

At sentencing, the trial Court Judge held as follows: -

*"... The Accused is sentence to imprisonment for life.*

*The offence with which he was convicted on his own plea of guilt carries a maximum sentence of death, for it is very grave.*

*In the circumstances of this case, the Victim was a 10-year-old child — a minor compared to the age of the convict 46 years.*

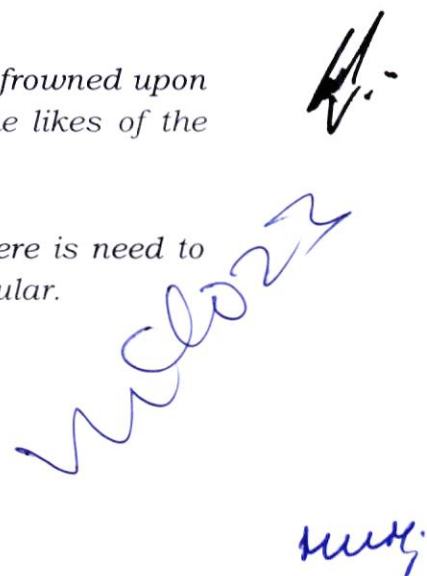
*The physical and emotional damage to the Victim of the convict's act can never be adequately atoned for even with a maximum sentence.*

*The convict defiled a Victim who is young enough to be his own child, if not grandchild. As rightly pointed out by the State Attorney, the convict does not show any sign of remorse. The tone I gather from the Doctor's report and from the Convict's comments to Court is that he seems to believe that he can have sex with underage girls whenever he pleases to do so.*

*In that case, even the convict's own children need to be protected from him if they are to get a reasonable chance to grow up into normal and well-adjusted persons.*

*The offence of aggravated defilement is rampant and is highly frowned upon by the public. Our children cannot be said to be safe with the likes of the Convict freely Walking our streets.*

*The offence causes a lot of apprehension in the public and there is need to protect society in general from such acts and children in particular.*



Court has taken into consideration the passionate plea of Counsel for the convict that the convict may not be entirely normal. But if that is the case and the convict cannot help himself and his actions, which is not the opinion of the Doctor, then the more reason why society should be protected from his actions.

The treatment that he may require can be availed at prison since the report to Court was made by a Consultant Psychiatrist attached to Murchison bay Hospital.

*The Right of Appeal against sentence explained to the Convict...*

We have considered the submissions of both parties to the Appeal and the authorities submitted to us for which we are grateful.

This Court in the matter of **Adiga Adinani V Uganda** CONSOLIDATED CRIMINAL APPEALS (Lira) NO. 635 OF 2014 & NO. 757 OF 2015 reviewed sentences for the offence of rape and held: -

*“Section 11 of the Judicature Act gives this Court all the powers, authority and jurisdiction as is that of the trial Court to impose an appropriate sentence of its own...”*

This Court in the matter of **Matovu Yusuf V Uganda** CACA No 187 of 2014 (Fort Portal) addressed itself to sentences for aggravated defilement and held: -

*“...We will look at similar offences of aggravated defilement and the sentences that were meted by court. In **Baruk V Asuman v Uganda**; CACA No. 38 of 2014, this Court, while emphasising the importance of consistency, cited the case of **Naturinda Tamson v Uganda**; SCCA No. 025 of 2015 where the Supreme Court upheld a sentence of 16 years' imprisonment for the offence of Aggravated Defilement of a 16-year-old victim. It also referred to the case of **Ederema Tomasi v Uganda**; CACA No. 554 of 2014; the Court of Appeal imposed a sentence of 18 years' imprisonment deeming the same fit because the appellant was HIV positive.*

*In **Tiboruhanga Emmanuel v Uganda**; CACA No. 655 of 2014, the Court of Appeal after reviewing the sentences approved in previously decided cases of aggravated defilement by the Supreme Court and the Court of Appeal, stated that the sentences imposed by the Court of Appeal for*

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aggravated defilement in previous cases fell within the range of between 11 years to 15 years. It, however, sentenced the appellant therein to 25 years for aggravate defilement reasoning that the appellant who was HIV- positive had exposed the victim to the risk of contracting HIV/ AIDS.

In **Kamugisha Asan v Uganda** CACA No. 212 of 2017, this Court sentenced an appellant who had defiled a three-year-old girl to 23 years of imprisonment. These were reduced to 22 years upon deducting the one year that the appellant had spent on remand.

*In this case, we would see no reason whatsoever to interfere with the trial Judge's sentence of 20 years' imprisonment. We do not find the sentence to be unusual in any way or manifestly high or even harsh as alleged by counsel for the appellant. We are particularly cognizant of the fact that the victim herein was only one and a half years old. We accordingly uphold the sentence and dismiss the Appeal for lack of merit..."*

The sentence of imprisonment for life in this matter is clearly not consistent with those meted out in the above cases. This is an indication the sentence of imprisonment for life in this appeal is manifestly harsh and excessive. We accordingly set it aside.

On another matter, though not argued by both counsel, from the Sentencing Order it can be seen that the trial Judge did not acknowledge the time spent on remand by the Appellant as required by Article 23 (8) of the Constitution. This makes the sentence in this illegal as well [**Tukamuhebwa David Junior v Uganda** SCCA No. 59 of 2015]. In this regard it can be discerned from the record that the Appellant had sent 2 ½ years on remand.

#### **Resentence.**

We now proceed under Section 11 of the Judicature Act to impose a fresh sentence on the Appellant as hereinafter. We note that the indeed the Appellant plead guilty and saved the Court time and the cost of a full trial. We also not that even though the medical report on the Appellant found him to be of sound mind, even the trial Judge had doubts as to the mental state of the Appellant. We also recall the other aggravating and mitigating factors that the trial Judge took into account and sentence the Appellant to 23 years' imprisonment. To this sentence we now apply the 2 ½ years the Appellant spent on remand and adjust the final sentence to be 21 ½ years.

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**Final Decision**

The Appeal is hereby allowed and we accordingly set aside the sentence of imprisonment for life years' imposed for aggravated defilement and substitute it with a sentence of 21 ½ years' imprisonment.

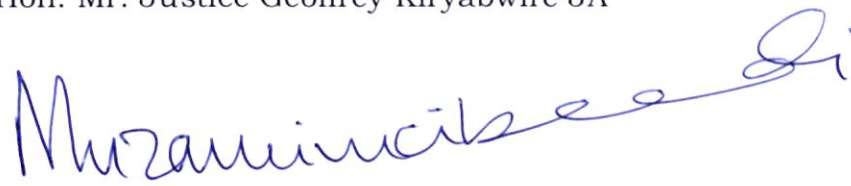
This sentence shall run from the original date of sentence.

We must inform the Appellant that he has a right to appeal against this sentence to the Supreme Court.

**We so Order.**

Dated at Jinja this 20<sup>th</sup> Day of July 2023

  
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Hon. Mr. Justice Geoffrey Kiryabwire JA

  
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Hon. Mr. Justice Muzamiru M. Kibeedi JA

  
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Hon. Lady. Justice Monica Mugenyi JA