THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT MBARARA

(Coram: Muzamiru M. Kibeedi, Christopher Gashirabake, & Eva K. Luswata, JJA)

CRIMINAL APPEAL NO. 476 of 2016

BETWEEN

BYARUHANGA ODI::APPELLANT

AND

UGANDA :: RESPONDENT

(Appeal from the Judgment of Michael Elubu, J, sitting at Rukungiri delivered on 8th, February, 2018)

JUDGMENT OF THE COURT

Introduction

1] The appellant, Mr. Byaruhanga Odi was charged with the offence of aggravated defilement contrary to **Section 129 (3)** and **4(b), (c)** of the **Penal Code Act Cap. 120 (PCA)**. It was stated in the indictment that on 30th day of March, 2013, at Ihambiro village, Bunono Parish, Nyarushanje S/C in Rukungiri District, the appellant performed a sexual act with NC, his daughter, a girl under the age of 14 years.

Brief Facts

2] The brief facts of the case as we have gathered from the record are that on the 30th day of March, 2013, the appellant a resident

of Ihambiro village in Rukungiri District, performed a sexual act on his daughter, NC, by then aged eight years. The appellant who had previously lost his wife, lived as a caretaker of the house belonging to one Musinguzi Henry. He shared the house with NC and her brother, Vent. According to the record, one Generous Musinguzi's wife had for sometime suspected that the appellant had repeatedly had sexual intercourse with NC. She reported her suspicions to her daughter Ainebyona, the latter who hacked a plan to confirm it. On the night of 30th March 2013 at around 1:00am, Ainebyona tip toed into the appellant's bedroom with a torch and found him on top of the NC having sexual intercourse with her. She observed him for about ten minutes then made an alarm which attracted Musingizi and Generous who came and also witnessed the act. All three observed that the zip of the appellant's trouser was open with his penis hanging outside. NC had no knickers and her blouse was pulled up to the chest. The appellant was arrested and at first denied the offence. He later admitted his acts before the Chairman LCI. He was accordingly charged and indicted for aggravated defilement of his biological daughter NC, convicted and sentenced to 37 years' imprisonment.

3] The appellant aggrieved with the decision of the High Court lodged an appeal to this Court on one ground that:

The learned trial Judge erred in law and fact when he sentenced the Appellant to 37 years' imprisonment which was manifestly excessive and harsh hence occasioning a miscarriage of justice.

Representation

4] At the hearing of the appeal, the appellant was represented by Ms. Maclean Kemigisha on State brief, while the respondent was represented by Mr. Sam Oola, a Senior Assistant Director of Public Prosecutions. The parties filed written submissions before the hearing of the appeal as directed by the Court. When the case was called for hearing, counsel for the appellant sought leave of Court under **Rule 43(3)(a)** of the Judicature Court of Appeal Rules, and **Section 132(1)(b)** of the Trial on Indictment Act, to appeal against sentence only, which was granted. Counsel for both parties applied and the Court accepted to adopt their written submissions as their legal arguments in the appeal. This appeal has thus, been disposed of on the basis of written submissions only.

Submissions for the Appellant

5] The gist of the submissions filed for the appellant were that the sentence of 37 years' imprisonment which was manifestly excessive and harsh, was made in error and had occasioned a miscarriage of justice. Ms. Mclean did appreciate that an appellate Court does 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 excessive to occasion an injustice. In her view, the appellant who was at the material time aged 50 years, a first offender who was remorseful, had suffered a harsh punishment.

She implored that for the time he has spent in prison, he has learnt his lesson and had reformed and could, if given a second chance, still make meaningful contribution to society.

6] Counsel referred to the case of **Wamusonze Wilson versus Uganda, CA Criminal Appeal No.319 of 2010,** where the Court after considering a range of cases, reduced a sentence of 30 years to 12 years' imprisonment. She concluded by inviting Court to find that the sentence was harsh and manifestly excessive. She then prayed that this Court invokes her powers under S.11 of the Judicature Act, to impose a sentence of 15 years' imprisonment that she found more appropriate and one that should take into account the mitigating factors cited.

Submissions for the respondent

7] In response, Mr. Sam Oola opposed the appeal and supported the sentence of 37 years' imprisonment. Counsel submitted that this being the first appellate Court, we had a duty to subject the evidence on record as a whole to a fresh and exhaustive scrutiny and draw our own conclusions of fact but bearing in mind that we never heard or the saw the witnesses as they testified. Citing the decisions of **Rwabugande Moses versus Uganda, SC Criminal Appeal No. 25 of 2014, Kyalimpa Edward versus Uganda, SC Criminal Appeal No. 10 of 1995** and others not repeated here, he stated that sentencing remains the discretion of the trial Judge. He in addition set out the principles upon which this Court can interfere with the sentence passed by the trial Court. He in addition emphasized that this Court does not

alter a sentence on the mere ground that if the members of the Court had tried the appellant, they might have passed a somewhat different sentence and that, each case presents its own facts upon which a Judge exercises his or her discretion

8] Counsel argued strongly that considering the maximum sentence for the offence of aggravated defilement is death, and the next serious sentence being life imprisonment, the sentence of 37 years' imprisonment passed against the appellant is not illegal. In addition, that the trial Judge considered both the aggravating and mitigating factors, in particular the appellant being HIV positive, before sentencing him.

9] Counsel continued that, the appellant acted in a beastly, barbaric and savage manner to ravish the victim his own daughter. He regarded the appellant's HIV status, as a fact that further aggravated the offence. Counsel then drew our attention to other decisions of this Court and the Supreme Court to argue that in comparison, the sentence against the appellant in the instant case is lenient. He in particular referred us to the case of **Bonyo Abdul versus Uganda, SC Criminal Appeal No. 07 of 2011,** where both this Court and the Court of Appeal upheld a sentence of life imprisonment for an HIV positive appellant who had sexual intercourse with a girl of 14 years. He in addition referred to the case of **Kaserebanyi James versus Uganda, SC Criminal Appeal No. 10 of 2014**, in which the appellant pleaded guilty for defiling his 15-year-old biological daughter regularly a result of which she became pregnant. His attempts to

appeal the sentence of life imprisonment failed in both this Court and the Supreme Court for it was considered lenient in comparison to the gravity of the offence. Similarly, that in **Bacwa Benon versus Uganda, CA Criminal Appeal No.869 of 2014,** an appellant who was HIV positive defiled the 10-year-old daughter of his live-in partner was, sentenced to life imprisonment, which on appeal to this Court, was upheld.

10] In conclusion, counsel stated that the appellant got away with a lenient sentence of 37 years' imprisonment which should be maintained. In his view, the circumstances of this case should have attracted a more serious sentence and as such, the appeal should be dismissed.

Analysis and decision of the Court

11] We have carefully studied the record, considered the submissions for either side, as well as the law and authorities cited to us, and those not cited but which we find relevant to this matter. We are alive to the duty of this Court as a first appellate Court to review the evidence on record and reconsider the materials before the trial Judge, including the decision of the trial Court, and come to our own Judgment. See: **Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13 – 10.** We do agree and follow the decision of the Supreme Court in **Kifamunte Henry versus Uganda, SC Criminal Appeal No. 10 of 1997,** where it was held that on a first appeal, this Court has a duty to:

> *"...review the evidence of the case and to consider the materials before the trial Judge. The appellate court must then make up its own mind not disregarding the judgment appealed from, but carefully weighing and considering it."*

12] There was only one ground of appeal against the sentence. It was submitted by counsel for the appellant that the sentence of 37 years' imprisonment was manifestly harsh and excessive resulting into a miscarriage of justice. Respondent's counsel disagreed. He considered the sentence lenient in the circumstances. He provided several authorities in which more severe sentences were given and maintained on appeal, and prayed that we should not interfere with it.

13] We agree with both counsel that an appropriate sentence is a matter of discretion of the sentencing Judge and each case presents its own facts upon which a Judge exercises that discretion. See **Karisa Moses versus Uganda, SC Criminal Appeal No. 23 of 2016.** The principles guiding the appellate Court when considering any contest to the severity of a sentence are well settled. As pointed out for the appellant our powers to intervene are quite limited so, we may interfere only in cases where it is shown that:

a. The sentence is illegal.
b. The sentence is manifestly harsh or excessive.
c. Where there has been failure to exercise discretion.

d. Where there was failure to take into account a material factor.

e. Where an error in principle was made.

See ***Ogalo S/O Owoura V R (1954) 21 E.A.C.A. 270,*** **Kyalimpa Edward versus Uganda, SC Criminal Appeal No. 10 of 1995; Kamya Johnson Wavamuno versus Uganda, SC Criminal Appeal No. 16 of 2000 and Kiwalabye versus Uganda, SC Criminal Appeal No. 143 of 2001.**

We are also mindful of the decision of the Supreme Court in **Kakooza versus Uganda, SC Criminal Appeal No.17 of 1993,** that sentences imposed in previous cases of a similar nature, while not being precedents, do afford material for consideration. However, since sentence is a matter of judicial discretion, uniformity is hardly possible. **See Aharikurinda Yustina versus Uganda, SC Criminal Appeal No. 27 of 2015.**

14] When considering a prayer to reduce sentence, we are best placed to consider the facts that led to the indictment as well as what was stated during the allocution proceedings. The submissions of both counsel when presenting the aggravating and mitigating factors are well stated on the record. Without repeating the record, we note that much was presented as aggravating factors. In response it was stated in mitigation that the appellant who was aged 50 years, was a first offender who sought lenience. The appellant himself prayed for lenience to enable him to return home to look after his children, who had no one else, since he was an orphan. He in addition mentioned the

period of three years he had spent on remand. When sentencing the appellant, the trial Judge had this to say:

> *"I have carefully considered all the agitating and aggravating factors brought to the attention of this court. This is a particularly disturbing case both to the court and society at large. The convict is the father of the infant victim, he is HIV positive and the mother is deceased.*
> *This child was only 8 years old and repeatedly abused by her own father who should have been the one to protect her. She is traumatized and will suffer long lasting effects emotionally as a result of repeated trauma she has endured. This is griny (sic) to affect unfaithful (sic) relationships as a well as denying her a right to enjoying her childhood as a normal child. She is already suffering the stigma of children and thus (sic) teasing her as the fruit of her father. The court has a duty to protect the girl child. It is especially so in such a case. The convict is a daughter to his own children and children of his (sic). He cannot be trusted not to quench his lust on them young and the victim. He must accordingly be punished and those of the like be detained. This offence is rampant and this court has dealt with similar cases in this and previous session. He must therefore be convicted. In light of this, and taking into account the aggravating of the convict, the fact that in (sic) prayers for lenience and that he has spent almost three years on remand. I find a sentence-of 37 years' imprisonment appropriate. He is so sentenced".*

15] It is evident that when sentencing the appellant, the trial Judge gave more prominence to the aggravating factors and what he considered to be the damaging effects the offence would have on the victim. However, in the same vein, he did take into consideration the appellant's plea for leniency and the fact that

he spent almost three years on remand. It was a legal sentence meted out in relation to the gravity and notoriety of the offence, as well as the manner it was committed. The appellant a widower and as such the only parent figure, saw no shame or restraint to frequently sexually ravage his ten-year-old daughter. The facts indicate that neighbors had previously heard the child's cries in what was confirmed to be the act of sexual intercourse. One can only imagine the pain, humiliation, fear, helplessness, desperation and disillusionment she must have suffered. The appellant who was HIV positive could have infected her. The fact that against better advice, the appellant insisted on sharing a bed with the victim, and his threats to stop her from reporting the matter, point to the fact that he meticulously planned the offence. Also his insistence on a full trial after such damning evidence, do not reflect one who was remorseful and ready to reform. The trial Judge was correct to consider this a particularly disturbing case, one where the aggravating factors far outweighed what was presented in mitigation.

16] Even then, the trial Judge considered it proper not to give the maximum sentence of death. His decision related well to the principle of consistency raised by both counsel in their submissions as enunciated in **Aharikundira Yustina versus Uganda (supra)**. Going by the precedents they provided, the sentencing range in cases of defilement has been between 12 years and life imprisonment. We note however that the decision of **Wamusonze versus Uganda (supra)** relied on by appellant is not a compelling authority to consider. In that case, although

previous cases with sentences ranging between 12 to 15 years was considered, the facts are somewhat different here. Wamusonze was aged 30 years and confirmed to be a stranger to his victim of 12 years. The fact that he readily pleaded guilty may also have persuaded the Court to agree to a reduction of the sentence. In contrast, the appellant here was the biological father, the only parent and guardian of the victim. He insisted on sharing a bed with her, and defiled her repeatedly before he was caught red handed at it.

17] We have considered other persuasive decisions like that of **Anguyo Siliva versus Uganda, CA Criminal Appeal No. 038 of 2014** in which an appellant aged 32 years and who knew that he was HIV positive, was sentenced to serve 21 years and 28 days in prison (after deducting the period of remand), for defilement of a girl aged 14 years. Further in **Bonyo Abdul versus Uganda, SC Criminal Appeal No. 07 of 2011 (Unreported)** the Court upheld a sentence of life imprisonment for an HIV positive appellant who defiled a girl aged14 years old. Similarly, in **Kaserebanyi James versus Uganda, [2014] UGCA 89]**, an appellant who defiled and impregnated his daughter aged 15 years was sentenced to life imprisonment when confirming the sentence, this Court stated that a father who defiles his own daughter deserves a deterrent sentence.

18] In addition, we would consider the provisions of the Third Schedule of the Constitution (Sentencing Guidelines of the Constitution) for **Courts of Judicature (Practice), Directions**

2013. It provides that after considering both the aggravating and mitigating factors, the sentencing range for aggravated defilement, is 30 years to death as the maximum sentence. A sentence of 37 years, especially in relation to the facts presenting here, and compelling precedent, is well within the advised range. In the circumstances that we have carefully elaborated here, we find the sentence to be neither harsh nor manifestly excessive as claimed. We find no reason to fetter the discretion of the trial Judge to interfere with the sentence given.

19] We accordingly find no merit in the appeal. The appellant shall continue to serve the sentence of 37 years' imprisonment.

20] We are on record that our decision to maintain the sentence was not unanimous. Justice Muzamiru M. Kibedi JA agreed that the offence for which the appellant was convicted was a serious one and deserved an equally deterrent sentence. However, he was of the view that the sentence of 37 years' imprisonment was harsh and excessive in the circumstances of this case. He was thus not in agreement with the decision of the other two members of the Panel to maintain the sentence. For that reason, he declined to sign the judgment, which is his prerogative under the law. That notwithstanding, it is the decision of the Court that the sentence of 37 years' imprisonment is maintained.

21] Accordingly, the appeal stands dismissed.

Dated at **Kampala** this ..4th.. day of ..Sept..... 2023.

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HON. MUZAMIRU M. KIBEEDI
JUSTICE OF APPEAL

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HON. CHRISTOPHER GASHIRABAKE
JUSTICE OF APPEAL

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HON. EVA K. LUSWATA
JUSTICE OF APPEAL