THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT MBARARA

CRIMINAL APPEAL NO.0150 OF 2013

[CORAM: Buteera, DCJ; Gashirabake & Kihika, JJA]

BAGYENYI MARTIN :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Appeal against the decision of the High Court of Uganda at Rukungiri, (J. Murangira, J), vide Criminal Session Case No.209 of 2010 and dated 23rd October 2013)

JUDGMENT OF THE COURT

Introduction

The appellant was convicted of aggravated defilement contrary to Sections 129 (3) and 4(a) and (b) of the Penal Code Act, Cap 120, and sentenced to 20 years' imprisonment.

Brief Facts

On 23/08/2010, Merenia Kebitera (PW2) sent her daughter (KP), the victim, to fetch water from a communal well which was located below the farm where Bagyenyi Martin, (the appellant), worked. The appellant waylaid the victim and sexually abused her. He warned her not to reveal to anyone or else he would kill her. The victim did not reveal the ordeal until 3 days later when PW2 noticed that the victim was walking with difficulty and was discharging a foul smell. PW2 called her elder son, Turindwamukama Silver (PWl), who interrogated KP who narrated the incident which led to the arrest of the appellant and consequently being indicted with aggravated defilement. After a full trial, he was convicted and sentenced to 20 years' imprisonment. He now appeals against sentence only.

Ground of Appeal

The Learned Trial Judge erred in law and fact when he passed a manifestly harsh and excessive sentence without due regard to the time spent both on remand and the mitigating factors hence occasioning a miscarriage of justice.

Representation

At the hearing of the Appeal, the appellant was represented by Mr. Geoffrey Chan Masereka, on state brief, while the respondent was represented by Ms Innocent Aleto, Senior State Attorney in the Office of the Director of Public Prosecutions. Both counsel applied to court to adopt their earlier-filed written submissions as the legal arguments and the application was granted. These shall be relied on by court to resolve this appeal.

Case for the appellant

Counsel for the appellant sought leave of court under Section 132(2b) of the Trial on Indictments Act and Rules 43(3)(a) of the Judicature (Court of Appeal Rules) Directions SI 13-10, to appeal against sentence only. The leave was granted by court. He submitted that before a convict can be sentenced, the trial court is obliged to exercise its discretion by considering meticulously all the mitigating factors and other pre-sentencing requirements as elucidated in the Constitution, statutes, and practice directions together with general principles as guided by case law. He cited **Aharikundira Yustina versus Uganda, SCCA No. 27 of 2015**, where it was noted that; since the trial Judge did not weigh the mitigating factors as against the aggravating factors this automatically placed a duty on the Court of Appeal to weigh the factors raised.

Counsel cited, inter alia, **Ninsiima Gilbert versus Uganda, CACA No. 1080 of 2010**, where this court reduced the appellant's sentence of 30 years' imprisonment for the offence of aggravated defilement to 15 years. He also cited **German Benjamin v Uganda, CACA No. 142 of 2010** where this court set aside a sentence of 20 years' imprisonment for the offence of aggravated defilement and substituted it with a sentence of 15 years' imprisonment. In **Kato Sula v Uganda, Criminal Appeal No. 30 of 1999**, the court of appeal upheld a sentence of 8 years for a teacher who defiled a primary two school girl.

He argued that guided by the above authorities, the sentence of 20 years meted against the appellant was indeed excessive. He prayed that the appellant be granted a lenient sentence after weighing the mitigating factors against the aggravating factors and taking into account the period that the appellant had spent on remand. He implored Court to apply Article 23(8) of the Constitution of the Republic of Uganda 1995 and deduct the period that the appellant spent on remand before his conviction.

Case for the respondent

In opposing the appeal, counsel for the respondent submitted that the appellant received a fair and a lenient sentence considering that he was convicted for the offence of aggravated defilement which carries a maximum death sentence under section 129 (3) & (4) of the PCA. She submitted that it is the position of the law, that sentencing is the discretion of a trial Judge and an appellate court can only interfere with the sentence of a lower court where in the exercise of its discretion, the court imposes a sentence which is manifestly excessive or so low as to amount to a miscarriage of justice or where the court ignores to consider an important matter or the sentence imposed is wrong in principle. He referred court to

Kiwalabye vs Uganda, Criminal Appeal No. 143 of 2001 as cited in **Kawooya Joseph vs Uganda; Criminal Appeal No. 0512 of 2014.**

Counsel further cited **Muhwezi Bayon versus Uganda, Criminal Appeal No. 198 of 2013**, where this court cited with approval **James s/o Yoram v R (1950) EACA 147**, where the Court of Appeal for Eastern Africa held that:

> **"It may be that this court been trying the appellant it might have imposed a less sentence but that by itself is not a ground for interference and this court will not ordinarily interfere with the discretion exercised by the trial judge in the matter of sentence. Unless it is evidence that the trial judge acted on some wrong principle overlooked some material factor."**

Counsel referred to The Constitution (Sentencing Guidelines for the Courts of Judicature (Practice) Directions, Legal Notice No.8/2013, and specifically Guideline 6 which outlines the general sentencing principles that the sentencing court should take into consideration, including the gravity of the offence, the degree of culpability of the offender.

She submitted that the learned trial Judge, while sentencing the appellant, was alive to the requirements under Guideline 6 (a), as regards the mitigating and aggravating factors which he put into consideration while exercising his discretion as a Judge who both heard the evidence and had the opportunity to see the witnesses testify in court.

Counsel further observed that the learned trial Judge in sentencing the appellant considered the fact that the victim at the time of the incident was aged 9 years, while the appellant was aged 24 years (going by the charge sheet). She submitted that the appellant was duty bound to protect

the victim from harm, but instead preyed on her, thereby abusing the trust society places on adults in the protection of children. The trial Judge also took into consideration the fact that the appellant threatened to harm the victim after sexually abusing her which explains why the mother, PW2, was able to notice that the victim had been abused 3 days after the incident.

Counsel submitted that the learned trial Judge exercised his discretion judiciously within the precincts of the law in assessing the aggravating factors as against the mitigating factors and implored this honorable court find that the trial judge considered all material factors and imposed an appropriate sentence.

On the submission that the learned trial Judge did not deduct the period spent on remand by the appellant, counsel referred to the record of appeal and noted that the learned trial Judge while sentencing the appellant took into consideration the period the appellant spent on remand, when he stated at page 39 of the trial court Judgment that the appellant deserved a sentence of imprisonment for life and that the period he had been on remand was considered.

She contended that the legal regime at the time of sentencing the appellant, did not require the trial Judge to arithematically deduct the period that the appellant had spent on remand. That the appellant in the instant case was sentenced on 23/10/2013, and the requirement to apply arithmetic formula to deduct remand period commenced with the decision in **Rwabugande Moses Vs Uganda; SCCA No. 25 of 2014**, which was delivered on 3rd March 2017.

Counsel submitted that the Supreme Court echoed this position in **Byamukama Herbert Vs Uganda, SCCA No. 2I of 2017**, in which the justices of the supreme court at page 10 of the judgement in a Judgment

delivered on 5th October 2021 clearly pronounced that **Rwabugande** (supra) which was decided in March 2017 is inapplicable in the case (**Byamukama**) where the appellant had been convicted in December 2016. The Supreme Court emphasized that:

> **"For a case to be cited as a precedent, it ought to have been decided earlier**
>
> **before the matter at hand. The Rwabugande decision thus does not serve that purposes in the instant appeal."**

Similarly, in **Nashimolo Paul Kibolo vs Uganda SCCA No. 46 of 2017**, it was held that;

> **"The decision (Rwabugande) was delivered on 3rd March 2017. In the accordance with the principle of precedent, this court and the courts below have to follow the position of the law from the date hence forth."**

Counsel contended that it would be incorrect for this honorable court to fault the learned trial Judge for rightly applying the law as it was then, since the arithmetical deduction was not applicable at the time of sentencing the appellant in the present case. Counsel prayed that this court finds no reason to warrant interference with the sentence since the period spent on remand, the aggravating factors were put into consideration before sentencing the appellant, and the issues raised by counsel for the appellant as grounds of appeal were duly considered by the trial judge at the point of sentencing.

Court's consideration

The gist of this appeal is two- pronged; that the learned trial judge did not consider the mitigating factors in favor of the appellant, and that he did

not deduct the period that the appellant had spent on remand prior to his conviction. In answering the first leg, we make reference to the record of appeal on sentencing. We observe that the learned trial Judge considered all the factors advanced by counsel for both parties in mitigation of sentence, and the Sentencing guidelines in respect to the offence of aggravated defilement. He, however, noted the fact that the appellant deserved a sentence of imprisonment for life. He considered the period that the appellant had spent on remand and sentenced the appellant to 20 years' imprisonment. Thus far, we find that the learned trial Judge did not ignore any mitigating factors but rather was alive to them while sentencing. As such, we would not fault the learned trial Judge for not doing what he actually did.

Regarding the argument that the learned trial Judge passed a manifestly harsh and excessive sentence, we are guided by the fact that the maximum penalty for the offence of aggravated defilement with which the appellant was convicted is death. The appellant in the instant appeal was sentenced to 20 years. In **Mwanje Godfrey vs Uganda; Criminal Appeal No. 266 of 2015**, this Court upheld the sentence of 22 years where the appellant pleaded guilty to two counts of aggravated defilement. This Court found that the sentence of 22 years' imprisonment was neither harsh nor excessive. Judgment was delivered on 14th March 2022.

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 **Okello Geoffrey vs Uganda; SCCA No. 34 of 2014**, the appellant was sentenced to 22 years' imprisonment and the Supreme Court in upholding the sentence found the sentence not to be illegal.

In **Wakata Joseph vs. Uganda; Criminal Appeal No. 043 of 2013**, this Court after deducting the period the appellant spent on remand reduced a sentence of 35 years to 28 years' imprisonment for aggravated defilement of a 6-year-old victim.

The above cited authorities and many more confirm that the appellant was given a lenient sentence. It cannot be said that the sentence was harsh, excessive or unusual. We find no reason to interfere with that sentence and hereby reject this contention.

On the contention that the trial judge did not deduct the period that the appellant had spent on remand, we observe that the sentence in this case was passed on 23/10/2013. At this time, the legal regime on the interpretation of Article 23 (8) of the Constitution was that 'considering the remand period', was good enough. In **Kizito Senkula vs. Uganda SCCA No. 24 of 2001,** the Court stated as follows:

> **"As we understand the provisions of article 23(8) of the Constitution, they mean that when a trial court imposes a term of imprisonment as sentence on a convicted person the court should take into account the period which the person spent in remand prior to his/her conviction. <u>Taking into account does not mean an arithmetical exercise</u>. Further, the term of imprisonment should commence from the date of conviction, not back-dated to the date when the convicted person first went into custody."** (Emphasis ours)

The trial Judge was alive to this when he stated that, 'the period he has been on remand is considered'. As has been held by this Court and the Supreme Court, **Rwabugande** (supra) does not apply retrospectively. In **Sebunya Robert & Anor v Uganda; SCCA No. 58 of 2016**, it was observed that:

> **"Rwabugande does not have any retrospective effect on sentences which were passed before it by Courts 'taking into account the periods [a convict] spends in lawful custody'. Accordingly, we find no justifiable reason to fault the High Court for passing or the Court of Appeal for confirming the sentences that were imposed on the appellants as those sentences were in conformity with the law that applied at the time the sentences were passed."**

In this case, the sentence having been passed before 03rd March 2017 when **Rwabugande** (supra) was passed, the learned trial Judge cannot be faulted for not mathematically deducting the period the appellant spent on remand. It was sufficient for him to state that he had considered the period the appellant spent on remand. We accordingly find no merit in the appeal and dismiss it accordingly. The appellant shall continue to serve his sentence.

Dated at Mbarara this ....08th.... day of ....September.... 2023

Richard Buteera
Deputy Chief Justice

Christopher Gashirabake
Justice of Appeal

Oscar John Kihika
Justice of Appeal