THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

CRIMINAL APPEAL NO. 37 OF 2019

(Coram: Obura, Bamugemereire & Madrama, JJA)

MBOTTO DOMINIC} ..... APPELLANT

VERSUS

UGANDA} ..... RESPONDENT

(Appeal from the decision of the High Court of Uganda Holden at Mbale in Criminal Session Case No 022 of 2016 before Asiimwe, J delivered on 28th November 2018)

JUDGMENT OF COURT

The Appellant was indicted for aggravated defilement contrary to section 129 (3) and (4) of the Penal Code Act. He was tried and convicted on his own plea of guilty whereupon he was sentenced to 25 years' imprisonment.

The appellant being aggrieved appealed against his conviction and sentence on the following grounds:

1. The learned trial judge erred in law and fact when he convicted the appellant on his own plea of guilty without following the right procedures.
2. The learned trial judge erred in law and fact when he passed an illegal, manifestly harsh and excessive sentence of 25 years on the appellant.

At the hearing of the appeal, the respondent was represented by the learned Senior Assistant DPP Mr. Oola Sam while the appellant was represented by learned counsel Mr. Geoffrey Nappa. The appellant was present in court.

The court was addressed in written submissions.

Ground 1.

The learned trial judge erred in law and fact when he convicted the appellant on his own plea of guilty without following the right procedure.

The appellant's counsel submitted that in as much as the learned trial judge stated in the sentence that the accused chose to change his plea and the indictment was read to him afresh, the accused accepted the charge and a plea of guilty was entered and the court proceeded to convict him after accepting the fact as read by the prosecution, the proper procedure was not followed. Counsel referred the court to the record of proceedings and submitted that whereas in the said record of proceedings it reflected that the appellant changed his plea from "not guilty" to "guilty", the record does not reflect that the charges were ever read back to the appellant nor does it even show that the prosecution equally read the facts back to the appellant upon which he decided to change the plea from not guilty to guilty.

The appellant's counsel submitted that the procedure for recording a plea of guilty was settled by Spry V-P as he then was in **Adan Vs Republic (1973) EA 446** which he cited for the proposition that where a person is charged, the charge and the particulars should be read back to him so far as is possible in his own language but if it is not possible then the language which he can speak and understand. The magistrate would then explain to the accused person all the essential ingredients of the offence charged. If the accused person then admits all the essential elements, the magistrate should record what the accused has said as nearly as possible in his own words and then formerly enter a plea of guilty. The magistrate should then ask the prosecutor to state the facts of the alleged offence and when the statement is complete, should give the accused person an opportunity to dispute or explain the facts or to add to any other relevant facts which if true, might raise a question as to his guilt. The magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence.

The appellant's counsel submitted that the rationale behind this principle is to ensure that an accused person is properly convicted on his own plea. As far as the record is concerned, the appellant's counsel maintains that the convict neither admitted any facts nor does the said record reflect that the court/trial judge ever read to the appellant the statement of the offence, and the particulars of the offence. The appellant's counsel further relies on section 63 of the Trial on Indictment Act which provides that if the accused pleads guilty, the plea shall be recorded and he or she shall be convicted. Counsel submitted that it is mandatory for the court to record the plea on the record which was not the case in the circumstances of this appeal.

In **Namara Daphine Vs Uganda; Criminal Appeal No 030 of 2013** the court stated that an accused person must have pleaded to each ingredient of the offence and a generalised statement such as "I plead guilty" were insufficient in plea taking. Further in the case of **Nsubuga Ali AKA Cobra Vs Uganda; Criminal Appeal No 276 of 2017**, the court was faced with a similar dilemma where the appellant after hearing of the first prosecution witness is said to have changed his plea from "not guilty" to "guilty". However, according to the record, the learned trial judge only read out the charge to the appellant who merely stated that he had committed the offence and then the prosecution read back to the appellant the facts which he admitted but the ingredients of the offence were not read back to the appellant. The appellant's counsel submitted that it was required of the trial judge to explain all the essential ingredients of the offence of murder to the accused and therefore the trial judge was faulted on that.

As far as the facts of the appellant's case are concerned, the appellant's counsel submitted that the situation was even worse where the record does not even indicate that the charge was ever read back to the appellant, the essential ingredients of the offence were not read and even the prosecution never read out the facts but instead the record merely show that before the trial judge's summing up for the assessors, he went ahead to convict the appellant on his own plea. In the premises, the appellant's counsel prayed that the court be pleased to quash the conviction, set aside the illegal sentence and acquit the appellant.

Ground 2.

The learned trial judge erred in law and fact when he passed an illegal, manifestly harsh and excessive sentence of 25 years to the appellant.

The appellant's counsel submitted that the learned trial judge did not deduct the period the appellant spent on remand prior to his conviction when he imposed a sentence of 25 years' imprisonment. In the premises, the sentence passed by the trial judge was an illegal sentence.

Further, the appellant in mitigation submitted that he was a first-time offender and a young person who could be useful to society. There was no doubt that the appellant was a first-time offender since there was no evidence brought by the prosecution to the contrary. He had spent 3 years and 12 months on remand. In the premises, the appellant's counsel submitted that the sentence of 25 years' imprisonment was in the circumstances, harsh and excessive. The appellant's counsel submitted that while the trial judge had the discretion, one of the aims for punishments is reformation and this could not be achieved by lengthy terms of imprisonment. It is contended that the period of three years spent on remand was sufficient for the appellant to reform (see **Aharikundira Yustina Vs Uganda; SCCA No 27 of 2015**)

The appellant also relied on the Sentencing Guidelines and the question of consistency in sentencing and submitted that the court should consider other precedents in similar cases. In **German Benjamin Vs Uganda; Criminal Appeal No 142 of 2010**, the appellant had been convicted of aggravated defilement of a girl of five years. The appellant was 35 years old and had been on remand for four years whereupon he was sentenced to 20 years' imprisonment after deducting the period he had spent on remand prior to his conviction and sentence. Counsel submitted that in the current matter, the victim was six years old and the appellant was aged 33 years old, he was HIV negative and a sentence of 21 years after deducting the period spent on remand was excessive. In **German Benjamin** (supra) after the court considered the mitigating factors, the appellant was, on appeal, sentenced to 15 years' imprisonment. Counsel also relied on **Ninsiima Gilbert Vs Uganda; Criminal Appeal No 0180 of 2010**. The appellant had been found guilty of defilement of a girl aged 8

years whereupon he was convicted and sentenced to 30 years' imprisonment. On appeal, the sentence was reduced to 15 years.

The appellants counsel relied on other precedents and submitted that in cases of aggravated defilement, without additional aggravating factors, the sentences ranged between 11 years and 15 years. In the premises, he prayed that the court applies the principle of consistency in sentencing and be pleased to set aside the sentence imposed on the appellant and that the court exercises its discretionary power under section 11 of the Judicature Act and sentence the appellant to an appropriate sentence.

In reply, the respondents counsel opposed the appeal.

In as far as ground 1 of the appeal is concerned, the respondent's counsel drew the attention of the court to the proceedings on 20 November 2018 where the learned trial judge adjourned the case for summing up to the assessors on 21st of November 2018. The supplementary record of proceedings showed that the procedure for plea taking was followed. Further, the respondent's counsel submitted and the effect of those submissions is that the law is as submitted by the appellant's counsel in the appellant's submissions and the controversy seems to be in its application to the facts. The respondent's counsel contended that the only irregularity was that the trial judge did not record the detailed facts of the case as narrated by the prosecutor. However, the appellant in his own words admitted that the facts are correct which demonstrated that the facts were read to the appellant. He submitted that the omission by the learned trial judge to record the facts as read by the prosecutor was a mere irregularity and did not occasion any miscarriage of justice. Further that the irregularity was curable by section 139 (1) of the Trial on Indictments Act.

Additionally, the respondents counsel submitted that section 34 (1) of the Criminal Procedure Code Act, stipulates that the appellate court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. The respondent's counsel maintains that the appellant knew the offence he was pleading to and admitted the facts as read by the

prosecutor were correct. The appellant was therefore properly convicted and ground 1 of the appeal has no merit and ought to be dismissed.

With regard to ground 2 of the appeal that the sentence passed was illegal, manifestly harsh and excessive, the appellant's counsel submitted that the premises of the sentence was incorrect in that the appellant was not sentenced to 25 years' imprisonment but to 21 years, 11 months and 13 days' imprisonment.

Further, the respondent's counsel submitted that an appropriate sentence is a matter for the discretion of the sentencing judge and this court as an appellate court will not normally interfere with the sentence unless it is illegal or manifestly harsh or excessive or where the trial judge overlooked some material factor or acted upon wrong principles. He submitted that the sentence passed against the appellant had not been shown to be illegal, neither has any of the other grounds been proved to warrant interference by this court.

Counsel sought to distinguish the facts of the case of the appellant from other facts with emphasis on the age of the victim. In the cases cited, the age of the victims ranged between 12 years, 9 years and 15 years while in the instant case the victim was aged only 6 years. He submitted that at the age of 43 years, the appellant was capable of being a father to the victim but instead lured her and sexually ravished her. The prosecution had prayed for the maximum sentence of death. The learned trial judge spared the appellant the maximum penalty and instead imposed a sentence of only 21 years, 11 months and 13 days after deducting the period he had spent on remand. In the premises, the respondent's counsel submitted that it was in the interest of justice not to interfere with the sentence against the appellant and if this court is inclined to do so, it will be acting contrary to the principle of consistency and uniformity of sentences.

The learned trial judge considered both the aggravating factors and mitigating factors before imposing the sentence and there was no compelling reason advanced to warrant interference by the court with the sentence. He prayed that the conviction and sentence of the appellant is upheld and the appeal dismissed.

In rejoinder, the appellant's counsel submitted that he had read through the supplementary record of proceedings for 21 November 2018 and that it still offends the guidelines for plea taking as submitted earlier.

Further, the appellant's counsel submitted that the supplementary record of proceedings shows that the trial judge read the charges to the appellant and he said that it was true. But the authorities cited show that the accused person must plead to each ingredient of the offence and generalised statements such as "I plead guilty" were insufficient in plea taking. In the premises, the omission by the trial judge in following the right procedure in recording the plea can never be taken for granted to conclude that it did not occasion a miscarriage of justice. It was an illegality which goes to the root of the plea taking process that should never be sanctioned by this court.

The appellant's counsel reiterated earlier submissions that the court disregards the submissions of the respondent's counsel.

With regard to ground 2 of the appeal, the appellant's counsel reiterated earlier submissions.

Consideration of appeal.

We have carefully considered the appellant's appeal, the submissions of counsel, the record of appeal and the law generally.

This is a first appeal from the decision of the High Court in the exercise of its original jurisdiction and we have the duty to reappraise the evidence on record and subject it to exhaustive scrutiny. However, bearing in mind that the matter proceeded on the basis of a plea of guilty, it is sufficient to consider the proceedings relating to the plea taking and it is not necessary for that purpose to reappraise the evidence on record. The plea taking came after all evidence had been adduced and the matter was adjourned for summing up to the assessors.

The first ground of appeal is that **the trial judge erred in law and fact when he convicted the appellant on his own plea of guilty without following the right procedure**.

The question of whether the right procedure was followed or not, is a question of law though it may be based on fact as to what the record discloses in terms of how the court proceeded with the plea taking.

Plea taking in capital and other offences triable by the High Court are governed by the Trial on Indictments Act, Cap 23. Under section 60 of the TIA, an accused person is required to plead to an indictment which is read to him or her before the trial commences. Section 60 of the Trial on Indictments Act provides that:

> 60. Pleading to indictment.
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> The accused person to be tried before the High Court shall be placed at the bar unfettered, unless the court shall cause otherwise to order, and the indictment shall be read over to him or her by the chief registrar or other officer of the court, and explained if need be by that officer or interpreted by the interpreter of the court; and the accused person shall be required to plead instantly to the indictment, unless, where the accused person is entitled to service of a copy of the indictment, he or she shall object to the want of such service, and the court shall find that he or she has not been duly served with a copy.

The accused shall plead instantly to what has been read and explained. The statement of offence and the particulars of the offence are contained in the indictment which have to be framed according to the rules for the framing of indictments under 25 (a) – (q) of the Trial on Indictments Act.

In short, section 60 of the TIA provides that the indictment shall be read over to the accused and where he or she does not understand, the same shall be translated or explained to the accused. Thereafter where the accused pleads not guilty the matter proceeds for trial. Where the accused pleads guilty, section 63 of the Trial on indictment Act indicates, a plea of guilty shall be recorded and this is a preliminary requirement as the plea of guilty is to be tested as to whether it is equivocal or unequivocal. In the subsequent proceedings, the plea can be changed to a plea of not guilty subsequently. Section 63 provides as follows:

> 63. Plea of guilty.
>
> If the accused pleads guilty, the plea shall be recorded and he or she may be convicted on it.

The question of whether the court will convict on a plea of guilty depends on the subsequent proceeding to the plea of guilty that has been preliminarily entered. When a plea is taken by a prisoner at the commencement under section 60 of the TIA, it is not a finding of the court but a statement taken from the accused. Thereafter the court may find the accused guilty and convict him or her. Under section 63 of the TIA the court merely records the plea and thereafter it provides that the accused may be convicted on it.

The totality of the procedure for recording a plea of guilty was set out by the East African Court of Appeal in **Adan v Republic [1973] 1 EA 445** per Sir William Duffus P, Spry VP and Mustafa JA. Spry VP read the judgment of the court and said at pages 446 – 447:

> We think the practice is desirable and should generally be followed throughout East Africa. So that there may be no doubt in the matter, we set out the procedure in the following paragraph. We would add also, with respect, that we are in complete agreement with a further observation by the Chief Justice and Muli, J., also in Criminal Appeal No. 743, that a plea should not be taken unless the prosecution are in a position to state the facts. An adjournment between the plea and the statement of facts ought never to be necessary and is most undesirable.
>
> When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded.
>
> The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the

> accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction.

The facts of the instant case demonstrate that the proceedings took place after the closure of the prosecution and defence cases and it was for summing up to the assessors. The supplementary record is hereby reproduced as follows:

- Defence:
- the accused would like to change his plea.
- Court:
- Explain to the accused and get his response.
- Accused: I want to change my plea. I instructed my lawyers.
- Court:
- The charge be read to the accused again.
- Accused: it is true.
- Court: a plea of guilt is entered.
- State: facts ready to the accused.
- Accused states: the facts are correct.
- Court: the accused is convicted on his own plea of guilty in this case of aggravated defilement.

Clearly the record shows that the charges were read again. It however does not show what those words were. In other words, it is not recorded what words were used when the charge was read to the accused. The court only recorded what took place. Ordinarily, this would be reflected in the audio record. If the recording of the court is taken to be an account of what transpired rather than a verbatim translation of what occurred, then the procedure was followed.

It is our conclusion that the record of appeal was inadequate and the supplementary record likewise was inadequate in that it does not have the words which were spoken in the proceedings so much so that the words of the charges and the particulars of the charge are not reflected in the proceedings. Secondly the explanation which the court recorded took place, was not recorded. Thirdly, the facts which were read by the state after the plea of guilty was entered are not recorded. There ought

to have been a transcript of the recording but none was availed. Nonetheless, we are satisfied that the proceedings demonstrate that the procedure was followed and the failure to record or transcribe the actual words spoken did not occasion any miscarriage of justice and is an irregularity that has no bearing on the proceedings which took place. Moreover, the change of plea took place after all the evidence had been adduced by all the prosecution witnesses and the accused had also given his defence to it. The matter was for summing up to the assessors and it cannot be said that the appellant may not have understood the ingredients and the facts before changing his plea to guilty.

In the premises, ground 1 of the appeal has no merit and is hereby disallowed.

With regard to ground 2 of the appeal, the appellant had been sentenced to 21 years' imprisonment and not 25 years' imprisonment as submitted by the appellant's counsel. The record is clear in that respect and the sentencing notes of the learned trial judge are *inter alia* as follows:

> The maximum sentence in an aggravated defilement case is death which is not mandatory according to the decision in **Attorney General Vs Susan Kigula and 417 others; Constitutional Petition Appeal No 03 of 2006**, this court has power to pass a death sentence. However, this case is not the rarest of the rarest cases and therefore a death sentence is ruled out.
>
> The circumstances surrounding the commission of this case also do not fall in the sentence of life imprisonment. This court will therefore rule out a sentence of life imprisonment hence leaving the only option of a custodial sentence.
>
> Under custodial sentence, the minimum jail period recommended under the sentencing guidelines for a person convicted of aggravated defilement is 30 years' imprisonment. It can be reduced or moved upwards depending on the aggravating and mitigating factors.
>
> I will consider a custodial sentence of 30 years for this case as a starting point.
>
> In this case, I have taken into account the fact that the convict has pleaded guilty, as one of the factors mitigating his sentence. However, it has come way too late on a day fixed for summing up of assessors are not at the earliest opportunity, I will not grant the convict the traditional discount of one third (1/3) (ten years) because at the time of summing up, court has literally gone through the entire trial. I therefore will discount the sentence by a sixth 1/6th (five years) bringing the sentence to 25 years.

> I have also considered the submissions made in mitigation of sentence in relation to a period the convict has spent on remand. In accordance with Article 23 (8) of the Constitution and Regulation 15 (2) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, to the effect that the court should deduct the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. I note that the convict has been in custody since 13th November, 2015. I hereby take into account and set off 3 years and 17 days as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of 21 years and 11 months and 13 days to be served starting today.
>
> Having been convicted and sentenced his own plea of guilty, the convict is advised that he has a right of appeal against the legality and severity of this sentence, within a period of 14 days.

The learned trial judge took into account the period the convict spent on remand and therefore the sentence is a legal sentence. Secondly, on the question of legality of sentence, the learned trial judge clearly stated that he had discounted life imprisonment and the maximum penalty of death had preferred to give the appellant a lesser punishment of a custodial sentence.

We have considered several other precedents and find that the imposed sentence of 21 years' 11 months and 13 days' imprisonment after deduction of the period spent on remand would be excessive in light of the plea of guilty and other precedents of this Court and the Supreme Court and we set it aside on this ground.

Having set aside the sentence of 21 years, 11 months and 13 days imposed on the appellant, we exercise the powers of this court under section 11 of the Judicature Act, to impose a sentence of our own.

For purposes of establishing the most current trend in sentencing, we have considered the recent precedents.

In **Kizito Senkula v Uganda; (Criminal Appeal No. 24 of 2001) [2002] UGCA 36** the victim of the offence was 11 years old and the Court of Appeal, on appeal, held that a sentence of 15 years' imprisonment was appropriate.

Secondly, in **Katende Ahamad v Uganda; (Criminal Appeal No. 6 of 2004) [2007] UGSC 11** the appellant defiled his biological daughter of 9 years of

age and the Supreme Court on a second appeal imposed a sentence of 10 years' imprisonment after deducting a period of 2 ½ years the appellant had spent in lawful custody prior to his conviction.

In **Babua Roland v Uganda; Criminal Appeal No. 303 of 2010 [2016] UGCA 34**, the appellant was married to the victim's aunt. The victim was 12 years old at the time of the offence and was under the care of the appellant and her aunt. The appellant was convicted of aggravated defilement and sentenced to life imprisonment. On appeal, this court held that the sentence of life imprisonment was harsh and excessive and substituted it with a term of 18 years' imprisonment.

In **Ninsiima Gilbert v Uganda; Criminal Appeal No. 0180 of 2010 [2014] UGCA 65** the appellant was convicted of aggravated defilement of a victim of 8 years of age and the trial court convicted and sentenced the appellant to 30 years' imprisonment. On appeal, this court reduced the sentence of 30 years' imprisonment to 15 years' imprisonment.

Lastly in **Lukwago Henry v Uganda; Court of Appeal Criminal Appeal No 0036 of 2010 [2014] UGCA 34**, the appellate was convicted on his own plea of guilty and sentenced to 13 years' imprisonment and this court upheld a sentence of 13 years imposed on the appellant for the offence of aggravated defilement of a victim of 13 years.

The facts of this case are that the appellant pleaded guilty to the offence of aggravated defilement where he defiled a child of only six years of age. The convict was 43 years of age. We have established from the record that the state attorney submitted that the appellant had no previous criminal record. Further in aggravation, it was submitted that the sexual act was repeatedly committed because the evidence demonstrated that the sexual act had been done on her for more than once. The convict was a guardian and abused his trust. In mitigation, it was submitted that that the convict pleaded guilty and was remorseful. He was a first-time offender and would still be a useful member of society and prayed for a sentence of five years.

The fact that the appellant pleaded guilty after evidence had been adduced should not be used against him because he was entitled to change his mind at any stage of the proceedings. The burden was on the prosecution to prove the offences beyond reasonable doubt. The fact that

the appellant pleaded guilty at the end of the proceedings can be taken as a mitigating factor as far as sentence is concerned. Secondly the appellant has no previous record of conviction. The learned trial judge discounted the maximum penalty of death and the next severest sentence of life imprisonment. In the premises, we would impose a custodial sentence that is appropriate in the circumstances.

The appellant pleaded guilty, and there is a chance that he would reform. He had committed a serious offence given that the victim was only six years old. In the premises we would find that a sentence of 18 years' imprisonment would be appropriate. From this period, we would deduct the 3 years and 17 days that the appellant spent in pre-trial detention before his conviction by the High Court on 30 November 2018.

We therefore sentence the appellant to 15 years, 11 months and 13 days' imprisonment. The sentence shall be served with effect from 30 November 2018, the date when the appellant was convicted and sentenced by the High Court.

Dated at Mbale the 30th day of June 2023

Hellen Obura

Justice of Appeal

Catherine Bamugemereire

Justice of Appeal

Christopher Madrama

Justice of Appeal