# THE REPUBLIC OF UGANDA

## IN THE COURT OF APPEAL OF UGANDA AT MBARARA

[Coram: R. Buteera, DCJ. C. Gashirabake, JA, O. Kihika, JA.]

## CRIMINAL APPEAL NO. 025 OF 2015

*(Arising from Criminal session case No. 0088/2015, at Rukungiri)*

BETWEEN

**BASHIR BURAHURI..... APPELLANT**

AND

**UGANDA ..... RESPONDENT**

*(Appeal against the sentence passed by Michael Elubu J. delivered on the 16th day of January 2015 at Rukungiri)*

## JUDGMENT OF COURT

### Introduction

1.] The appellant was indicted and convicted of aggravated defilement contrary to sections 129 (3) and (4)(a) of the Penal Code Act.

2.] It was alleged that on 1st March 2012 at Nyakibuka Cell, Kihanda Parish Kirima Sub-County in Kanungu District, the victim came back from school and reached home at 6:00 p.m. The grandmother sent her to one Sarah Kamazoba to pass her information about a village group called Bakikuru. After the victim passed information to Sarah Kamazoba in the presence of the appellant, Sarah Kamazoba told the victim to go with the appellant to get Cocoyams. The victim went with the appellant who started seducing her for sex. The appellant gave her Shs.100/= (one hundred shillings), a pen, and

further told her that he wanted the victim to be his wife. The appellant requested sex which the victim declined. The appellant caught her by force, blocked her mouth, and had sex with the victim. The victim started crying and the appellant gave her Cocoyams and told her to keep quiet.

3.] The following day, on the 2nd of March, the victim went and told her grandmother Tibwekabisa Loy, that blood was coming from her vigina and when the grandmother asked her what had happened the victim narrated to her the whole ordeal. The matter was reported to Katete Police Post in Kanungu District, the appellant was arrested and charged with aggravated defilement. The appellant was sentenced to 40 years' imprisonment. Aggrieved with the trial Court findings the appellant lodged this appeal on one ground that;

> *"the sentence imposed onto the appellant was harsh, manifestly excessive and it was ambiguous/ illegal in as much as it was not clear as to whether the period spent on remand had been deducted.".*

**Representation**

4.] At the hearing of the appeal, the appellant was represented by Ms. Maclean Kemigisha on State brief. The respondent was represented by Mr. Joseph Kyomuhendo Chief State Attorney.

**Submissions by counsel for the appellant**

5.] Counsel for the appellant faulted the trial Judge for failure to put into consideration the mitigating factors by the appellant which factors would have attracted a lesser sentence compared to the 40 years handed down to the appellant. During the appellant's allocutus, it was stated that he was a first offender, he was of advanced age, (54) years, he was remorseful, had 14 children and an elderly mother and he was the only surviving child of his mother.

6.] Counsel submitted that when sentencing, the trial Judge did not consider such mitigating factors and only pointed at the aggravating factors. She further argued that the victim did not contract any serious sexually transmitted disease and this ought to have been put into consideration.

7.] Additionally, counsel acknowledged the fact that an appellate court does not normally interfere with the discretion of the sentencing Judge unless the sentence is illegal or unless the Court is satisfied that the sentence imposed by the trial Judge was manifestly excessive to occasion an injustice. Counsel cited **Wamusonze Wilson Vs. Uganda, Criminal Appeal No. 319 of 2010,** where after considering a range of cases, a sentence of 30 years was reduced to 12 years.

8.] Furthermore, it was submitted that the appellant is not certain as to whether the trial Judge deducted the time that he spent on remand. Whether the deduction was done before or after arriving at the 40 years. To buttress her argument counsel cited the case of **Rwabugande Moses Vs Uganda, Criminal Appeal No. 25 of 2014**, which is to the effect that the court must arithmetically take into account the period spent on remand**.** Counsel referred to article 23(8) of the constitution as well. Counsel submitted that the sentence was ambiguous and illegal to the extent that it was not clear as to whether the trial Judge had deducted the period spent on remand.

9.] Counsel invited this court to find that the sentence was harsh and excessive. She prayed that this Court invokes section 11 of the Judicature Act Cap 13 and impose a sentence of 15 years before deducting the years spent on remand.

**Submissions by counsel for the respondent**.

10.] Counsel for the respondent submitted that an appellate court should not interfere with the discretion of the sentencing judicial officer unless such

decision is harsh, manifestly excessive, so low as to amount to a miscarriage of justice or the court ignored an important matter. Counsel cited the case of **Kiwalabye Bernard V Uganda, Criminal Appeal No. 143 of 2001** cited with approval in **Kato Kajubi Godfrey V. Uganda, SCCA No 20/2014**. Counsel also cited the case of **Biryomumisho Alex Vs Uganda, Criminal Appeal No. 464 of 2016**, where it was held that interfering with the sentence is not a matter of emotions but rather one of law.

11.] It was further submitted for the respondent that the 40 years' imprisonment sentence imposed on the appellant is neither ambiguous nor illegal. The trial Judge complied with the Constitutional provisions that required him to take into consideration the period the appellant had spent on remand. It was stated that the sentencing regime at the time did not require a Judicial Officer to arithmetically consider the period spent on remand while sentencing a convict. Counsel cited the case **Kizito Senkula vs. Uganda, SCCA No. 24 of 2001,** it was held that:

> *"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 a sentence on a convicted person the court should take into account the period which the person spent in remand prior to his/her conviction. Taking this into account does not mean an arithmetical exercise. 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".*

12.] Counsel argued that considering the record of proceedings, the learned trial Judge clearly took into consideration the years spent on remand. He noted that the requirement of arithmetical deduction was a recent development of 2017 that did not operate retrospectively. He cited the case of **Rwabugande**

**Moses Vs Uganda,** *(supra)*. Counsel further cited the case of **Abelle Asuman Vs Uganda,** *(supra)*, where the Supreme Court held that:

> *"The Court of Appeal could not be bound to follow a decision of the Supreme Court of 3rd March 2017 coming about four months after its decision. The case of Rwabugande (supra) would not bind Courts for cases decided before the 3rd of March 2017."*

13.] The Principle in the case of **Rwabugande vs Uganda,** *(supra)* that the appellant wishes to rely on is not applicable in the instant case. The learned trial Judge sentenced the appellant in accordance with the sentencing regime of the time. The learned trial Judge took into consideration the period that the appellants spent on remand as required by the law.

14.] As regards harshness, it was argued for the respondent that the 40 years' imprisonment sentence imposed on the appellant is neither harsh nor manifestly excessive. In arriving at the 40 years' imprisonment sentence, the learned trial Judge considered both the aggravating and mitigating factors. The learned trial judge weighed the aggravating factors against the mitigating factors and found that the former outweighed the latter.

15.] Counsel submitted that the offence of aggravated defilement is very serious and it attracts a maximum sentence of death. The **Constitution (Sentencing Guidelines for Court of Judicature) (Practice) Directions 2013,** provides for the starting point in sentencing for aggravated defilement as 35 years and the maximum as death. Counsel for the respondent acknowledged the principle of consistency in sentencing as amplified in the case of **Aharikundira Yustina vs. Uganda, SCCA No. 27/2005.** However, counsel submitted that this should not be a matter of emotions but rather law and reason. A man who defiles a 12-year victim repeatedly and ravages her

private parts deserves a higher sentence than a man who defiles a 12-year-old just once.

16.] Counsel argued that the circumstances of each case should be put into consideration. He cited the case of **Byaruhanga Okot Vs. Uganda, CACA No. 078/2010**.

17.] Counsel referred to the case of **Bachwa Benon Vs Uganda, CACA No869 of 2014**, where this Court confirmed a life imprisonment sentence for the appellant who had pleaded guilty to aggravated defilement and sentenced him to life imprisonment. Similarly, in the case of **Banyo Adul Vs. Uganda, SCCA No. 17 of 2011**, the Supreme Court confirmed a life imprisonment sentence for an H.I.V Positive appellant and in the case of **Anguyo George V. Uganda, CACA No 0044 of 2014**, this court confirmed a 40 years' imprisonment sentence against the appellant who was convicted of aggravated defilement.

18.] Counsel stated that the 40 years' imprisonment sentence imposed on the appellant is within the sentencing range of this court.

**Consideration of Court.**

19.] The duty of the first appellate court is to re-evaluate the evidence and come up with its own conclusion(s) as per Rule 30 (1) (a) of the Judicature (Court of Appeal Rules Directions and the cases of **Pandya Vs R, [1957] EA 335 and Kifamunte Henry Vs. Uganda, SCCA No. 10 of 1997**. In the case of **Abdallah Nabulere and two others Vs Uganda, Criminal Appeal No. 9 of 1978**, the Supreme Court held that;

> *"An Appellate Court has indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction that is always exercised with caution. It is not enough that the appellate Court will only interfere with the findings*

*of fact of a trial court if there is no evidence to support a particular conclusion. But if the evidence as a whole can be regarded as justifying the conclusion reached at the trial, the view of the judge as to where the credibility lies is entitled to great weight..."*

20.] The appellant herein contends against the sentence only. It was submitted by counsel for the appellant that the sentence of 40 years' imprisonment was harsh and manifestly excessive and that it is not clear whether the sentencing Judge deducted the time spent on remand. On the other hand, counsel for the respondent submitted that the sentence was appropriate in the circumstances of the case and the time spent was considered accordingly.

21.] We agree with both counsel that an appropriate sentence is a matter of discretion of the sentencing Judge. We also agree that each case presents its unique facts that require the Judge to exercise that discretion. See **Kyalimpa Edward vs. Uganda, SCCA No. 10 of 1995, and Kiwalabye vs. Uganda, SCCA No. 143 of 2001**.

22.] The appellate court while considering the severity of the sentence, whether it is harsh or manifestly excessive, is guided by principles of law. This court in **Byaruhanga Odi vs. Uganda, Court of Appeal Criminal Appeal No. 476 of 2016,** held that;

*"the principles guiding the appellate Court when considering any contest to the severity of a sentence are well settled. As pointed out by 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 a failure to exercise discretion.*

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

e. *Where an error in principle was made."*

23.] As we review the evidence on record, in order to come up with an independent decision, we shall be guided by both the mitigating and aggravating factors presented before the Court.

24.] For aggravating factors, the State stated that the appellant was not remorseful. The victim was only l2 years old then, appellant was 52. There was an age difference of 40 years. The victim sustained sexual injuries in private parts caused by the appellant. At the time the appellant was mentally normal. He knew what he was doing. The victim was a vulnerable person and was introduced to sex very early. The victim was traumatized to date. The victim will live to fear men because of the trauma. The appellant had a premeditated plan and did it 3 times. The appellant is a person of responsibility and a neighbour of the victim who should have protected the victim. He breached that trust when he brutally defiled her. This offence is rampant. He prayed for a deterrent sentence in order to protect the vulnerable children. The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, item 3 of Part 1 of Schedule 3, provides the starting point for sentencing aggravated robbery as 35 years. Counsel for the state had prayed for 70 years.

25.] The victim's uncle in allocutus stated that the victim has remained weak and cannot do work. The other pupils at school mocked her and they had to change school. Even in the new school, she was continually teased. As a family, they incurred medical expenses. Villagers recommend harsh sentence such that the appellant remains in prison.

26.] In mitigation, counsel for the appellant stated that the appellant was a first-time offender at, the advanced age of 52 years. He exercised his right of trial and appeared remorseful. He has been on remand since April 2012. He prayed for 10 years' sentence. On the other hand, the appellant thanked God for what he has been through, all his brothers and sisters are dead. He has young children who dropped out of school when he was imprisoned. He has an elderly mother who is 85 years.

27.] While sentencing the trial Judge held that;

> *"The convict is treated as 1st offender. The time that he has spent on remand is taken into consideration. The family situation of the convict is noted. The convict is a man of advanced age. This court notes the mansion age difference between the convict and the victim. He was 40 years' older than her and old enough to be her grandparent. His actions have traumatized the victim and the effects continue to follow her after the acts. It is especially aggravating here that the convict ravished the victim on multiple occasions. The court notes the tannish paid and injury that he visited on her knowing full well what effect his forceful actions would have on a child of her age. The court notes that aggravated defilement is rampant in the region. If there must be deterred. The circumstances are aggravating. The maximum sentence here is death. The starting point is 35 years. The state prayed for 70 years and the defence for I0 years. All these the court finds inappropriate.*
>
> *Taking his period spent on remand into consideration the court sentences the convict to 40 years."*

28.] It is evident that when sentencing the appellant, the trial Judge considered both the aggravating and mitigating factors. He took into consideration the fact that the appellant is a first-time offender, the time he spent on remand, and the family situation of the appellant and of advanced

age. He did not also consider the maximum sentence not even the 70 years prayed by the State because he considered it inappropriate.

29.] We agree with the position of the law in **Aharikundira Yustina vs Uganda,** (*supra*), which emphasizes the importance of consistency while sentencing. However, we are further guided by the case of **Byaruhanga Okot vs. Uganda,** (*supra*) cited by the respondent that implores courts to bear in mind the circumstances of each case while sentencing. Going by the precedents provided, the sentencing range of defilement is between 12 years and life imprisonment. We note however that the decision of **Wamusonze vs. Uganda,** (*supra)* relied on by the appellant may not be applicable. In that case, the appellant was 30 years and the victim was 12 years. It was confirmed that the appellant was a stranger to the victim. Which is not the case in this matter. Herein, the appellant is 40 years older than his victim, having been 52 years at the time of the crime and the victim 12 years. The appellant was a neighbour who ought to have protected the victim but instead took advantage of the victim not once but three times.

30.] We have considered decisions like that in the case of **Bachwa Benon vs. Uganda, CACA No. 896 of 2014**, where this court upheld the conviction of life imprisonment imposed on the appellant who being a guardian to the 10-year-old victim had sexual intercourse with her and infected her with HIV. Furthermore, in the case of **Bonyo Abdul vs. Uganda, SC Criminal Appellant No 07 of 2011**, the court upheld a sentence of life imprisonment and in the case of **Kaserebanyi James vs. 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 defiled his own daughter deserves a deterrent sentence.

31.] Additionally, we would consider the provisions of the Third Schedule of the Constitutional Sentencing Guidelines. *(supra)* It provides the starting point for sentencing aggravated defilement is 35 years of imprisonment to death as the maximum sentence. A sentence of 40 years considering the facts presented in this case is well within the range.

32.] Furthermore, on whether the trial court considered the years spent on remand, it is very clear that the trial Judge was alive to this fact. The arithmetical deductions came into force with the decision of **Rwabugande Moses vs. Uganda,** *(supra)* which was decided in 2017 way after the trial Judge had made this decision in 2015. We are persuaded by the position of the law in The Supreme Court decision in the case of **Abelle Asuman vs. Uganda,** (*supra*) that the position of the law in **Rwabugande** *(supra)*does not operate retrospectively. Therefore, the guiding position of sentencing then was well laid in the case of **Kizito Senkula vs. Uganda,** *(supra)*.

33.] Having carefully considered the circumstances of this case and the fact that the trial Judge did not fault any sentencing principle set out we find the sentence of 40 years' imprisonment to be neither harsh nor manifestly excessive as claimed by the appellant. We find no reason to tamper with the discretion of the trial Judge to interfere with the sentence given.

34.] We accordingly find no merit in the appeal. The appellant should continue to serve the sentence of 40 years' imprisonment.

35.] Accordingly, the appeal stands dismissed.

**We so order**

**Dated at Kampala this** 12th **day of** October **2023**

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**RICHARD BUTEERA**

**DEPUTY CHIEF JUSTICE**

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**CHRISTOPHER GASHIRABAKE**

**JUSTICE OF APPEAL**

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**OSCAR KIHIKA**

**JUSTICE OF APPEAL**