THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Buteera, DCJ, Mulyagonja & Mugenyi, JJA

CRIMINAL APPEAL NO. 0526 OF 2016

SSEBUGWAWO HASSAN :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Appeal from the decision of Mutonyi J, delivered on 20th December 2016 at Kampala in High Court Criminal Session Case No. 216 of 2016)

JUDGMENT OF THE COURT

Introduction

The appellant was indicted for the offence of aggravated defilement contrary to Section 129 (1), (3) and 4 (b) of the Penal Code Act. After entering a plea bargain agreement, he was sentenced to serve 15 years' imprisonment.

Background

The facts that were admitted by the appellant were that the victim, whom we shall refer to as KK was 13 years old. That at around 2:00pm on 7th January 2015, at Bufumbe Village, Najja Sub County in Buikwe District, while she was on her way back home from the Trading Centre, KK went to the appellant's home to collect her brother's belongings. When she got there the appellant asked her to enter his house but she refused to do so. That the appellant then forcefully dragged her into the house, threw her onto his bed and forcefully subjected her to a sexual

act. KK made an alarm which attracted several residents from the neighbourhood who found the appellant in the act. The appellant attempted to run away but was arrested and taken to the Chairman, Local Council I who made a complaint at Lugazi Police Station. Upon medical examination, it was established that KK was 13 years old. She also had a ruptured hymen and bruises.

The appellant was also examined and found to be of normal mental status. He was thus arraigned for aggravated defilement but he admitted that he was guilty and entered into a plea bargain agreement. The trial judge sentenced him to 15 years' imprisonment as agreed. He was however dissatisfied with the sentence and appealed on one ground of appeal as follows:

> **The learned trial judge erred in law and fact when she imposed a harsh and excessive sentence of 15 years against the appellant thereby causing a miscarriage of justice.**

The respondent opposed the appeal.

Representation

At the hearing of the appeal on 17th August 2023, Ms Sheila Kihumuro represented the appellant on State Brief. The respondent was represented by Ms Anna Kizza, Chief State Attorney from the Office of the Director Public Prosecutions, who held the brief for Ms Samalie Wakooli, Assistant DPP.

Counsel for the appellant applied for leave to appeal against sentence only as is required by section 132 (b) of the Trial on Indictments Act, and it was granted. Counsel for both parties filed written submissions before the hearing as directed by court. They each prayed that their

submissions to be adopted as their final arguments in the appeal and their prayers were granted.

Submissions of Counsel

Ms. Sheila Kihumuro, for the appellant stated that the appellant was convicted and sentenced to 15 years' imprisonment after he entered into a plea bargain agreement on 20th December 2016. She contended that he had before that spent one year and 11 months on remand but it was not deducted from the sentence.

Counsel relied on Article 23 (8) of the Constitution which stipulates that where a person is convicted and sentenced to a term of imprisonment, any period he or she spends in lawful custody before completion of his or her trial shall be taken into account in imposing the sentence. She referred to **Abelle Asuman v Uganda; Supreme Court Criminal Appeal No. 066/2016,** where the court held that where a sentencing court clearly demonstrates that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate court only because the sentencing judge/justices used different words in the judgment, or missed to state that they deducted the period spent on remand.

Counsel for the appellant also referred court to the decision in **Tumwesigye Rauben v Uganda; CACA No. 181/2013**, where the decision in **Abelle Asuman** (supra) was cited with approval, and in which the court held that since the trial judge never considered the period spent on remand nor made any deduction of it from the sentence, the sentence was a nullity. She then pointed court to page 6 of the record of proceedings and stated that it would have been prudent for the trial judge to deduct the period spend on remand before he signed and agreed to the sentence imposed.

Counsel went on to point out that in the Commitment Warrant, it was shown that the trial judge sentenced the appellant to 15 years' imprisonment, period spent on remand inclusive. She asserted that this meant the leaned trial judge did not take time to address her mind to deducting the period spent on remand and she thereby occasioned a miscarriage of justice. Counsel then referred to the decision of the Supreme Court in **Kizito Senkula v Uganda, Criminal Appeal No 24 of 2001**, where it was held that sentencing is within the discretion of the trial judge and the appellate court was most unlikely to interfere with a sentence passed by a lower court, save where the court relied on a wrong principle.

She concluded that since the trial judge did not adhere to the provisions of Article 23 (8) of the Constitution the sentence that was imposed was a nullity. That it empowers this court to interfere with the sentence and therefore, it ought to be set aside so that the appellant is sentenced afresh.

Counsel then addressed court on the principles of uniformity and consistency in sentencing to advance the argument that the appellant's sentence was harsh and excessive in the circumstances. She referred to **German Benjamin v Uganda, Criminal Appeal No. 142 of 2010** and **Kyotera Anthony v Uganda, Court of Appeal Criminal Appeal No. 071 of 2014** to support her submission.

Relying on rule 8(2) and 6(1)(a) of the Judicature (Plea Bargain) Rules, counsel went on to argue that the record does not indicate that guidance was offered to the appellant on the plea bargain; that the trial judge endorsed a sentence that is excessive and above what would have been passed at a normal trial. Further, that it would be unfair for one to plead

guilty and get a sentence higher than what a full trial would attract without the intervention of the trial judge.

Counsel prayed that this court considers the fact that the appellant had spent 1 year and 11 months on remand before he was sentenced, that he had no criminal record prior to that, was remorseful, a sole bread winner of his family and did not waste court's time in arriving at an appropriate and lenient sentence. She then prayed that this court sets the sentence aside and substitutes it with the more appropriate sentence of 10 years' imprisonment.

In reply, Ms Anna Kizza for the respondent submitted that the appellant has no right to appeal in this matter since he entered into a plea bargain agreement where the sentence was agreed upon. She referred to **Lwere Bosco v Uganda, Criminal Appeal No 531 of 2016** to support her submission on that point. She went on to assert that the sentence was voluntarily agreed upon as is shown at page 6 of the record where it is emphasised that the appellant understood the bargain before he signed the agreement.

Counsel further submitted that aggravated defilement is a capital offense which attracts the death penalty according to section 129 (3) of the Penal Code Act. However, the appellant was sentenced to only 15 years' imprisonment which is a lenient sentence in the circumstances of the case. She prayed that this court upholds the sentence.

In response to the submission that the sentence was harsh and excessive, counsel relied on several decisions in which the courts have confirmed higher sentences than that which was imposed upon the appellant, such as **Bonyo Abdul v Uganda; SCCA No. 7 of 2011** where the Supreme Court upheld a sentence of life imprisonment for the aggravated defilement of a girl aged 14 years; and **Abingoma Defonzi v**

Uganda; Criminal Appeal No. 0284 of 2016 where this court upheld a sentence of 40 years imprisonment for the aggravated defilement of a girl who was 14 years old. Counsel then asserted that a sentence of 15 years was neither harsh nor excessive and it ought to be upheld.

With regard to the contention that the trial judge did not deduct the period that the appellant spent on remand from the sentence imposed, counsel referred to **Kizito Senkula v Uganda** (supra) and submitted that the decision in the case at hand was made on 20th December 2016. That sentencing courts at the time were required to take into consideration the period spent on remand, not to arithmetically deduct it from the sentence, as was held in **Rwabugande Moses v Uganda, Supreme Court Criminal Appeal No 25 of 2014**, which was handed down on 3rd March 2017. She further relied on the decision in **Kirisa Moses v Uganda SCCA No. 23/2016** where it was held that the decision in **Rwabugande's** case does not have a retrospective effect on sentences which were passed before it was handed down.

Counsel further submitted that the arguments on uniformity and consistency in sentencing do not arise in this matter since the sentence was the result of a plea bargain. She clarified that one is given what they bargain for, not what prevails on the market. She added that contrary to the appellant's submissions, the plea bargain agreement includes mitigating factors to be considered as part of the process. That therefore, the submissions on this point had no bearing on the merits of this case. She prayed that the appeal be dismissed and that this court upholds the sentence imposed by the trial judge.

Analysis and Determination

The principle that this court will only interfere with a sentence imposed by the trial court when it is illegal or founded on wrong principles of law

has been settled for a long time. The court will also interfere with the sentence where the trial court has not considered a material factor in the case; or has imposed a sentence which is harsh and manifestly excessive in the circumstances. [See **Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 143 of 2001 (unreported), Bashir Ssali v Uganda [2005] UGSC 21 and Livingstone Kakooza v Uganda [1994] UGSC 17**.] We took cognizance of these principles in disposing of this appeal.

Counsel for the appellant raised two issues in her submissions: i) that the sentence imposed upon the appellant was illegal because the trial judge did not deduct the period spent on remand from her final sentence, and ii) that the sentence of 15 years' imprisonment was therefore manifestly harsh and excessive due to the alleged omission to deduct the period spent in custody before sentence.

We observed that the ground of appeal that was framed by the appellant's Advocate did not advert to any illegality, save that the sentence that was imposed was harsh and excessive in the circumstances, which too is a matter of law. And at the risk of repetition but for clarity, it was coached in the following terms:

> *"That the learned trial judge erred in law and fact when she imposed a harsh and excessive sentence of 15 years against the appellant thereby arriving at a miscarriage of justice."*

We understood that this sole ground of appeal required this court to consider whether or not the sentence of 15 years' imprisonment for the offence of aggravated defilement was harsh and excessive in the circumstances of this case. However, counsel for the appellant addressed an alleged illegality in the sentencing process when she contended that the trial judge omitted to deduct the period spent in

custody before sentence contrary to Article 23 (8) of the Constitution, as it was required of sentencing judges by the Supreme Court in the case of **Rwabugande** (supra).

Rule 66 (2) of the Court of Appeal Rules provides that the memorandum of appeal shall set forth concisely without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact, which are alleged to have been wrongly decided by the trial court. In order to comply with this rule, counsel for the appellant ought to have framed another ground of appeal stating that the trial judge erred when she omitted to deduct the period spent on remand from the sentence and so imposed an illegal sentence. The contention that the sentence that she imposed was harsh and excessive would then have been a ground in the alternative.

As it stands therefore, counsel for the appellant brought up an alternative ground of appeal in her submissions that she did not state in the memorandum of appeal. This goes against the provisions of rule 74 of the Rules of this Court which provides as follows:

> **74. Arguments at hearing.**
>
> **(1) At the hearing of an appeal—**
>
> **(a) the appellant shall not, without leave of the court, argue any ground of appeal not specified in the memorandum of appeal or in any supplementary memorandum lodged under rule 67 of these Rules;**

The Rules of this court ought to be followed because each of them has a purpose. Pleadings that do not set out the appellant's case clearly may occasion injustice to a litigant who has a good case. But in this case, we will not penalise the appellant for he did not himself draft the memorandum of appeal. For completeness, we will address both

complaints that were raised for the appellant, if necessary, so that substantive justice is seen to have been done.

Legitimacy of the sentence

We accept the submission that according to the decision of the Supreme Court in the case of **Abelle Asuman** (supra) where the decision in **Rwabugande Moses** (supra) was considered with approval, it is now the legal position that sentencing judges are required to deduct the period spent on remand from the sentence to be imposed. It is also clear in this case that the trial judge did not deduct the period spent on remand from the sentence of 15 years that was agreed upon. It has therefore got to be determined whether the judge was under an obligation to do so, given the manner in which the sentence negotiated with the prisoner was stated in the plea bargain agreement.

Rule 12 (4) and (5) of the Judicature (Plea Bargain) Rules, 2016 provides for the execution of the plea bargain agreement and for its confirmation by the court as follows:

> **(4) The accused person shall freely and voluntarily, without threat or use of force, execute the agreement with full understanding of all matters.**
>
> **(5) A Plea Bargain Confirmation shall be signed by the parties before the presiding Judicial officer in the Form set out in the Schedule 3 and shall become part of the court record and shall be binding on the prosecution and the accused.**

The Form in Schedule 3 of the Plea Bargain Rules provides for the findings and order of the court and contains the following particulars:

> **This court, having reviewed this form and any addenda, and having questioned the accused concerning the accused's constitutional rights, finds that the accused has expressly, knowingly, and intelligently waived and given up his or her constitutional and statutory rights. The court finds that the accused's plea(s) and admission(s) are freely and**

voluntarily made with an understanding of the nature and consequences thereof, that any allegations as indicated in this form are true, and that there is a factual basis for the plea(s) and admissions(s). The court accepts the accused's plea(s). The court orders that this form be filed and incorporated in the record of proceedings.

Name and signature of Judge or Magistrate

Date

The trial judge did sign the order as it is required and it was made part of the record. On the record, she made a note as follows:

> *"Agreement explained. Accused understood before signing. Sentence of 15 years endorsed as agreed.*

She endorsed the proceedings with her signature and the date; and that was the end of the proceedings.

We note that even if they were based on a plea bargain agreement the trial judge unnecessarily abridged the proceedings. The procedure for plea bargaining in court is set out in Schedule 2 to the Plea Bargain Rules. After the accused person pleads guilty, he/she is convicted accordingly. The process that follows is that the State is heard in aggravation and the defence in mitigation. The convict is also heard in *allocutus*. The victim or complainant is then given an opportunity to express views on the sentence that is recommended in the agreement. Thereafter the convict is sentenced as agreed, if the trial judge deems the recommended sentence appropriate in the circumstances of the case.

In the instant case, the trial judge did not go through the usual processes of hearing the aggravating and mitigating factors. Neither did she hear the victim's statement nor the *allocutus* of the convict. The trial judge simply endorsed the sentence recommended without much ado, as reproduced above. We therefore find that the court did not sentence

the convict as is required by law, or at all, in this case. There was thus no valid sentence to appeal against, neither could this court consider whether the trial judge imposed a sentence that was manifestly harsh and excessive in the circumstances of the case.

Nonetheless, we observed that the facts that constituted the offence were read to the appellant before he took plea and he agreed that they were true. Therefore, we find that the trial judge properly took the appellant's plea and his guilty plea will stand.

Section 11 of the Judicature Act provides that for the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated. This court therefore may exercise its jurisdiction to sentence the appellant according to the plea bargain agreement, and we hereby do so.

We have considered the aggravating and mitigating factors that were stated in the plea bargain agreement, at pages 10-28 of the record of appeal. The appellant was 21 years old at the time be committed the offence. He pleaded guilty and executed an agreement with the prosecution to that effect. He was a first time-offender, remorseful and repentant. On the other hand, the victim was only 13 years old. The appellant used force to drag her into his house and inflicted injuries upon her as he forced himself on her.

The appellant agreed to have a sentence of 15 years' imprisonment imposed upon him, the period of remand included therein. The offence took place on 7th January 2015 and he agreed that the period spent on remand would be included in the sentence of 15 years' imprisonment. The appellant was still a young man and capable of reform and in view

of the fact that he pleaded guilty, we considered the recommended sentence of 15 years appropriate to meet the cause of justice in this case.

We note that the appellant spent one (1) year in prison before he pleaded guilty and was convicted. Since we are to re-sentence him, we take cognisance of the rule that was approved by the Supreme Court in **Abelle Asuman v Uganda** (supra) that in order to comply with Article 23 (8) of the Constitution, sentencing courts shall deduct the period spent on remand from the proposed sentence.

This appeal therefore succeeds and, we now sentence the appellant to serve a term of imprisonment of 14 years, to commence on 12th December 2016, the date on which he was convicted.

Dated at Kampala this 25th Day of October, 2023.

Richard Buteera
DEPUTY CHIEF JUSTICE

Irene Mulyagonja
JUSTICE OF APPEAL

Monica K Mugenyi
JUSTICE OF APPEAL