THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT JINJA

(Coram: Kiyabwire; Kibeedi & Mugenyi, JJA)

CRIMINAL APPEAL NO. 70 OF 2014

KIBIKYO PAUL ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

(Appeal from High Court of Uganda at Mukono (Mukasa, J) in Criminal Case No. 150 of 2011)

JUDGMENT OF THE COURT

A. **Introduction**

1. Mr. Paul Kibikyo ('the Appellant') was convicted of the offence of aggravated defilement contrary to section 129(3) and (4)(a) of the Penal Code Act, Cap. 120; and sentenced to twenty-eight years' (28) imprisonment.

2. The facts as accepted by the trial court are that on 20th June 2010, Moses Mulindwa witnessed the Appellant inserting his penis into the victim's private parts in a broken shelter. Mr. Mulindwa immediately reported the incident whereupon one Vincent Sekandi and other undisclosed persons led to the immediate arrest of the Appellant. On 10th March 2014 he was convicted of the offence of aggravated defilement on his own plea of guilt.

3. The Appellant now contests the sentence handed down to him on the singular ground that '**the Learned trial Judge erred in law and fact when he sentenced the Appellant to a harsh and excessive sentence thus occasioning a miscarriage of justice**.'

4. At the hearing, Ms. Joan Nakhumitsa Napokoli appeared for the Appellant while the Respondent was represented by Ms. Mariam Kuluthum, a State Attorney.

B. **Parties' Legal Arguments**

5. The present Appeal is premised on the decision in **Apiku Ensio vs Uganda, Criminal Appeal No. 751 of 2015** where a 25-year term sentence for aggravated defilement was considered by this Court to have been harsh and manifestly excessive, and reduced to 20 years' imprisonment. This Court is urged to consider a sentencing range of 15 to 20 years as appropriate for the offence of aggravated defilement on the basis of decisions cited in that case as follows.

6. In **Ninsiima vs Uganda, Criminal Appeal No. 1080 of 2010**, the Court upheld a range of 15 to 18 years for aggravated defilement, and reduced a 30-year sentence to 15 years' imprisonment. Similarly, in **German Benjamin vs Uganda, Criminal Appeal No. 142 of 2010** a sentence of 20 years had been substituted with one of

15 years, while in **Candia Akim vs Uganda, Criminal Appeal No. 181 of 2019**, the Court upheld a sentence of 17 years imprisonment for the aggravated defilement of an 8 year old by her stepfather.

7. It is argued that the Appellant is a first offender; pleaded guilty and did not waste Court's time and Government resources, and is remorseful having sought forgiveness from the victim, her mother and grandmother. The fact that the medical report indicated that the victim's hymen had not been raptured is also advanced as a mitigating factor that indicates that there was only attempted penetration. Furthermore, insofar as the victim's grandmother had proposed a sentence above ten (10) years, it is proposed that a 12 – 15-year sentence would suffice.

8. We consider it necessary to pause here to observe that non-rapture of a hymen is immaterial to the offence of aggravated defilement given the definition in section 129(7)(a) of the Penal Code Act of a '*sexual act*' as '**penetration of the vagina, mouth or anus, *however slight*, of any person by a sexual organ**.' Therefore, the Appellant having pleaded guilty to the offence of aggravated robbery, it is presumed that there was some penetration however slight.

9. Conversely, the State supports the sentence imposed by the trial judge given the gravity of the offence and the tender age of the victim. Learned State Counsel relied on the Supreme Court case of **Opolot Justine and Agamet Richard vs Uganda, Criminal Appeal No. 31 of 2014** for the proposition that non-imposition of the maximum penalty for an offence would negate connotations that a sentence was harsh and excessive, the maximum penalty in this case being the death penalty. It is argued that the 28-year sentence that is in issue presently was indeed a lenient sentence in comparison with the death sentence or life imprisonment, which are noted by the Supreme Court to be the most severe sentences. *See* ***Tigo Stephen vs Uganda Supreme Court Criminal Appeal No 08 of 2009 (2011) UGSC 7***. State Counsel opines that inconsistency in sentencing is not a recognised ground of appeal, and the 28-year sentence imposed in this case was neither illegal nor harsh or excessive.

10. Deference is made to the principle of judicial independence in **Article 128 (1) and (2) of the Constitution** that portends that no person or authority may interfere with

the courts or judicial officers in the exercise of their judicial function. It is argued that the Appellant fell sort on demonstrating any error on the part of the learned trial judge or any material consideration that the lower court did not take into account at sentencing. On the contrary, in State Counsel's estimation, the trial court did consider all the mitigating factors raised by the Appellant as required of it in **Magala Ramathan vs Uganda, Criminal Appeal No 14 of 2014.** In that case, it was reportedly held that failure by a court to give an accused person a chance to say something in mitigation of sentence is a huge oversight that occasions a miscarriage of justice. Learned Counsel further contends that the sentencing ranges proposed by the Appellant have the effect of eroding the discretion of the sentencing judge without regard for the intrinsic circumstances against which such a judge exercises his discretion in determining the appropriate sentence.

C. **Determination**

11. The law on the powers of an appellate court in an appeal from a sentence, such as is the case presently, is stated in Section 132(1)(b) and (e) of the Trial on Indictment Act, Cap. 23 as follows:

> **(a) Subject to this section –**
>
> **a. .....**
>
> **b. An accused person may, with leave of the Court of Appeal, appeal to the Court of Appeal against the sentence alone imposed by the High Court...**
>
> **c. .....**
>
> **And the Court of Appeal may –**
>
> **d. .....**
>
> **e. In the case of an appeal against sentence only, confirm or vary the sentence.**

12. This being a first appeal from a decision of the High Court, this Court is required to review the evidence and make its own inferences of law and fact. *See Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, S.I 13 – 10.* It is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial Court and, while giving allowance for the fact that it has neither seen nor heard the witnesses, come to its own conclusion on that evidence. In so

doing, the first appellate court must consider the evidence on any issue in its totality and not any piece thereof in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial Court. *See* ***Baguma Fred vs Uganda, Criminal Appeal No. 7 of 2004*** *and* ***Kifamunte Henry vs Uganda, Criminal Appeal No. 10 of 1997*** *(both, Supreme Court).*

13. It is well recognised that an appropriate sentence is a matter for the discretion of the sentencing judge, which discretion is premised on the intrinsic circumstances of each case. Consequently, it is fairly well established judicial practice that an appellate court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or the appellate court is satisfied that the sentence imposed by the trial judge was so manifestly excessive as to perpetuate an injustice. *See* ***Karisa Moses vs Uganda, Criminal Appeal No. 23 of 2016***, ***Kiwalabye Bernard vs Uganda, Criminal Appeal No. 143 of 2001*** *and* ***Kyalimpa Edward vs Uganda, Criminal Appeal No 10 of 1995*** *(all, Supreme Court).* Equally pertinent to re-sentencing by appellate courts are the observations made by the Supreme Court in **Wamutabaniwe Jamiru vs Uganda, Criminal Appeal No 74 of 2007** where it was held:

> The Appellate Court is not to interfere with the sentence imposed by a trial Court which has exercised its discretion, unless the exercise of the discretion is such that it results in the sentence being imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial Court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle. See **Kamya Johnson Wavamunno vs Uganda, Criminal Appeal No. 16 of 2000.**

14. In the matter before us, the trial court rendered itself as follows in the *allocutus* proceedings:

> *I have considered the aggravating factors and mitigating factors put forward and the statements of both the victim's mother and grandmother. Court has a duty to protect children against all forms of violence, sexual violence inclusive. It was inhuman for a man of 40 years to engage a girl of 3 years in sexual intercourse. I however note the medical findings that there were minor bruises. The hymen was not raptured and minimal force of entry. The offence is rampant in the area. 19% the 40 cause listed*

cases were of defilement and many of girls between 3 and 5 years of age thus the need for a deterrent sentence. The offence under the sentencing guidelines LN8/2013 has a sentencing range from 30 years of imprisonment to death with a starting point of 35 years. Considering all the above I find a sentence of 28 years appropriate. I deduct the nearly 4 years spent on remand and sentence the convict to 24 years of imprisonment.

15. It becomes abundantly clear that whereas the trial judge was duly cognizant of the sentencing ranges prescribed in the *Constitution* (*Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* ('the Sentencing Guidelines'); he did not address himself to the question of consistency in sentencing. Contrary to the assertions of learned State Counsel, clause 6(c) of the Sentencing Guidelines does obligate a sentencing court to '**take into account the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances**.'

16. In addition, it is a renown rule of judicial practice that a plea of guilt should attract leniency at sentencing. Although the trial judge in this case did sentence the Appellant to a 28 years' imprisonment – two (2) years less than the minimum of thirty (30) years imprisonment proposed in the Sentencing Guidelines for aggravated robbery; we respectfully do not think this adequately caters for the leniency anticipated for an offender without previous antecedents that has promptly accepted responsibility for his actions and pleaded guilty.

17. We have taken due cognizance of the cases cited to us by learned Counsel for the Appellant where a sentencing range of 15 – 18 years was applied by this Court in respect of the offence of aggravated defilement. However, in **Kamugisha Asan vs Uganda, Criminal Appeal No. 212 of 2017,** this same Court sentenced an Appellant who defiled a 3-year-old girl to 23 years' imprisonment, which were reduced to 22 years on account of the one year that the Appellant had spent on remand.

18. Given the similarities between that case and the Appeal before us, the Appellant would have similarly earned himself a sentence of 23 years' imprisonment but having pleaded guilty that sentence is reduced to a 16-year custodial sentence.

D. **Conclusion**

19. In the result, the Appeal against sentence is hereby allowed. The sentence of 28 years imprisonment is hereby substituted with a custodial sentence of 16 years. In accordance with the constitutional prerogative delineated in Article 23(8) of the Constitution, we would deduct the period of three (3) years and nine (9) months spent on remand to yield a sentence of twelve (12) years and 3 months as from the date of conviction.

It is so ordered.

Dated and delivered at Kampala this 25th **day of** October **, 2023.**

Geoffrey Kiryabwire
Justice of Appeal

Muzamiru M. Kibeedi
Justice of Appeal

Monica K. Mugenyi
Justice of Appeal