THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.0193 OF 2020

(Arising from High Court Criminal Case No.1144 of 2016)

MABALA PATRICK::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala before Jane Frances Abodo, J dated 20th December, 2018 in High Court Criminal Session Case No.1144 of 2016)

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. LADY JUSTICE HELLEN OBURA, JA

HON. LADY JUSTICE EVA. K. LUSWATA, JA

JUDGMENT OF THE COURT

This is an appeal from the decision of Jane Frances Abodo, J in High Court Criminal Session Case No.1144 of 2016 delivered on 20th December, 2018 in which the appellant was convicted of the offence of aggravated defilement contrary to sections 129 (3) and (4) (a) of the Penal Code Act, CAP 120 and sentenced to 24 years, 4 months and 9 days' imprisonment.

Brief facts

The facts as accepted by the learned trial Judge were that the victim one Sarah aged ten years was with her young brother living with their Auntie PW2. They were sharing the house with the appellant. It was a one-bedroom house containing a sitting room and a bedroom. On the 27th day of March, 2016, the victim was left alone with the brother as PW2 and the appellant had gone for a party in the neighbourhood during the Easter festive season. The victim testified that it was at night while she was watching television and her young brother had gone to sleep when the appellant arrived and immediately switched off the television and asked the victim to join him on the mat. The victim refused and the appellant forcefully pulled her, undressed her, got his penis and inserted it into her vagina.

The victim felt so much pain but could not cry out because the appellant threatened her not to. After the sexual intercourse, the appellant then released the victim to go to bed and warned her not to tell anyone lest he would cut off her head. After some days, PW2 noticed that the victim was walking in an awkward way and she asked her why she was walking in that manner. The victim did not tell her anything. PW2 then got a piece of toilet paper and inserted it in her vagina and on getting it out, it had pus and blood. The victim informed her auntie PW2 that the appellant had defiled her some four days back. The victim requested PW2 not to let the appellant know that she had reported him as he had promised to cut off her head if she reported him. The

matter was reported to police and both the victim and the appellant were examined on PF3A and PF24A respectively. The appellant was charged, tried and convicted of aggravated defilement contrary to sections 129 (3) and (4) (a) of the Penal Code Act, CAP 120, and sentenced to 24 years, 4 months and 9 days' imprisonment. The appellant now appeals against the sentence only having obtained leave of this Court to do so. The ground of appeal states as follows;

That the learned trial Judge erred in law and fact when she meted out a manifestly harsh and excessive sentence against the appellant.

Representation

At the hearing of the appeal, the appellant was represented by Mr. Henry Kunya while Ms. Sherifah Nalwanga, Chief State Attorney appeared for the respondent.

Appellant's submissions

Counsel for the appellant submitted that it was settled law that this Court could not interfere with the sentence imposed by the trial Court unless the exercise of the discretion was such that the trial Court ignored to consider an important matter or circumstances which ought to have been considered while passing the sentence. He further submitted that the appellant was a first offender of a relatively youthful age (42 years) and hence capable of being re-integrated in society as a reformed person. That he also had family responsibilities of looking after close to 10 children. Counsel invited Court to

find that the sentence of 24 years, 4 months and 9 days' imprisonment imposed on the appellant by the learned trial Judge was manifestly harsh and excessive in the circumstances. He relied on ***Ninsiima Gilbert V Uganda, Court of Appeal Criminal Appeal No.180 of 2010*** where a 29-year-old appellant who was convicted of the offence of aggravated defilement of an 8-year-old girl was sentenced to 30 years' imprisonment and on appeal this Court reduced the sentence to 15 years' imprisonment. Counsel prayed that this appeal be allowed and the sentence be substituted with an appropriate one.

Respondent's submissions.

Counsel for the respondent opposed the appeal and submitted that the sentence of 24 years, 4 months and 9 days imposed on the appellant was neither harsh nor excessive considering that the offence of aggravated defilement carries a maximum sentence of death. Counsel further submitted that the learned trial Judge considered both the aggravating and mitigating factors and rightfully followed the principles of law before imposing the sentence. He relied on ***Katureebe Boaz and Muhereza Bosco V Uganda, Supreme Court Criminal Appeal No.41 of 2016*** for the proposition that consistency in sentencing is neither a mitigating nor aggravating factor to render a sentence passed illegal. After considering the mitigating and aggravating factors, the sentence imposed lies in the discretion of the Court which in exercise thereof was done judiciously in the instant case.

Courts' consideration

We have carefully perused the Court record, considered the submissions of both counsel and the authorities relied upon.

Being a first appellate Court, it is our duty to review and re-evaluate the evidence before the trial court by subjecting it to fresh scrutiny, then draw inferences and reach our own conclusion bearing in mind that this Court did not have the opportunity to hear and observe the witnesses testify as the trial Court did. See ***Rule 30(1) of the Rules of this Court and Bogere Moses V Uganda, Supreme Court Criminal Appeal No.1 of 1997.***

The principles upon which an appellate Court may interfere with a sentence of the trial Judge were stated by the Supreme Court in the case of ***Kiwalabye Bernard V Uganda, Criminal Appeal No.143 of 2001 (unreported)*** as follows:

> *"The appellate Court is not to interfere with the sentence imposed by a trial Court where that trial Court has exercised its discretion on sentence, unless the exercise of that discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where the trial Court ignores to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in principle."*

It was submitted for the appellant that the sentence of 24 years, 4 months and 9 days meted out to the appellant was manifestly harsh and excessive in the

circumstances and prayed counsel for the appellant that this Court reduces it to an appropriate sentence.

While passing the sentence, the trial Judge stated as follows;

> *"Although I am not imposing a death penalty or life imprisonment, the circumstances in this case are grave enough to warrant a long custodial sentence. The victim in this case was a toddler compared to the age of the convict. He was old enough to even be her grandfather. He used threats on the victim during and after the sexual assault. The convict did not allow her to let out the excruciating pain she was experiencing ... ...*
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> *I have considered a starting point of thirty-five years' imprisonment. A number of factors mitigate the seriousness of this offence; the fact that the convict is a first offender, with considerable family responsibilities, and the ten orphans need his love and care. The severity of the sentence he deserves has therefore been mitigated by the factors above. From the earlier proposed thirty-five years after taking into account the aggravating factors, now a term of imprisonment of twenty-seven years. The convict has been on remand since 11th April, 2016, I hereby take into account and set off two years and seven months and 21 days as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of Twenty-four (24) years and four (4) months and nine (9) days to be served starting today."*

Counsel for the appellant prayed that this court substitutes the sentence with an appropriate sentence and cited ***Ninsiima Gilbert V Uganda, Court of Appeal Criminal Appeal No.180 of 2010*** where the appellant had been sentenced to 30 years' imprisonment and this Court reduced the sentence to 15 years' imprisonment. The appellant was for a 29-year-old and he was convicted of the offence of aggravated defilement of an 8-year-old girl.

We are alive to the fact that no two crimes are identical. However, we should try as much as possible to have consistency in sentences.

In ***Kisembo Patrick V Uganda, Court of Appeal Criminal Appeal No.441 of 2014***, the appellant had been convicted of aggravated defilement of a child of 4 years. He had been on remand for 2 years and this Court reduced his sentence from life imprisonment to 18 years' imprisonment.

In ***Birungi Moses V Uganda, Court of Appeal Criminal Appeal No.177 of 2014,*** the appellant was convicted of the offence of aggravated defilement and sentenced to 30 years' imprisonment. The victim was 8 years old at the time she was defiled and the appellant was 35 years old. He had been on remand for 3 years. This Court reduced the sentence to 12 years' imprisonment after taking into account the period that the appellant had spent on remand. In ***Ntambale Fred V Uganda, Court of Appeal Criminal Appeal No.0177 of 2009***, this Court confirmed a sentence of 14 years where the victim was a daughter of the appellant.

Considering the range of sentences in the above cases and the aggravating and mitigating factors, we find the sentence of 24 years, 4 months and 9 days imposed in this case above the range and we accordingly set it aside for being harsh and excessive.

We now invoke ***Section 11 of the Judicature Act, CAP 13*** that grants this Court the same power as that of the trial Court in the circumstances such as

the instant one to impose a sentence we consider appropriate in the circumstances of this appeal.

Considering that the appellant had been on remand for 2 years 7 months and 21 days before conviction, was a first offender and capable of reforming if given a chance, we find a sentence of 21 years' imprisonment appropriate. We deduct the period of 2 years, 7 months and 9 days the appellant spent on remand and sentence him to 18 years, 7 months and 21 days. The sentence shall run from 20th December, 2018, the date of conviction.

We so order

Dated at Kampala this ... 8th ... day of ... NOV ... .2023.

Cheborion Barishaki

JUSTICE OF APPEAL

Hellen Obura

JUSTICE OF APPEAL

Eva. K. Luswata

JUSTICE OF APPEAL