THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

CRIMINAL APPEAL NO. 0238 OF 2019

[CORAM: Buteera, DCJ; Mulyagonja & Mugenyi, JJA]

ISUZU KANAKULYA :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Appeal against the decision of the High Court of Uganda at Jinja, (Basaza Wasswa, J), in Criminal Session Case No.229 of 2015, dated 30th March 2015)

JUDGMENT OF THE COURT

Introduction

The appellant was convicted of aggravated defilement contrary to Sections 129 (3), 4 (a) and (b) of the Penal Code Act, Cap 120, pursuant to a plea of guilty, and sentenced to 35 years' imprisonment.

Brief Facts

On the 14th day of June 2012 at Namabwere Village in Iganga District, Isuzu Kanakulya, the appellant, being HIV Positive, performed a sexual act with N. A., a girl aged 5 years. The appellant pleaded guilty to the charges and was duly convicted and sentenced. He now appeals against sentence only on the following ground:

> **That the learned trial Judge erred in law and fact when she passed a sentence of 35 years which is illegal for failing to subtract the period spent on remand and is manifestly harsh and excessive in the circumstances.**

Representation

At the hearing of the Appeal, the appellant was represented by Miss Nalule Shamim Rukiyah, on State Brief, while the respondent was represented by Ms Tuhimbise Rose, Senior Assistant Director of Public Prosecutions. Both counsel applied to court to adopt their earlier-filed written submissions as their legal arguments. The application was allowed. This court shall rely on those submissions in resolving this appeal.

The appellant counsel also prayed for leave to appeal against sentence only.

Case for the appellant

Regarding the duty of the first appellate court, Counsel for the appellant cited the case of **Kifamute Henry Vs Uganda Criminal Appeal No.10/97,** where the Supreme Court Justices reiterated that it was the duty of the first appellate court to rehear the case on appeal by reconsidering all the materials which were before the trial court and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.

Counsel for the appellant submitted that the learned trial Judge passed an illegal sentence when she did not deduct the period of 3 years 9 months and 21 days, that the appellant spent on remand as required by Article 23 of the Constitution, Guideline 15(1) and (2) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2003, and the Supreme Court decision in **Rwabugande Moses V Uganda; SCCA 25 of 2014.**

Counsel further referred to the case of **Ntambala Fred V Uganda; Criminal Appeal 34 of 2015** relied on in **Anguyo Robert V Uganda; Criminal**

Appeal 38 of 2014, where the Supreme Court approved a sentence of 14 years' imprisonment imposed on the appellant by the trial court and confirmed by the Court of Appeal, considering it appropriate for aggravated defilement.

It was counsel's contention that this honorable court be pleased to allow the appeal and find that the sentence passed by the trial judge was illegal for failure to comply with Article 23(8) of the Constitution. He prayed that the sentence of 35 years be set aside and an appropriate sentence be passed by the court.

Case for the respondent

In opposing the appeal, counsel for the respondent submitted that the learned trial Judge considered the time the appellant had spent on remand and deducted it from the sentence she imposed. She stated that the trial Judge only failed to do the arithmetic. She submitted that the error could be cured under section 11 of the Judicature Act.

She observed that the record showed that the sentence was imposed on 30th March 2015 at 3:10pm. The appellant had been on remand since 9th June 2012, and that by a simple calculation, he had spent 2 years 9 months and 21 days on remand. She prayed that the period is deducted from the sentence of 35 years' imprisonment, bringing the final sentence to 32 years, 3 months and 7 days.

Regarding the contention that the sentence was harsh and excessive, counsel submitted that the sentence was not. She stated that the trial judge considered the mitigating and aggravating factors. She considered that the victim was 5 years old and that the appellant was HIV positive and exposed the victim to multiple risks of death, rapture of the uterus, HIV infection,

social stigma and all types of health complications, much as he pleaded guilty to the offence.

On the issue of uniformity and consistency of sentencing, counsel referred to **Aharikundira Yustina v Uganda; SCCA No. 27/2015**, in which the Court cited **Kyalimpa Edward v Uganda; SCCA No. 10/ 1995 and R v Haviland (1983) 5 Crim. App. R 109,** and held that an appropriate sentence is a matter for the discretion of the trial judge. Counsel submitted that each case presents its own facts upon which the judge exercises his or her discretion. And that the practice is that an appellate court shall not interfere with the discretion of the trial judge unless the sentence is illegal or manifestly excessive as to amount to an injustice.

Counsel contended that it is not a legal requirement that sentences must be uniform. She thus prayed that court finds the sentence of 35 years' imprisonment appropriate and only interferes with it by deducting the period spent on remand by the appellant.

Court's consideration

The gist of this appeal revolves around the legality of the sentence. It was counsel for the appellant's contention that the sentence was illegal for not deducting the period that the appellant spent on remand. Counsel for the respondent conceded to this contention and asked this court to employ section 11 of the Judicature Act to deduct the remand period from the sentence. 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."

In exercising that power, we looked at the sentence that was meted by the trial Judge at page 16 of the record as follows:

> *'The convict; ISUSU KANAKULYA MOSES is hereby sentenced to 35 years imprisonment. The fact that he pleaded guilty has been considered although he should have done so immediately upon his arrest and should have not wasted government resources. The period the accused has been on remand since 9th June, 2012 is hereby deducted from this sentence.'* (Sic)

The above sentence was passed on 30/ 05/ 2015. At that time, the interpretation of Article 23 (8) of the Constitution was according to the court decision in **Kizito Senkula vs. Uganda; SCCA No. 24 of 2001,** where the Court held:

> **"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 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 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."** (Emphasis added)

However, the Supreme Court in **Moses Rwabugande v Uganda; SCCA No. 14/ 2015,** departed from the above position and held thus:

"The principle enunciated by the Supreme Court in; Kabuye Senvewo vs. Uganda SCCA No. 2 of 2002; Katende Ahamad vs. Uganda SCCA No.6 of 2004 and Bukenya Joseph vs. Uganda SCCA No. 17 of 2010 is to the effect that, the words *"to take into account"* does not require a trial court to apply a mathematical formula by deducting the exact number of years spent by an accused person on remand from the sentence to be awarded by the trial court.

...

We have found it right to depart from the Court's earlier decisions mentioned above in which it was held that consideration of the time spent on remand does not necessitate a sentencing court to apply a mathematical formula.

It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused."

(Emphasis ours)

The above decision was delivered on 3rd March 2017. This position was upheld and clarified in the case of **Asuman Abele v Uganda; Supreme Court Criminal Appeal No. 66 of 2016** (unreported).

The sentence having been passed on 30th March 2015, the trial judge could not have applied a position of the law before it came into existence. The Supreme Court observed as much in **Karisa Moses v Uganda; SCCA No. 23 of 2016**, when it cited its earlier decision of **Sebunya Robert & Anor v Uganda; SCCA No. 58 of 2016**, where it observed that:

> **"Rwabugande does not have any retrospective effect on sentences which were passed before it by Courts 'taking into account the periods [a convict] spends in lawful custody'. Accordingly, we find no justifiable reason to fault the High Court for passing or the Court of Appeal for confirming the sentences that were imposed on the appellants as those sentences were in conformity with the law that applied at the time the sentences were passed."**

In **Byamukama Herbert Vs Uganda SCCA No. 2I of 2017**, the justices of the Supreme Court at page 10 of the judgement delivered on 5th October 2021 clearly pronounced that **Rwabugande** (supra) which was decided in March 2017 is inapplicable in the case (**Byamukama**) where the appellant had been convicted in December 2016. The Supreme Court emphasized thus:

> **"For a case to be cited as a precedent, it ought to have been decided earlier before the matter at hand. The Rwabugande decision thus does not serve that purposes in the instant appeal."**

Similarly, in **Nashimolo Paul Kibolo vs Uganda SCCA No. 46 of 2017**, it was held that;

"The decision (Rwabugande) was delivered on 3rd March 2017. In accordance with the principle of precedent, this court and the courts below have to follow the position of the law from the date hence forth."

In view of the above authorities, we find that the learned trial Judge was well within the legal interpretation of Article 23 (8) of the Constitution at the time. We cannot, therefore, fault the manner in which she passed sentence when she stated that 'the period the accused has been on remand since 9th June, 2012 is hereby deducted from this sentence'.

Regarding whether the sentence was harsh and excessive and should therefore be set aside, we note that the circumstances under which an appellate court may interfere with the trial court's sentencing discretion are well established. In **Ogalo s/o Owoura v R; Criminal Appeal No. 175 of 1954**, the Court of Appeal for Eastern Africa held as follows:

"The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v. R. (1950) 18 E.A.C.A. 147, "it is evident that the Judge has acted upon some wrong principle or overlooked some material factor". To this we would add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R. V. Shershewsky, (1912) C.C.A. 28 T.L.R. 364

In the instant case, the learned trial Judge considered the mitigating and aggravating factors and imposed a sentence of 35 years' imprisonment. We are alive to the fact that death is the maximum penalty for the offence the appellant was convicted of. To establish whether the sentence was harsh and excessive or not, we shall look at the sentences passed in similar cases.

In **Anguyo Siliva Vs Uganda; Court of Appeal Criminal Appeal No. 0038 of 2014**, the appellant was convicted and sentenced to 27 years for aggravated defilement by the High Court at Arua. The victim was aged 7 years old. Considering the relevant material, this Court found a sentence of 25 years' imprisonment to be appropriate. From that it deducted the remand period of 2 years, 11 months and 2 days and sentenced the appellant to 21 years and 8 days' imprisonment.

In **Musabuli Sedu v Uganda; Court of Appeal Criminal Appeal No. 111 of 2011**, this Court found that the sentence imposed was within the range of sentences that have been imposed by the High Court for the offence of aggravated defilement and been upheld by the Court of Appeal. The Court also found no lapse on the part of the trial Judge in exercising his discretion in sentencing the appellant as he had. It, therefore, maintained the 25 years' imprisonment sentence and rejected the appeal.

We note further that the appellant in this case pleaded guilty. A plea of guilty has been considered to be a mitigating factor. Paragraph 21 (e) of The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, gives a plea of guilty as one of the factors mitigating a sentence of death.

In **Nkurunziza Julius v Uganda; CACA No. 12 of 2009 [2022] UGCA 65**, the appellant was convicted on his own plea of guilty and had his

sentenced at 17 years' imprisonment by this court. The court treated the guilty plea as a mitigating factor.

In **Lubanga Emmanuel v Uganda; Criminal Appeal No. 124 of 2009**, the appellant who pleaded guilty to the defilement of a child aged 1-year-old and was HIV positive was sentenced to a term in prison of 15 years. This court upheld the sentence.

In **Olara John Peter v Uganda; C.A. Criminal Appeal No. 30 of 2010**, the appellant was convicted for aggravated defilement of a girl aged 14 years on his own plea of guilty. He was 29 years and knew that he was HIV positive. He appealed against a sentence of 16 years' imprisonment complaining that it was manifestly excessive in view of the fact that he pleaded guilty. This court considered the that the victim was exposed to the danger of contracting HIV and confirmed the sentence of 16 years' imprisonment was neither manifestly excessive nor harsh in the circumstances of the case.

In **Ederema Tom v Uganda; C.A. Criminal Appeal No. 554 of 2014**, the appellant was one of three men who gang- raped a girl below the age of 14 years. He was sentenced to a term of imprisonment of 25 years. He appealed against the sentence on account of the fact that the trial judge did not take into account the period he had spent in lawful custody before he was sentenced. Court agreed that the sentence was illegal on that account and set it aside.

In light of the above authorities and in the spirit of consistency in sentencing, we find that the sentence that was passed by the learned trial Judge was, in the circumstances, on a higher end. This is because the appellant was a first time offender and he pleaded guilty to the charge. We

find the 35 years' imprisonment to be manifestly harsh and excessive and we hereby set it aside.

We shall invoke the powers of this court under Section 11 of the Judicature Act to sentence the appellant. In so doing, we take cognizant of the fact that the victim was 5 years' old and she deserved protection from the appellant and not violation of her innocence. In mitigation, we note that the appellant, though HIV positive, was a first time offender and he pleaded guilty. We deem a sentence of 25 years to be fair and appropriate in the circumstances. From this we shall deduct the period that the appellant spent on remand prior to his conviction. He will, therefore, serve an imprisonment term of 23 years, 3 months and 10 days. This shall run from the date of conviction on 30/05/2015.

In the result, the appeal partially succeeds.

Dated at Kampala this ..... 7th ..... Day of ..... March 2023

Richard Buteera
Deputy Chief Justice

Irene Mulyagonja
Justice of Appeal

Monica Mugenyi
Justice of Appeal