

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KABALE
CRIMINAL APPEAL NO. COA-00-CR-CN-0120-2018
(Coram: M.M. Kibeedi; C. Gashirabake & O. J. Kihika JJA)

BENYWANIRA EMMANUEL :::::::::::::::::::: APPELLANT

VERSUS

UGANDA RESPONDENT

(Appeal from the Orders of the High Court of Uganda at Rukungiri, Moses Kazibwe Kawumi, J, dated 13/04/2018 in Criminal Case No. 0123 of 2016)

JUDGMENT OF THE COURT

The appellant was convicted of the offence of Aggravated Defilement contrary to **Sections 129(3) and (4) (a) & (b) of the Penal Code Act, Cap 120**, and sentenced to 32years' and 06 months' imprisonment after deducting the two years and six months spent on remand.

Brief Facts

On 30th October 2015, Kemigasho Beatrice, grandmother to the victim left the victim at home, asleep and went to seek treatment at a clinic. While at the clinic, a one Kwikiriza Apollo reported to her that he had seen the appellant having sexual intercourse with the victim at home, and that the victim was crying. The matter was reported to area local leaders who sought confirmation of the allegation from the victim.

W. C. Brown

medical examination. The medical examination report of the victim confirmed defilement, lacerations in the vulva and a whitish non foul smelling discharge. The age of the victim was estimated 4 years and HIV Positive. The doctor remarked that she needed referral to the ART Clinic for further management.

The medical examination report of the appellant revealed that he was approximately 47 years old, with a normal mental status and HIV positive. He was accordingly charged of Aggravated defilement. He initially pleaded not guilty but after the testimony of the 1st prosecution witness, he changed his plea to a plea of guilty. He was convicted on his own plea of guilty and sentenced to 35 years' imprisonment. After deducting the period spent on remand, the appellant was ordered to serve 32 years and 06 months' imprisonment. Being dissatisfied with that decision, he sought leave to file this Appeal against sentence.

Ground of Appeal

The learned trial Judge erred in law and fact when he sentenced the appellant to 35 years' imprisonment which sentence is unduly harsh and excessive in the circumstances.

Representation

At the hearing of the appeal, the appellant was represented by Mr. Mbalile Mohammed of M/S Mayanja, Nakibuule & Co. Advocates, on state brief, while the respondent was represented by Mr. Joseph Kyomuhendo Chief State Attorney, holding brief for Ms. Angutoko Immaculate, Chief State Attorney, from the Office of the Director of Public Prosecutions.

Case for the appellant

Counsel faulted the learned trial Judge for passing a sentence which is manifestly hash, excessive, and not consistent with sentences of similar offences committed under the same circumstances. He relied on the

authority of ***Omara Charles Vs Uganda, Criminal Appeal No. 158 of 2014.***

In this case, the appellant was convicted on two counts of aggravated defilement and sentenced to 28 and 40 years' imprisonment on counts 1 and 2 respectively. On appeal, the sentences were reduced to 17 and 11 years respectively. After deducting the period spent on remand, the appellant was ordered to serve 16 years' imprisonment on count one and 10 years' imprisonment on count two. At the time of the commission of the offence, the appellant was 33 years old, HIV positive and a step father to the victims, while the victims were 10 and 12 years respectively. Counsel also relied on the authority of ***Tiboruhanga Emmanuel Vs Uganda Criminal Appeal 0655 of 2014***, where a 28-year-old, HIV positive appellant was convicted on his own plea of guilty for the offence of aggravated defilement and sentenced to 40 years' imprisonment. On appeal, the sentence was reduced to 25 years from which the period spent on remand was deducted. The appellant was ordered to serve 22 years' imprisonment. The victim was 10 years old. Counsel for the appellant prayed that court re-evaluates the mitigating and aggravating factors to give an appropriate sentence.

Case for the respondent

Counsel for the respondent opposed the appeal on grounds that an appropriate sentence is a matter of discretion for the Judge passing the sentence. Counsel submitted that the appellate court will only interfere with the sentence imposed by the trial court if it is evident that court acted on a wrong principle or overlooked some material fact or if the sentence is manifestly harsh and excessive in view of the circumstances of the case. Counsel relied on the authorities in ***Kiwalabye Bernard V Uganda SCCA No. 143 of 2001*** and ***Kyalimpa Edward V Uganda SCCA No. 10 of 1995.***

Counsel submitted that the victim in the current case was 3-4 years old, and that from the victim impact report of Mubangizi Bosco Kahigi, the appellant infected her with HIV. She was reported to be on treatment and that her life

was impacted forever. That the appellant, an uncle to the victim ought to have protected her. Counsel further submitted that court considered both the mitigating and aggravating factors in arriving at the sentence of 32 years and 06 months, a sentence within the range of sentences upheld by this court.

Counsel relied on the authorities of *Kabazi Issa V Uganda CACA No.268 of 2015*, decided in February 2022, where court in dismissing the appeal, found a sentence of 32 years for aggravated defilement of two victims aged 7 and 12 years within the permissible sentencing range of 30 years up to death as provided by the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013. She further cited the case of *Asega Gilbert V Uganda CACA 016 of 2013*, in which court dismissed an appeal for lack of merit, where the appellant was sentenced to 30 years' imprisonment on two counts of aggravated defilement. Counsel for the respondent invited court to dismiss the appeal.

Court's consideration

The law that governs appellate courts in regard to sentencing is well settled. In *Kamya Johnson v Uganda; SCCA No. 16 of 2000*, the Supreme Court held:

"It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a material consideration, or an error in principle was made. It is not sufficient that the members of the Court would have exercised their discretion differently."

The learned trial Judge's sentencing order was couched as follows;

"Sentence and Reasons for the sentence

I have considered the submissions of counsel in aggravated and in mitigation of the sentence. I have also considered the plea of the accused in allocutus and the views of the grandmother who together with a civil society organization are taking care of the victim. It is confirmed the victim is HIV positive on account of aggravated defilement by the convict.

The convict was over 40 years older than the 03 years old victim at the time the offence was committed and a relative. He was duty bound to protect and not to ravish the victim. Aggravated defilement fetches a maximum sentence of death. The Courts of Judicature (Sentencing Guidelines) provides for a starting point of 35 years if a custodial sentence other than life imprisonment is to be considered.

I have considered the guilty plea by the convict which has saved court's time and which is a sign of remorse. I will not consider the life imprisonment but sentence the convict to 35 years. As required by Article 28(3) of the Constitution I will deduct the 2 ½ years the convict has spent on remand, he will serve 32 years and 06 months from the 13/04/2018.

MOSES KAZIBWE KAWUMI

JUDGE

13/04/2018"

Both counsel invited court to consider the principle of consistency in sentencing. Both cited cases in favor of the arguments advanced for either reduction of the sentence in the case of the appellant and for upholding the sentence in the case of the respondent. Sentencing principle No. 6(c) of the *Constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions, 2013 Legal Notice No. 8 of 2013* provides that "(e)very court

shall when sentencing an offender, take into account . . . the need for consistence with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances.”

5 Court has considered the authorities relied upon by both Counsel. In the Tiboruhanga case(supra) cited by Counsel for the appellant, the sentence was reduced from 40 to 22 years' imprisonment in 2019. Exposure of the victim to HIV was one of the compelling aggravating factors in spite of the fact that the appellant had pleaded guilty. Key to note is that the age gap
10 between the appellant and the victim was 15 years. In the Omara(supra) case also cited by the appellant's Counsel and decided in 2017, court reduced the sentence of the appellant from 28 years to 17 years on count 1 and from 12 years to 11 years on count 2. The victim in count 1 was exposed to HIV. The age gap between the victims and the appellant was 23 and 21 years
15 respectively.

On the other hand, in the cases of Kabazi Issa and Asega Gilbert(supra) cited by the respondents and decided in 2022 and 2016 respectively, court upheld the sentences of 32 and 30 years' imprisonment respectively, imposed by the trial courts for the offence of aggravated defilement. Court noted that consistency in sentencing is neither a mitigating nor an aggravating factor to render a sentence passed illegal. Exposure to HIV was not a factor considered.

In this case however the age difference between the appellant and the victim was over 40 years. The appellant was 47 years while the victim was 4 years. The appellant infected the victim with HIV. The sentence of 32 years given the circumstances of the case was legal and there is no basis for setting it aside. The Appeal is accordingly dismissed.

Dated at Kabale this 29th day of November 2023

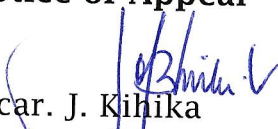
M. J. Green

Muzamir Kibeedi
29/11/2023

Muzamiru M. Kibeedi
Justice of Appeal



5 Christopher Gashirabake
Justice of Appeal


Oscar. J. Kihika

10 **Justice of Appeal**