

(Coram: M.M. Kibeedi; C. Gashirabake & O. J Kihika, JJA)

## VERSUS

*(Appeal from the Orders of the High Court of Uganda at Kabale, Michael Elubu, J, dated 17/03/2014 in Criminal Session Case No. 003 of 2013)*

was conducted and the report

*W. J. Brown*

reflected that the victim sustained posterior perineal tear and was recommended for repairs to be done by a gynecologist. The appellant was on the run but upon return to the village he was arrested.

5 He was accordingly charged of Aggravated defilement. He was convicted on his own plea of guilty and sentenced to 22 years' imprisonment. After deducting the period spent on remand, the appellant was ordered to serve 20 years' imprisonment. Being dissatisfied with that decision, he sought leave to file this Appeal against sentence.

### **Ground of Appeal**

10 The learned trial Judge erred in law and fact when he sentenced the appellant to a manifestly harsh and excessive sentence of 22 years' imprisonment thereby occasioning a miscarriage of Justice.

### **Representation**

15 At the hearing of the appeal, the appellant was represented by Mr. Nicholas Kibulirani on state brief, while the respondent was represented by Ms. Aleto Innocent, Senior State Attorney, from the Office of the Director of Public Prosecutions.

### **Case for the appellant**

20 Counsel faulted the learned trial Judge for not considering the mitigating factors including a plea of guilty that saved court's time and the request for forgiveness from the complainant and from court. Counsel further stated that the trial judge did not consider the principle of consistency while sentencing the appellant as provided in Sentencing Principle No. 6(c) of the *Constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions, 2013 Legal Notice No. 8 of 2013*. He

relied on the authority of *Aharikundira Yustina Vs Uganda SCCA No.27 of 2014* where court held that consistency is a vital principle of a sentencing regime and is deeply rooted in the rule of law, requiring that laws be applied with equality and without differentiation. Counsel further relied on the case of *Senyonjo Paul Vs Uganda CACA No. 115 of 2014* where court reduced a sentenced from 21 to 11 years based on the principles of uniformity and consistency. He also relied on the authority of *Tiboruhanga Emmanuel Vs Uganda Criminal Appeal 0655 of 2014*, where court held that in absence of aggravating factors like HIV the sentencing range for aggravated defilement should be 11 to 15 years. He prayed that the appellant's sentence be reduced to 11 years or below.

### **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*.

Counsel further submitted that aggravated defilement attracts a maximum penalty of death. That the Third Schedule of the Sentencing Guidelines provides a starting point of imprisonment of 35 years up to death, and therefore the sentence of 22 years imposed by the trial court was far below the starting range, making the sentence lenient under the circumstances. Counsel referred court to paragraphs 35 and 36 of the Sentencing Guidelines which enumerate the aggravating factors (degree of injury, age of the victim, knowledge of the age of the victim) and mitigating factors (remorsefulness of the offender, absence of previous conviction, plea of guilty).



Counsel submitted that the trial court considered the above factors and invited court to read page 12 and 13 of the trial record where the judge weighed the age difference between the appellant and the victim, and the gravity of injuries suffered against the mitigating factors of a plea of guilty, remorsefulness and family responsibility raised by the appellant, before passing the sentence. Counsel argued that while the principle of consistency in sentencing is imperative, no two cases are identical. He relied on a number of authorities where sentences of 20 years' imprisonment and above were found to be neither harsh nor excessive. See, *Kaserebanyi James Vs Uganda CACA No. 40 of 2006* and *Bachwa Benon Vs Uganda Criminal Appeal 869 of 2014*, *Othieno John Vs Uganda CACA No. 174 of 2010* where court confirmed 29 years' imprisonment for aggravated defilement. He prayed that court dismisses 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 notes and order were couched as follows;

*"... the accused shall be treated as a first offender. The convict is a young man who was twenty (20) at the time this offence was committed and this will be taken into consideration. The family situation of the convict having to look after his*

grandmother has been taken into consideration. The court has also noted that the convict readily pleaded guilty and did not waste the court's time. However, I take cognizance of the age difference between the convict and the victim, which was about ten (10) years. I note that the victim was gruesomely injured and could not even walk. She suffered the worst kind of sexual trauma. I note that the doctor noted that she would need gynecological repair for the injuries she suffered. The court cannot condone this kind of action. The convict and the others of the like mind should be punished and deterred from this kind of conduct. In the result, I find a sentence of 22 years would be appropriate. I shall reduce this by the time the spent on remand of two (2) years and sentence the convict to 20 years' imprisonment.

Michael Elubu

Judge

17/03/2023"

The sentencing notes above clearly show that the trial Judge considered both the aggravating and mitigating factors while sentencing and used his discretion to arrive at a sentence of 22 years' imprisonment from which he deducted the period spent on remand leaving the appellant to serve 20 years' imprisonment. The age difference between the appellant and the victim was about 10 years. The victim was 11 years old and the nature of injuries suffered were grave and required that the victim undergoes corrective gynecological repair. This aggravating factor justified the sentence in spite of the mitigation elements of a plea of guilty, remorsefulness and the family responsibilities of the appellant.

In the recent case of *Kabazi Issa V Uganda CACA No.268 of 2015*, decided in February 2022 court confirmed a sentence of 32 years for the offence of aggravated defilement. In *Asega Gilbert V Uganda CACA 016 of 2013*, court confirmed a

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sentence of 30 years' imprisonment for a similar offence. Therefore, the sentence meted out by the trial Judge given the circumstances of the case was legal and there is no basis for setting it aside. The Appeal is accordingly dismissed.

5 Dated at Kabale this 29th day of November 2023

Muzamir M. Kibeedi  
29/11/2023

Muzamiru M. Kibeedi  
**Justice of Appeal**

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Christopher Gashirabake

Christopher Gashirabake  
**Justice of Appeal**

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Oscar J. Kihika

Oscar. J. Kihika  
**Justice of Appeal**