THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

[Coram: Egonda-Ntende, Gashirabake, Kihika, JJA]

CRIMINAL APPEAL NO.0060 OF 2012

(Arising from High Court Criminal Case No. 107 of 2010 at Mbale)

NABA YA PETER ..... APPELLANT

VERSUS

UGANDA.....RESPONDENT

(Appeal against the Judgment of the High Court of Uganda [Flavia Anglin, J] at Mbale delivered on the 27th of February 2012)

JUDGMENT OF THE COURT

Introduction

1] This is an appeal, with the leave of court, against sentence only. The Appellant was indicted with the offence of aggravated defilement contrary to Sections 129(3) (4) (a) and (c) of the Penal Code Act. The facts were that on the 19th day of May 2010 at Bunasomi village in the Sironko District the Appellant performed a sexual act on his own daughter Nambafu Loyce, a child of 10 years.

The appellant was convicted and sentenced to 20 years' imprisonment. The Appellant was dissatisfied with the sentence and he appealed against the sentence only stating that:

> *That the learned Trial Judge erred in law and fact when he subjected the appellant to a sentence that was manifestly excessive in the circumstances of the case.*

2] The respondent opposed the appeal.

Representation

3] The Appellant was represented by Ms. Agnes Wazemwa. The Respondent was represented by Ms. Hellen Longole, Resident State Attorney Bukedea.

Submissions by counsel for the Appellant

4] Counsel submitted that according to **Kiwalabye Bernard Vs. Uganda Supreme Court Criminal Appeal No. 142 of 2001 (unreported)** it was held that: -

> *"the Appellate Court is not to interfere with a sentence imposed by the trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that results in the sentence imposed being 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 a sentence or where the sentence imposed is wrong in principle."*

5] Counsel faulted the trial Judge for failure to put into consideration the time spent on remand as required under Article 23 (8) of the Constitution 1995. Counsel argued that Article 23 (8) is mandatory. Counsel noted that in this case trial Judge imposed the sentence of 20 years' imprisonment and stated that the period spent on remand was to be put into consideration but did not deduct it while sentencing the Appellant.

6] Counsel submitted that from the record the Appellant was arrested on 19th May 2010 and taken to Sironko Police from where he was taken to court, charge

read, and remanded. The Appellant was produced in Court on 27th July 2011 for a plea and the hearing of the case commenced. He was sentenced on 27th September 2011. His remand warrant was signed on the 27th day of February 2021. Accordingly, at the time of sentence, the Appellant had spent 1 year and 9 months in prison. Counsel submitted that this was contrary to the position of the law in **Rwabugande Moses Vs. Uganda [2017 UGSC 8.**

7] Counsel prayed that this court deducts the mandatory time spent on remand such that the Appellant serves a sentence of 18 years and 3 months.

Submissions by Counsel for the Respondent.

8] In response Counsel opposed this appeal and supported the sentence imposed on the appellant by the trial Judge. Counsel cited the following cases that state the position of the law when an appellate Court can interfere with the discretionary sentencing power of the trial Court. In **Kiwalabye Bernard Vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001** and **Kyalimpa Edward Vs Uganda, Supreme Court Criminal Appeal No. 10 of 1995**,

9] Counsel conceded to the position of the law in Article 23 (8) of the Constitution of the Republic of Uganda and in **Rwabugande Moses vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014**, which requires the arithmetic deduction of time spent on remand when passing a sentence to an accused person. Counsel, however, argued that in this particular case, the sentence was passed down before the decision in the *Rwabugande case* (supra)

10] Counsel cited cases where the Court held that as long as the sentencing Court as demonstrated that he has taken into account the time spent on remand, the sentence would not be interfered with. Counsel cited **Abelle Asuman vs**

Uganda, Supreme Court Criminal Appeal No. 66 of 2016, and **Bukenya Joseph Vs Uganda, Supreme Court Criminal Appeal No. 17 of 2010.**

11] Counsel argued that in her view the sentence of 20 years' imprisonment was appropriate in the circumstances of this case. She cited several cases to buttress her argument. These included **Tindifa Moses Vs Uganda, Court of Appeal Criminal Appeal No. 0256 of 2011, Musabuli Sedu vs. Uganda, Court of Appeal Criminal Appeal No. 111 of 2011**, and the case of **Mugerwa Paul vs. Uganda, Court of Appeal Criminal No. 461 of 2015,**

12] Counsel prayed that this appeal be dismissed and the sentence of 20 years' imprisonment against the appellant be upheld.

In rejoinder

13] Counsel agreed with the fact that the decision in the *Rwabugande case* (supra) came into force after the Appellant had earlier been convicted and sentenced, however argued that Article 23(8) which gave the appellant a right to benefit from his period spent on remand was in force since 1995. Counsel further argued that the Principle in the *Rwabugande case* (supra) applies squarely in the circumstances of this appeal since the same was still pending determination.

14] Additionally, counsel argued that the Constitution is the supreme law of the land and any other law is subordinate to the provisions of the Constitution. It therefore, suffice to note that the Trial Judge in sentencing the Appellant did not properly apply and follow the provisions of the constitution. He, applied wrong principles of law by merely stating that the period spent on remand had been put into account without subtracting the same from the sentence.

ANALYSIS

15] It is the duty of a first appellate court to review and re-evaluate the evidence before the trial court and reach its own conclusions, taking into account of course that the appellate court did not have the opportunity to hear and see the witnesses testify. **See Rule 30(1) (a) of the Court of Appeal Rules and Pandya v R [1957] EA 336; Ruwala v Re [1957 EA 570; Bogere Moses v Uganda Cr. App No. 1/97(SC); Okethi Okale v Republic [1965] EA 555; Mbazira Siragi and Anor v Uganda Cr App No. 7/2004(SC).** Specifically, in **Kifamunte Henry v. Uganda, Supreme Court Criminal Appeal No. 10 of 1997**, it was held that:

> *"We agree that on first appeal on convict by the Judge, the Appellant is entitled to have the Appellate Courts on consideration and views of evidence as a whole and make its own decision thereon. The first Appellate court has a duty to review the evidence of the case and to consider the materials before the trial Judge. The appellate court must then make up its own mind. Not disregarding the judgment appealed from but carefully weighing and considering it."*

16] The role of the appellate court in interfering with the discretion of the sentencing Judge was stated in **Wamutabaniwe Jamiru Vs. Uganda, SCCA No. 74 of 2007**, which is similar to the holding of Court in **Kamya Johnson Wavamuno CACA, No. 16 of 2000**, where court held that;

> *"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 or 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 circumstances which ought to be considered*

while passing the sentence or where the sentence imposed is wrong in principle."

17] See also **Kyalimpa Edward vs. Uganda, SCCA No. 10 of 1995**, and **Kiwalabye vs. Uganda SCCA No. 143 of 2001.**

18] The Court can interfere with the exercise of the discretion of the sentencing Court if it is satisfied that there was a failure to exercise discretion or a failure to take into account a material consideration or an error in principle. In this particular case, the appellant contended that the trial Court did not take into consideration the time spent on remand.

19] In addressing this appeal, we shall address two concerns, whether the sentencing regime then required the Court to arithmetically deduct the years spent on remand, and secondly, whether the years spent on remand were deducted.

20] On the first issue, we note that the decision was made on the 27th of February 2011. The sentencing regime in 2011 did not require the trial Judge to arithmetically deduct the years spent on remand. This was the position in **Kizito Senkula vs. Uganda, SCCA No. 24 of 2001**, the court held as follows:

"as we understand the provisions of article 23(8) of the Constitution, they mean that when a trial court imposes as 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."

21] It has been held by the Supreme Court and this court that the law in **Rwabugande** (supra)does not apply retrospectively. In **Sebunya Robert and Anor vs. Uganda, SCCA No. 58 of 2016**, it was held 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"*

22] In 2011, it sufficed that the Judge took into consideration the time spent on remand without arithmetically deducting the years. The second issue is whether the trial Judge took the time spent on remand into consideration. While sentencing the trial Judge held that:

> *"the accused is sentenced to imprisonment for 20 years. The years he has so far been on remand to be taken into account"*

23] The language the trial Judge used while sentencing is ambiguous and leaves us wondering whether the period spent on remand was deducted or would be considered at a later stage and by whom. The Judge stated that "*The years he has so far been on remand to be taken into account.*" The statement is futuristic in nature. While sentencing the Judge has to be clear in their statement such that there is no room for doubt. Secondly the period that the appellant had not spent on remand is not identified by the judge. It is therefore not possible to determine exactly what period did he take into account. We therefore find that the trial Judge did not deduct the 1 and 8 months spent on remand. It is trite law that any sentence that does not take into account the time spent on is illegal. Having found that the sentence was illegal we invoke the powers of the

Court under section 11 of the Judicature to set aside the trial Court sentence aside and sentence the Appellant afresh.

24] In sentencing the Appellant afresh, we are guided by both the mitigating and aggravating factors. In mitigation, the Appellant was a family man living with three children without their mother. The children are living alone. The Appellant is a first-time offender and he prayed for a lenient sentence. Regarding aggravating factors, the offence committed by the Appellant is very grave. The victim was his daughter and only 10 years of age which has both health and moral effects on the victim.

25] We are further guided by the principle of consistency provided for under paragraph 6 (c) of the Constitution (Sentencing Guidelines for (Courts of Judicature) (Practice) Directions, 2013. We have considered decisions like that in **Bachwa Benon vs. Uganda, CACA No. 896 of 2014**, where this court upheld the conviction of life imprisonment imposed on the appellant who being a guardian to the 10-year-old victim had sexual intercourse with her and infected her with HIV. Furthermore, in the case of **Bonyo Abdul vs. Uganda, SC Criminal Appellant No 07 of 2011**, the court upheld a sentence of life imprisonment and in **Kaserebanyi James vs. Uganda, [2014] UGCA 89**, an appellant who defiled and impregnated his daughter aged 15 years was sentenced to life imprisonment when confirming the sentence, this Court stated that a father who defiled his own daughter deserves a deterrent sentence. In **Mutebi Ronald vs. Uganda, Criminal Appeal No. 38 of 2019**, where this court found the sentence of 23 years' imprisonment appropriate because the victim was 6 years old.

26] We find that the sentence of 20 years is appropriate in the circumstances of this case. We deduct the 1 year and 8 months spent on remand and the Appellant will serve 18 years and 4 months' imprisonment.

Decision

1. The appeal succeeds on the above terms.
2. The sentence of the trial Court is set aside
3. The Appellant shall serve 18 years and 4 months having deducted the 1 and 8 months spent on remand.
4. The sentence shall run from the date of conviction

We so order

Dated at Kampala this 21st **day of** May **2023**

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FREDRICK EGONDA-NTENDE
JUSTICE OF APPEAL

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CHRISTOPHER GASHIRABAKE
JUSTICE OF APPEAL

.....

OSCAR JOHN KIHIKA
JUSTICE OF APPEAL