

THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA HOLDEN AT MBALE  
CRIMINAL APPEAL NO.17 OF 2019  
(CORAM: Obura, Bamugemereire & Madrama, JJA)

5 AGEET JOSEPH ..... APPELLANT

VERSUS

UGANDA..... RESPONDENT

*[Appeal from the decision of Anthony Oyuko Ojok J, dated 12<sup>th</sup> November 2018 in  
High Court Criminal Session No.219 of 2016 Holden at Mbale)*

JUDGMENT OF THE COURT

15 The appellant was indicted for the offence of Aggravated Defilement  
contrary to section 129 (3) and (4) (a) of the Penal Code Act. It was  
alleged that the appellant on the 21<sup>st</sup> day of January 2015 at Adokar village in  
Katakwi district performed a sexual act on Irene Acam, a girl aged 6 years,  
knowing that he was HIV positive.

Background

20 The background to this appeal is that on the 21<sup>st</sup> day of January 2015 at  
around 22:00 hours, while the victim was having her meal, the appellant  
purported to join her and then dragged her behind the house. The appellant  
ordered the victim to lie down and performed a sexual act on her. The  
victim's mother inquired from the siblings where the victim was. When the  
25 appellant heard he jumped off the victim but the victim's mother found him  
while he was trying to dress up. The victim's brother and father also joined  
at the scene of crime and the appellant was arrested.

The appellant pleaded not guilty and after a full trial he was convicted and sentenced to 56 years and 2 months' imprisonment. Dissatisfied, the appellant lodged this appeal against both conviction and sentence.

5 However, during the hearing of the appeal, counsel for the appellant sought leave of this court under **rule 67 (2) of the Judicature (Court of Appeal Rules) Directions SI 13-10** to substitute the earlier Memorandum of appeal filed by the appellant with a new one filed by counsel, appealing against sentence only. Counsel for the respondent did not object to the appellant's prayers. This court allowed the appellant to file a supplementary  
10 memorandum of appeal and granted leave to appeal against sentence only.

### Ground of Appeal

That the learned trial Judge erred in law and fact in passing an illegal, manifestly harsh and excessive sentence of 56 years and 2 months to the appellant.

### 15 Representation

At the hearing of the appeal, Mr. Geoffrey Nappa represented the appellant on state brief while Mr Sam Oola, Senior Assistant Director of Public Prosecutions (DPP) represented the respondent.

### Appellant's submissions

20 Counsel for the appellant submitted that it is trite that before any Judge sentences the convict, he or she must take into consideration the various mitigating factors that may be brought to its attention during allocutus.

Counsel referred to **guideline 6 (c) of the Constitution (Judicature Sentencing Guidelines)** which provides that "every court shall when

sentencing an offender take into account the need for consistency with appropriate sentencing levels and other means of dealing with the offender in respect of similar offences committed in similar circumstances.

5 It was counsel's submission that the need for uniformity was emphasized in the case of **Kajungu Emmanuel v Uganda CACA No. 625**.

Counsel cited **Anguyo Silver v Uganda CACA No. 38 of 2014** where the appellant who was HIV positive was convicted of Aggravated Defilement and sentenced to 27 years imprisonment.

10 Counsel further referenced **Ederema Tomasi v Uganda CACA No. 554 of 2014** where the appellant who was HIV positive was convicted of Aggravated Defilement and sentenced to 18 years imprisonment.

It was counsel's contention that the trial Judge only considered the appellant being a first offender and the period spent on remand while mitigating the sentence but forgot to consider the age of the appellant.

15 Counsel prayed that this court invokes its powers under **section 11 of the Judicature Act** to set aside the harsh sentence imposed by the trial court and accordingly pass a sentence fit in the circumstances.

### **Respondent's submissions**

20 Counsel for the respondent submitted that it is trite that an appropriate sentence is a matter for the discretion of the trial Judge and this court can only interfere where it has been shown that the sentence was illegal, manifestly harsh or excessive or where there has been failure to take into account a material factor.



Counsel contended that the maximum sentence for the offence of aggravated defilement is death and the next most serious is life imprisonment, however, the appellant was spared the two. Counsel added that the trial Judge considered both the aggravating and mitigating factors  
5 before sentencing the appellant.

Counsel referred to **Bacwa Benson v Uganda CACA No. 869 of 2014** where the sentence of Life Imprisonment was upheld on appeal in a case where the appellant who was HIV positive was convicted of Aggravated Defilement of a girl aged 10 years.

10 Counsel further cited **Kaserebanyi James v Uganda SCCA No. 10 of 2014** where the Supreme Court upheld a sentence of Life Imprisonment in a case where the appellant who pleaded guilty was convicted of Aggravated Defilement of his daughter aged 15 years.

It was counsel's argument that the appellant could have been sentenced to  
15 Life Imprisonment which was more deserving given the gravity of the offence. It was counsel's submission that the sentence of 56 years and 2 months imprisonment against the appellant should not be interfered with.

Counsel prayed that the sentence against the appellant be upheld and the appeal be dismissed.

20 **Decision of the Court**

This being a first appeal, this court is obliged under **rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions** to reappraise the evidence and draw inferences of fact. This duty was well expounded in **Kifamunte Henry v Uganda SCCA No. 10 of 1997** as follows;

“The first appellate court has a duty to review the evidence of the case and to reconsider 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...”

5 We shall bear the above principles in mind as we resolve the grounds of appeal in this case.

We note that in Livingstone Kakooza v Uganda SCCA No. 17 of 1993, it was observed that;

10 “Courts can and will only interfere with a sentence of the trial court if the sentence is illegal or is based on a wrong principle or the court has overlooked a material factor or where the sentence is manifestly excessive or so low as to amount to a miscarriage of justice.”

In the instant case, counsel for the appellant contended that the trial Judge did not consider the age of the appellant while sentencing and thus  
15 sentenced him to a harsh sentence. The respondent in reply averred that the sentence meted out by the trial Judge was lenient given that the maximum penalty for Aggravated Defilement is death.

On the issue of mitigating factors, the trial Judge while sentencing noted that;

20 “True, the convict is a first offender, been 3 years & 10 months. However, the offence is rampant, victim has been put through such a traumatizing situation which will forever be on her mind and haunt her, convict ought to have protected her little sister, rather than harm her in such a way. I therefore sentence the

convict to 60 years imprisonment, less 3 years and 10 months leaving him to serve 56 years and 2 months.”

The above excerpt from the sentencing of the trial court shows that the trial Judge considered both mitigating and aggravating factors, however, he  
5 forgot or omitted to consider the age of the appellant at that time.

In Kabatera Steven v Uganda; CACA No.123 of 2001, this court held that the age of an accused person is a material factor that may act as a mitigating factor, especially where the convict is young. The court agreed with the submission that the trial Judge should have considered the age of the  
10 appellant at the time he committed the offence before passing sentence. He was a young offender and a long period of imprisonment would not serve him to reform.”

Further, in Kawesa Ivan v Uganda CACA No. 404 of 2019, it was held that;

15 “However, we think that the learned trial Judge did not give due consideration to the youthful age of the appellant at the time of commission of the offence. The appellant, while testifying in Court in 2019, said that he was 21 years. He was therefore 19 years old at the time of commission of the offence, two years earlier. The learned trial  
20 Judge ought to have considered that the appellant had just passed the dividing line, of 18 years, between childhood and adulthood, and reflected that consideration with a shorter sentence than he imposed.”

The appellant was thus sentenced to 15 years imprisonment.



We are cognizant of other cases where this court and the Supreme Court upheld the sentence of Life Imprisonment in cases of Aggravated Defilement however; we find that each case should be considered basing on its own circumstances.

5 In Tiborushange Emmanuella v Uganda CACA No. 655 of 2014, which was cited with approval in Anguyo Silver v Uganda CACA No. 38 of 2014 it was found that the sentence range approved by this court in previous aggravated defilement cases which did not possess aggravating factors lay between 11 years and 15 years.

10 In Ederema Tomasi v Uganda; (supra) this court found a sentence of 18 years' imprisonment appropriate where the appellant was HIV positive.

In the instant case, we have considered that the appellant was 19 years at the time he committed the offence. This makes him a youthful offender capable of reforming having been a first offender. We are however, mindful  
15 of the fact that the appellant was HIV positive and an elder brother to the victim who was only 6years old which makes this an offence of an incestuous nature, never mind that he was not so charged. In our view, however, the sentence of 56 years and 2 months' is on the higher side given that the appellant was still a teenager at the time the offence was  
20 committed. He was therefore a young offender with prospects of rehabilitation if granted an opportunity. A long custodial sentence which was almost three times of his spent life was not only harsh and but also excessive.

We therefore set aside the illegal sentence of 56 years and 2 months'  
25 imprisonment. Under section 11 of the Judicature Act we now pass a fresh sentence of 24years' imprisonment against the appellant. From this we

deduct the 3 years and 10 months which the appellant spent on remand. The appellant will now serve a sentence of 21 years and 2 months' imprisonment W.E.F 12<sup>th</sup> November 2018 being the date on which he was sentenced.

5 This appeal therefore succeeds.

Nota Bene

10 We call attention to the fact that our learned brother the Hon. Justice Christopher Madrama JA does not agree with the sentence and therefore has not endorsed this judgment.

15 Dated at Kampala this.....7<sup>th</sup>.....Day of .....Feb.....2023.

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Hon. Lady Justice Hellen Obura  
Justice of Appeal

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Hon. Lady Justice Catherine Bamugemereire  
Justice of Appeal

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