THE REPUIBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Elizabeth Musoke, Christopher Gashirabake, Eva K. Luswata JJA)

CRIMINAL APPEAL NO. 0382 OF 2019

SSAZI ROBERT :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Appeal from the Judgment of the High Court sitting at Mpigi in Criminal Case No. 023 of 2018 by Hon. Justice Kaweesa Henry Isabirye delivered on 25/09/2019)

JUDGMENT OF THE COURT

Introduction

1] The Appellant was indicted for the offence of aggravated defilement contrary to section 129(3) and (4) of the Penal Code Act. It was stated that on the 8th day of June 2017, at Bugeye Village in the Mpigi District, the appellant performed a sexual act with AN, a girl aged 16 years and a person with disability. The appellant denied the charge and the matter went to trial.

2] The facts confirmed at the trial are that the appellant went to the home of AN's mother, parked and left his motorcycle in her compound, then went behind her house. AN's mother became concerned when she could not find AN in the house, so together with her co-wife and neighbours, she mounted a search during which she saw the appellant walking out of the garden. He refused to respond when AN's mother called out to him. AN's mother finally found AN in their garden and confirmed that she had been defiled because she was dirty and had semen on her private parts and thighs. Her findings were confirmed at the clinic where AN was examined. The appellant was arrested and handed over to the LC Chairperson of Bugeye to whom he confessed that he had defiled AN and sought for forgiveness. However, he later escaped from the Chairperson's home and was subsequently re-arrested on the 13/7/2017 and charged with aggravated defilement. Following his trial, he was convicted and sentenced to 20 year's imprisonment.

3] The appellant being aggrieved with the decision of the High Court lodged an appeal to this court on one ground that:

> The Learned Trial Judge erred in law and fact in sentencing the appellant to 20 years' imprisonment which sentence was deemed illegal, manifestly harsh and excessive in the circumstances

Representation

4] At the hearing of the appeal, the appellant was represented by Mr. Emmanuel Muwonge of Katende Sempebwa & Co. Advocates on state brief, while the respondent was represented by Ms. Sherifah Nalwanga a Chief State Attorney. Counsel for the parties applied and were allowed to adopt their written submissions which this court will consider to decide the appeal.

Ground one

Submissions for the Appellant

5] Appellants counsel submitted that the duty of the first appellate court is set out in rule 30(1) of the Judicature (Court of Appeal Rules) Directions, SI No. 13-10. He referred to the cases of **Kifamunte Henry versus Uganda, SCCA No. 10 of 1997**, **Diana Luutu Nabbengo versus Uganda, CACA No. 128 of 2020** and **Pandya versus R (1957) EA 336** where it was held that:

"The first appellate court has a duty to re-evaluate and reappraise all the evidence brought before the trial Court and to draw its own findings/ inferences and conclusions of fact and law. In exercising this duty, the Court must be conscious that it did not have the opportunity to observe the demeanor of the accused and the extent, the court must be guided by the observations made by the trial Court".

6] Counsel submitted further that sentencing the appellant to an imprisonment term of 18 years running from the first date of admission on remand was illegal, manifestly harsh and excessive in the circumstances. Counsel also argued that the sentence did

not involve the reduction of the period spent on remand as required by law.

7] Counsel invited us to consider the decision in **Kiwalabye Benard versus Uganda, Supreme Court Criminal Appeal No. 143 of 2001.** It was held therein that an appellate Court is not to interfere with the sentence imposed by the trial court which has exercised its discretion, unless the exercise resulted in a harsh and manifestly excessive sentence, or where the sentence imposed is so low as to amount to a miscarriage of justice or where the sentencing judge proceeded on a wrong principle. He further referred to Section 11 of the Judicature Act which grants the Court of Appeal the same powers of sentencing as the trial Court if it considers invoking such powers is justifiable in any given circumstances.

8] Counsel further referred us to Paragraph 6(1) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) (Directions), 2013 (hereinafter the Sentencing Guidelines) to argue that at the trial, several mitigating factors were presented in favour of the appellant. He cited for example that it was mentioned he had spent two and a half years in prison on remand, but which the Court failed to appreciate or deduct. In particular, that the trial Judge did not follow the rule laid down in the case of **Rwabugande Moses versus Uganda, Supreme Court Criminal Appeal No. 25 of 2014** where it was held that when imposing an imprisonment sentence, the trial court must always take into

account the period spent on remand, which must be arithmetically deducted.

9] In conclusion, appellant's counsel prayed that this appeal be allowed and the sentence of 18 years' imprisonment be set aside and substituted with a sentence in accordance with the law.

Respondent's Submissions

10] In response, respondent's counsel agreed with the finding in **Rwabugande Moses versus Uganda,** (supra) and conceded that the learned trial Judge erred in law and fact when he failed to deduct the period of two years spent on remand as required under Article 23(8) of the Constitution. She pointed out that the trial Judge is required to have mathematically deducted the remand period.

11] Even so, counsel did not agree that the sentence of 20 years' imprisonment was manifestly excessive and harsh considering as the trial Judge did, that the maximum sentence for aggravated defilement is death. She in addition referred to Schedule III of the Sentencing Guidelines which provide a sentencing starting point of 35 years for such an offence with room for increasing or reducing the sentence based on the aggravating and mitigating factors (respectively) presented in any case. In her view, at page 27 of the record, the trial Judge took into consideration both aggravating and mitigating factors and the sentence given was lenient in the circumstances. Counsel also found fault with the

Judge for not seriously applying the aggravating factors (for example, the fact that the victim was deaf and dumb). That had he done so, the sentence would have been much higher than 20 years' imprisonment.

12] Counsel then referred to the case of **Apiku Ensio versus Uganda, CA Criminal Appeal No. 751 of 2015** where the court sentenced the appellant to 20 years for aggravated defilement of a victim who was dumb with a mental disability. In conclusion she asked us to maintain the sentence of 20 years' imprisonment and deduct the two years spent on remand.

Decision of Court.

13] We have carefully studied the court record, considered the submissions for either side, and the law and authorities cited therein. A first appeal from a decision of the High Court requires this Court to review the evidence and make its own inferences of law and fact. **See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.113-10.** We are alive to our limitations of not having observed the witnesses at the trial and in that regard, follow the decision of the Supreme Court in **Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997.** It was held that on a first appeal, this 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 judgement appealed from but carefully weighing and considering it."

14] Appellant's counsel correctly submitted on the law of sentencing. It was held for example in **Livingstone Kakooza versus Uganda SC Criminal Appeal No. 17 of 1993** that was followed by this Court in **Malong Lawrence Yor & Anor versus Uganda, CA Criminal Appeal No. 219 of 2021** that sentencing is a matter of discretion of the sentencing court. Thus, an appellate court can only interfere with the exercise of discretion if the sentence imposed is manifestly excessive, or is so low as to occasion a miscarriage of justice. The appellate court may also interfere where the trial court ignores to consider an important matter or circumstance it ought to have considered before imposing the sentence or where the sentence imposed is wrong in principle.

15] The appellant's contention against the sentence was twofold; that the Judge did not consider all the mitigating factors presented in his favour and he also failed to deduct the period he had spent on remand which resulted into a sentence that was manifestly harsh and excessive. State counsel conceded that the remand period was not considered in the sentence but argued that the Judge considered both the aggravating and mitigating factors before coming up with a sentence of 20 year's imprisonment which was in the circumstances of the case, lenient.

16] We find it useful at this point to mention what both counsel presented in the allocution proceedings. Briefly, the prosecutor stated that he had no record of a previous record, but the appellant had committed a grave offence upon a 16-year-old girl with a disability. In addition, that the offence carried a maximum penalty of death and the Sentencing Guidelines gave a starting point of 30 years which counsel considered appropriate. Conversely, it was stated in mitigation that the appellant was a youthful first time offender aged 21 years and a father to two children aged below five years. He had spent 2 years on remand and was capable of reform. His counsel prayed for a custodial sentence of eight years.

17] Counsel for the appellant contended that the omission by the trial judge to take into consideration all of the mitigating factors that were advanced resulted in a manifestly harsh, and excessive sentence. It is provided in Section 108 of the TID that:

(1) A person liable to imprisonment for life or any other person may be sentenced for any shorter term. Emphasis applied

From the reading of the provision, it appears to us that the mitigation of sentences or penalties is discretionary; it is up to the sentencing court to decide, given the circumstances of the particular case, whether to impose the maximum sentence provided for by law of to impose a lower sentence. Since the Supreme Court made the decision in **Attorney General v. Susan Kigula & 417 Others, Constitutional Appeal No. 3 of 2006**, that

the death sentence is no longer mandatory, the provisions of section 108 TIA also apply to the maximum sentence of death.

18] In his sentencing ruling the Judge stated as follows:

"Given the mitigating and the aggravating factors, this court sentences the accused as follows. The offence is grave. It carries maximum of death. The prosecution has raised aggravating factors and prayed for 30 years (as deterrence). Defence raised mitigations and prayed for 8 years. I have considered all factors, accused needs both rehabilitation and deterrence. Given the mitigations I will further move the sentence from 30 years to 20 years.
The accused shall serve a custodial period of 20 years running from the first day of admission on remand. I so order...."

19] It appears from the ruling that the Judge only made a sweeping statement that he had considered both aggravating and mitigating factors and the sentences offered by either side. Although he mentioned the mitigating factors while reducing the sentence, to 20 years there was lack of depth in the ruling. It is evident that the Judge did not carefully balance the two sides before arriving at the sentence. Section 86 of the Trial On Indictments Act Cap 23 provides some guidance on how sentences ought to be recorded. It is provided in Section 86(4) as follows:

"The judgment in the case of a conviction shall be followed by a note of the steps taken by the court prior to sentence and by a note of the sentence passed together with the reasons for the sentence when there are special reasons for passing a particular sentence".

20] According to Section 129(3) of the PCA, the maximum sentence for the offence of aggravated defilement is still death. If the trial judge sentenced the appellant to a sentence less than the

death sentence, there must have been reasons why he decided to sentence him to 20 years' imprisonment instead. The parties are entitled to know the reasons for the decision and it is our opinion that the trial judge has an obligation to set down those reasons, especially in the trial of a serious offence such as aggravated defilement. Our findings are fortified by the decision in **Aharikundira Yustina versus Uganda, Supreme Court Criminal Appeal No. 27 of 2015 [2018] UGSC 49** where the Supreme Court found fault with this court and the trial court for failing to take into account the mitigating factors that were advanced in favour of the appellant's sentence at her trial. It was stated in part that:

"Before a convict can be sentenced, the trial court is obliged to exercise its discretion by considering meticulously all the mitigating factors and other pre-sentencing requirements as elucidated in the Constitution, Statutes, Practice Directions together with general principles of sentencing as guided by case law".

We are persuaded that it is for that reason that the Second Schedule to the Sentencing Guidelines lay down a list of 23 factors that a sentencing court must take into account before passing sentence.

21] We accordingly find that the trial judge erred when he omitted to take into account all the mitigating factors that were advanced in favour of the appellant, and also erred when he did not set out in reasonable detail, reasons for his sentence, as is required by section 86 (4) of the TIA.

22] With regard to the complaint that the sentence was manifestly harsh and excessive, the trial Court is enjoined to maintain consistency or uniformity in exercising its sentencing discretion. It is a delicate balancing act because crimes are never identical or committed under exactly the same circumstances. There is guidance in the Sentencing Guidelines in that regard. In particular, under **Paragraph 19(1)** the court shall be guided by the sentencing range specified in Part I of the Third Schedule in determining the appropriate custodial sentence in a capital offence. Under **Paragraph 19(2)** in cases where a death sentence is prescribed as the maximum sentence for an offence, the court shall, considering the factors in paragraphs 20 and 21, determine the sentence in accordance with the sentencing range. According to the third Schedule, the sentencing range for aggravated defilement after considering both the aggravating and mitigating factors, is 30 years to death as the maximum sentence.

23] We are also mindful to apply the principle of consistency in sentencing as articulated in the authority of **Aharikundira Yustina vs Uganda,** (supra) where it was stated that:

".....it is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation".

24] Accordingly, we have considered the sentences imposed in previously decided cases for the offence of aggravated defilement,

for guidance and consistency. In **Apiku Ensio versus Uganda, Criminal Appeal No. 751 of 2015** the appellant had unlawful sexual intercourse with a girl under the age of 14 who was dumb with a mental disability. After taking into account the aggravating and mitigating factors, the Court found a sentence of 20 years appropriate. From that 2 years and 11 months that the appellant had spent on remand, was deducted. Yet in in **Kule Ronald verses Uganda, CA Criminal Appeal No. 132 of 2014,** an appellant who defiled a victim of 14 years old, who was disabled, mentally challenged and deaf had his sentence reduced from 30 to 16 years, from which the period of remand was deducted. The Court came to that decision after taking into consideration that that the sentencing range in previous appeals with similar facts was 16-18 years.

25] Both counsel agreed that the Judge did not take into consideration the period the appellant had spent on remand, which is a mandatory requirement under Article 23(8) of the Constitution. It is provided that:

"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment".

The Supreme Court has explained in Moses Rwabugande versus Uganda, (supra) that:

"...Article 23 (8) of the Constitution (supra) makes it mandatory and not discretional that a sentencing judicial officer accounts for the

remand period. As such, the remand period cannot be placed on the same scale with other factors developed under common law..... which are discretional mitigating factors which a court can lump together. Furthermore, unlike it is with the remand period, the effect of the said other factors on the court's determination of sentence cannot be quantified with precision."

It is our decision then that the sentence imposed on the appellant was illegal. We set it aside and under Section 11 of the Judicature Act move to impose an appropriate sentence.

26] In making our decision, we have considered both the aggravating and mitigating factors of the offence that were advanced at the trial, reproduced in paragraph 16 above. The appellant committed a grave offence which carries a maximum penalty of death. Taking into consideration the provisions of the Sentencing Guidelines, he would be liable to face a deterrent sentence of at least 30 years or more, for although the victim was aged 16 years, she was severely physically impaired and could not fight off or easily report the sexual assault. However, taking into consideration that the appellant was a relatively young, first time offender of 21 years with very young dependants, there is likely hood that he can reform and become a useful parent and citizen. Taking into account those facts and the doctrine of consistency, we find a sentence of 18 years as appropriate in the circumstances.

27] We are enjoined under Article 23 (8) of the Constitution to take into account the period of two years, three months and 17

days, the appellant spent on remand before the date he was convicted. It is now deducted from the 18 years' imprisonment. As a result, we sentence the appellant to 15 years, eight (8) months and 13 (thirteen) days' imprisonment to be served with effect from the date of his conviction.

28] Consequently, this appeal is allowed.

Dated at **Kampala** this ..21st.. day of ..Feb.. 2023

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HON. ELIZABETH MUSOKE
JUSTICE OF APPEAL

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HON. CHRISTOPHER GASHIRABAKE
JUSTICE OF APPEAL

.....
HON. EVA K. LUSWATA
JUSTICE OF APPEAL