THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

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

CRIMINAL APPEAL NO. 0374 OF 2019

BETWEEN

MUBIRU ANDREW:: APPELLANT

AND

UGANDA:: RESPONDENT

(Appeal from the Judgment of the High Court sitting at Mpigi in Criminal Session Case No. 008/2018 by Hon. Justice Kaweesa Henry Isabirye delivered on 26/09/2019)

JUDGMENT OF THE COURT

Introduction

1] The Appellant was charged with the offence of aggravated defilement contrary to Sections 129(3) and (4)(b) of the Penal Code Act (PCA). It was stated in the indictment that during the year 2016 on an unknown date, at Kasozi Village in the Mpigi District, the appellant performed a sexual act with NR a girl aged 16 years, and at the time he was infected with HIV (Human Immune Virus)(Sic).

2] The facts of the case as we have gathered from the record are briefly that sometime during 2016, the appellant who was a produce seller in Kasozi Trading Centre, started a love relationship and sexual intercourse with NR, who was at the time aged 16 years. During 2017, NR's mother, the complainant, heard rumours that NR and the appellant were having a love affair, which prompted her to take NR to her father's place in Kasanga. Subsequently, NR fell sick and the complainant went to check on her, and found her with birth control pills. When the complainant interrogated NR to explain why she had the pills, NR revealed to her that she had been having sexual intercourse with the appellant who as her boyfriend, had requested her to procure the pills. When NR returned to Kasozi with her mother, the appellant again pestered her to resume their affair. After seeing the appellant at her home, the complainant reported to Kituntu Police Station, leading to the appellant's arrest. The appellant and NR were examined and confirmed to be HIV positive. NR alleged that she was born HIV negative and had not had sexual encounters with any other man before. The appellant was then charged and indicted for aggravated defilement of NR, convicted and sentenced to 22 years' 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 22 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 on State brief, while the respondent was represented by Mr. Fatinah Nakafeero a Chief State Attorney with the Director of Public Prosecutions (DPP).

5] The parties filed written submissions before the hearing of the appeal as directed by court. Counsel for both parties applied and the Court accepted to adopt their written arguments as submissions in the appeal. This appeal has thus been disposed of on the basis of written arguments only.

Submissions for the Appellant

6] Counsel for the appellant started his submissions by stating the duty of the 1st Appellate court which is to reappraise the whole evidence before the trial court and draw its own inferences of the fact. He cited **Rule 30(1) of the Judicature (Court of Appeal) Directions** and the case of **Kifamunte Henry Versus Uganda SC Constitutional Appeal No.10 of 1997.**

7] Counsel submitted that the trial Judge sentenced the appellant to imprisonment of 22 years running from the first date of admission on remand, which sentence was illegal, manifestly harsh and excessive in the circumstances. He submitted that the sentence

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

8] Counsel referred us to the case of **Kiwalabye Bernard vs Uganda, SC Criminal Appeal No. 143 of 2001** where it was held that the Appellate Court is not to interfere with the sentence imposed by the trial court which has exercised its discretion, unless the exercise of the discretion resulted in a harsh or 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 the case of **Kakooza versus Uganda, (1994) UGSC 17.**

9] Counsel also 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 justifiable in the circumstances. He also referred to Paragraph 6(1) of the Constitutional (Sentencing Guidelines for Courts of Judicature (Practice) (Directions), 2013 (Sentencing Guidelines,) which mandates every sentencing Court to take into account circumstances which the court considers relevant.

10] Counsel contended then that the Judge ignored several mitigating factors in favour of the appellant in the present case. For example, that it was stated that at the material time, the appellant who was a married man aged 34 years old, was a first

offender who was sickly with HIV, and had asthma and allergies. In addition, the Judge did not consider the period of two and a half years he had spent in prison before the matter was heard. Counsel then relied on the decision of **Rwabugande Moses versus Uganda, SC Criminal Appeal No. 25 of 2014** to submit that failure of the trial Court to take the period spent in remand into consideration amounted to an illegality and as such, the sentence was illegal and manifestly excessive on the circumstances.

11] In conclusion, counsel prayed that the appeal be allowed and the sentence of 22 years be set aside and substituted with a sentence in accordance with the law.

Respondent's Submissions

12] Respondent's counsel commenced her response by raising a preliminary point, that the appeal offends the provisions of Section 123(1) (b) of the Trial on Indictment Act Cap 23 (TID), because the appellant did not seek leave of this Court to lodge the appeal on sentence. He accordingly prayed that it is struck out.

13] In further response to the appeal, counsel for the respondent agreed with her learned colleague on the law pertaining to our powers on appeal. She also conceded that the trial Court must as a rule subtract the period spent on remand from the proposed sentence. She in that regard referred us to the decisions of **Nashimollo Paul versus Uganda, SC Criminal Appeal No. 046 of 2017,** and **Bulila Christiano & Another versus Uganda, SC**

Criminal Appeal NO. 61 of 2015. In **Nashimimolo Paul versus Uganda (supra),** the Supreme Court emphasized the need for Courts to follow the principles developed in the earlier decision of **Rwabugande Moses versus Uganda (supra).** Counsel submitted however that at the trial, the remand period of two years, two months and five days was not brought to the attention of the Judge, during allocutus and mitigation. Being in agreement with her colleague on this point, she concluded by praying this court to exercise its powers vested under Section 11 of the Judicature Act and Article 23(8) of the 1995 Constitution, to impose an appropriate sentence that took into account the pre-remand period.

14] Respondent's counsel continued by enumerating the aggravating factors that were submitted at the trial and also disputed the submission that the trial Judge made no consideration of the mitigating factors made in the allocution proceedings. She pointed us to page 28 at which the Judge considered both the aggravating and mitigating factors before giving justification why he decided on a sentence of 22 years' imprisonment. In her view, the mitigating factors were considered at the trial and requesting the Court to reconsider them now, would amount to a diversion from many compelling authorities of the Supreme Court regarding sentencing by the appellate courts. She added that the appellant was indicted for aggravated defilement with a maximum penalty of death, and that under the

Sentencing Guidelines, the recommended starting point for the offence is 35 years, with a sentencing range of 30 years to death.

15] Citing the decision of **Sekitoleko Yudah & Others vs Uganda, SCCA No. 33 of 2014,** counsel submitted further that sentencing is for the discretion of the trial court, which should consider each case with its facts as presented. She continued that it is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing Judge unless the sentence imposed by the trial Judge was so excessive as to amount to an injustice.

16] Counsel concluded that the sentence of 22 years was in the circumstances not manifestly harsh and the court rightly directed itself on the law and applied it to the facts. She repeated her prayer that this honorable court deducts the pre-trial remand period from the 22 years, before giving an appropriate sentence.

Decision of the Court

Preliminary Objection

17] The preliminary point of law was based on Section 132(1)(b) of the TID which provides as follows:

"An accused person may, with leave of the Court of Appeal, appeal to the Court of Appeal against the sentence alone imposed by the High Court, other than a sentence fixed by law";

18] It appears that the provision is not mandatory and will not, in all cases result into an appeal being dismissed as prayed. That notwithstanding, we have confirmed from the record of appeal that during the hearing on 26/07/2022, Mr. Muwonge as appellant's counsel, sought leave under that law to appeal against sentence only. Ms. Nakafeero who appeared for the DPP indicated that she had no objection to that prayer, which we granted. We are surprised she is raising this objection, which in our view has no basis at all.

19] We accordingly reject the preliminary objection.

Resolution of the merits of the appeal

20] We have carefully studied the court record, considered the submissions for either side, and the law and authorities cited by both counsel. 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 do agree with, and follow the decision of the Supreme Court in **Kifamunte Henry vs. Uganda, (supra),** where 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 weighting and considering it"

21] In this appeal, the contest was against the sentence only. It was submitted that the sentence of 22 years' imprisonment was illegal, as well as manifestly harsh and excessive in the circumstances. We are therefore only required to consider whether the trial Judge followed the correct principles when determining the appropriate sentence. We are in that regard guided by the Supreme Court decision of **Livingstone Kakooza v Uganda SC Criminal Appeal No. 17 of 1993** where it was held that:

"An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration": Also see ***Ogalo S/O Owoura v R (1954) 21 E.A.C.A. 270.***

22] Both counsel were at the trial allowed to make oral submissions during the allocution proceedings. It was stated for the prosecution that the appellant had committed an offence that carried a maximum sentence of death with a victim below 18 years, who he exposed to HIV. Counsel then prayed for a deterrent sentence of 35 years. Conversely it was submitted in mitigation that the appellant, a first time offender aged 34 years, had a wife and children and also cared for his sickly mother. That he had been on remand since his arrest and was sickly with asthma and allergies. While sentencing the appellant, the learned trial judge stated thus:

"The sentence is given with a view that, the accused needs: 1 – Deterrence, 2- Rehabilitation.
The offence carries a maximum penalty of death. Court considers the mitigation and the aggravating factors (HIV) plus (age of victim) and considers the accused should be given custodial sentence. The mitigations raised however move it from 35 years proposed to 22 years. Accused is accordingly running from the period spent on remand". (Sic)

23] 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".

24] 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 22 years' imprisonment instead. The parties were entitled to know the reasons for the decision and it is our opinion that the trial judge had 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 vs Uganda, Supreme Court Criminal Appeal No. 27 of 2015 (unreported)** 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".

25] In our view, the Judge in his sentencing ruling appeared to have given much attention to the aggravating factors but less than reasonable attention to the mitigating factors. He did not specifically record the reasons why he was persuaded to reduce the suggested 35 years to 22 years' imprisonment. It is also evident that he omitted to deduct the period of two years, two months and five days that the appellant spent on remand which offended the principle laid down by the Supreme Court in the case of **Rwabugande Moses versus Uganda,** (supra) that:

"It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused."

26] In our view, the omissions of the trial Judge resulted into a sentence that offended the Constitution and is thus, illegal. We hereby set it aside. We now invoke the provisions of Section 11 of the Judicature Act, which grants this Court the same powers as the trial court to impose a sentence on the Appellant.

27] We have found in paragraph 25 above that in his sentence, the Judge did not give equal attention to the mitigating factors as he did to those presented as aggravating the offence. He also omitted to consider the principle of consistency when determining the appropriate sentence. That principle that has been well followed by our courts is important, in that, an appellate court will be guided by sentences given in previous trials and appeals with similar facts. It is in itself a measure of whether in given circumstances a particular sentence is manifestly harsh and excessive. We are fortified in our findings by the provisions of Paragraph 6(c) of the Constitution (Sentencing Guidelines for Courts of Judicature)(Practice) Directions 2013, which provides that "a *court should be guided by the principle of consistency while passing a sentence to a convict.* Also by the case of **Aharikundira Yustina vs Uganda, (Supra)** where it was stated that:

".....it is the 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.

28] We will therefore consider some of the sentences that have been imposed for similar offences in order to determine whether the sentence that was imposed was appropriate in the circumstances.

29] In **Tiboruhanga Emmanuel versus Uganda, CA Criminal Appeal No. 0655 of 2014,** the Justices of this Court stated that

the sentences approved by the Court of Appeal in previous aggravated defilement cases, without additional aggravating factors, range between 11 years to 15 years. The Court considered the fact that the appellant was HIV positive an additional aggravating factor which exposed the victim to the risk of contracting HIV/AIDS. The court imposed a sentence of 25 years' imprisonment.

30] In **Anguyo Siliva versus Uganda, CA Criminal Appeal No. 038 of 2014.** The appellant was 32 years old at the time he committed the offence of aggravated defilement of a girl aged 14 years. The appellant knew that he was HIV positive when he committed the offence. Having taken into account the period of 2 years and 2 days the appellant had been in lawful custody before sentence, this court sentenced him to serve 21 years and 28 days in prison. Yet in in **Olara John Peter versus Uganda, Court of Appeal Criminal Appeal No. 30 of 2010**, the appellant was convicted of aggravated defilement of a girl aged 14 years on his own plea of guilty. He was 29 years old and HIV positive. He appealed against the sentence of 16 years which he considered manifestly harsh and excessive. This court after considering that the victim was exposed to the danger of contracting HIV did not agree with him, and maintained the sentence.

31] In the instant case, the Appellant defiled NR a 16-year-old girl and since both were confirmed to be HIV positive, there is a possibility he infected her. It is also possible that he introduced her to sex because she related that she did not have boyfriends

before and the appellant requested her to use contraceptives. Even when NR's mother tried to keep them apart, the appellant insisted on visiting their home and persuaded NR to resume their relationship. He was a married man, much older than NR who should have protected her instead. He committed a grave offence carrying a maximum sentence of death. That notwithstanding, it is on record that the appellant was a first time offender, aged 34 years, had the responsibility of a wife, children and a sickly mother. He was himself unwell for he suffered from asthma and allergies. It was not indicated that his ailments could not be treated while in prison.

32] Thus, taking into account the gravity of the offence, and after weighing the aggravating and mitigating factors that have been identified and similarly decided cases, we consider a sentence of 20 years' imprisonment more appropriate.

33] In addition, we are enjoined under Article 23 (8) of the Constitution to take into account the period of 2 years, 2 months and 5 days the appellant spent on remand, which we therefore deduct from the 20 years' imprisonment. As a result, we sentence the appellant to 17 years 9 months and 25 days' imprisonment for the offence of aggravated defilement contrary to Sections 129(3) and (4) of the PCA. He will serve the sentence with effect from the date of conviction on 25/09/2019.

Dated at Kampala this 22nd day of April 2023

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HON. ELIZABETH MUSOKE
JUSTICE OF APPEAL

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HON. CHRISTOPHER GASHIRABAKE
JUSTICE OF APPEAL

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HON. EVA K. LUSWATA
JUSTICE OF APPEAL