THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

CRIMINAL APPEAL NO. 142 OF 2016

(Coram: Obura, Bamugemereire & Madrama, JJA)

WADAKI STEVEN} ..... APPELLANT

VERSUS

UGANDA} ..... RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mbale in Criminal Session Case No 18 of 2014 before Kaweesa, J delivered on 10th March, 2016)

JUDGMENT OF COURT

The Appellant was charged with aggravated defilement contrary to section 129 (3) and (4) (a) (b) of the Penal Code Act. The particulars of the offence were that the appellant in the month of August and on the 4th in 2013 at Irorianga zone in Tororo district being infected with HIV, performed an unlawful sexual act with NJ, a girl aged 14 years.

The facts accepted by the learned trial judge are that NJ was a girl aged about 14 years old and the appellant was HIV-positive. NJ went to church whereupon she left the church and went to meet the appellant and the appellant took her to his home where he on numerous times had sexual intercourse with NJ. NJ went missing from her home and was traced and found in the home of the aunt of the appellant. The appellant was charged, tried and convicted whereupon he was sentenced to 26 years' imprisonment.

The appellant being aggrieved, appealed with the leave of court, against sentence only on the sole ground that:

1. The learned trial judge erred in law and fact upon imposing harsh and excessive sentence of 26 years on the appellant without considering the mitigating factors hence occasioning a miscarriage of justice.

At the hearing of the appeal learned counsel Mr. Deogratious Obedo appeared for the appellant while the learned Senior State Attorney Mr. Peter Mugisha Bamwine, appeared for the appellant. The appellant was present in court.

The court was addressed in written submissions. The appellants counsel relied on the decision of the Court of Appeal in **John Kasimbazi and Ors Vs Uganda; CACA No. 167 of 2013** where the appellants were charged with murder and sentenced to life imprisonment and on appeal the Court of Appeal reduced the sentenced to 12 years. Further in **Magala Ramadhan Vs Uganda; SCCA No 1 of 2014**, the Supreme Court reduced a sentence for two counts of murder to 14 years and 7 years' imprisonment respectively. The appellant's counsel invited the court follow these precedents. Further, he submitted that there is a need for consistency in sentencing according to the decision of the Supreme Court in **Mbunya Godfrey Vs Uganda; SCCA No 4 of 2011**. He prayed that the sentence be set aside and an appropriate sentence imposed.

The appellant's counsel further submitted that the appellant was remorseful, a youth aged 24 years at the time of commission of the offence and that he is able to reform and is a father of two infant children. In light of the above authorities, he submitted that the learned trial judge imposed a harsh and excessive sentence without considering the mitigating factors and as a result, occasioned a miscarriage of justice.

In reply, the respondent's counsel submitted that the sentence of 26 years' imprisonment was neither harsh nor excessive in the circumstances especially considering the fact that the maximum sentence for aggravated defilement is death. Further, the respondent's counsel submitted that the starting point in assessing imprisonment for the offence of aggravated defilement is 35 years' imprisonment according to the Third Schedule Part 1 of the Sentencing Guidelines Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013. He submitted that where the case justifies, the factors point to the rare of the rarest that would lead to a maximum sentences of death but this was not imposed and a sentence of 26 years' imprisonment would be lenient considering the factors. He contended that the appellant committed this gruesome crime against a child of 14

years of age when he had sex with her and when infected with the HIV virus and further he turned the victim into a sex object for more than a week. His actions portray a person of heartless character who deserved no mercy in the circumstances.

On the principles for sentencing, the respondent's counsel submitted that sentencing is at the discretion of the trial court and an appellate court would not interfere with a sentence unless it is satisfied that the sentence imposed is manifestly excessive or so low as to amount to a miscarriage of justice or where the trial court ignores to consider an important matter or circumstances which ought to be considered when passing sentence and finally where the sentence imposed is wrong in principle (see **Kiwalabye Vs Uganda; SCCA No 143 of 2001**).

The respondent's counsel submitted that the learned trial judge considered both the mitigating factors and the aggravating factors according to his sentencing notes which are on record. Further, the principle of consistency cannot be followed always. It is intended to be applied in cases with similar circumstances and no cases are identical as each case presents its own peculiar facts. He relied on **Anguyo Siliva Vs Uganda; CACA No 0038 of 2013** where the appellant was infected with HIV and the court considered that a sentence of 25 years' imprisonment was appropriate less the period the convict spent on remand.

In the premises, the respondent prayed that the appeal ought to fail and be dismissed for lacking merit.

Consideration of appeal

We have carefully considered the appellant's appeal, the submissions of counsel, the record of appeal as well as the law generally. While we have a duty to reappraise the evidence, the facts accepted by the learned trial judge are not in controversy in this appeal which is only against sentence and we do not need to re-evaluate them except as is material to sentence.

The basis for setting aside a sentence imposed by a trial court were generally set out by the East African Court of Appeal in **Ogalo s/o Owoura v R (1954) 21 EACA 270**. In the appeal, the appellant appealed against a

sentence of 10 years' imprisonment with hard labour which had been imposed for the offence of manslaughter. On the relevant principles to interfere with sentence, the East African Court of Appeal held that:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the court had been trying the Appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v. R*, (1950) 18 EACA 147, "it is evident that the Judge has acted upon wrong principle or overlooked some material factor". To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case

An appropriate sentence should be proportionate and should suit the offence as well as the goals of the sentence whether as deterrence, fostering reformation and re-integration in society etc. Generally, an offence considered to be the worst or the rarest of the rare and therefore very grave can attract the maximum penalty and proportionately, the slightly less grave offences in terms of degree would attract relatively lighter penalties. These possible sentences may range from death, life imprisonment and various fixed terms as suits the circumstances considered by the trial judge and all would depend on the degree of gravity in terms of aggravating factors weighed against the mitigating factors.

The reasons given by the learned trial judge for imposing a sentence of 26 years' imprisonment are as follows:

> Accused/convict is found liable of aggravated defilement contrary to section 129 (3) and (b) (c) Penal Code Act.
>
> The maximum sentence is in the rarest of the rare cases. The mitigations that accused is. Accused is a further. As dependence. Spent 2 ½ years on remand. Did not know his HIV status before the testing by police. He is remorseful (sic).
>
> In aggravation states showed that there was premeditation to commit the offence, and to inflict the victim with HIV. Accused's conduct was malicious and dangerous.
>
> The beginning point in sentencing guidelines is 35 years. The range is from 30 years to death. The mitigation in this case because the case away from maximum of death. However, the aggravating factors push it to the starting

range of 35 years. The sentence aims at achieving the connection of accused behaviour, deterrence from other offenders and rehabilitation of accused. The beginning point of 35 years if taken and the 3 years on remand subtracted leaves 31 years. If the mitigations are given the further weight of 6 and subtracted, the court considers a custodial sentence of 26 years sufficient in the circumstances. I sentence the convict to 26 years (sic).

The learned trial judge clearly considered the sentencing guidelines as binding in terms of giving him a beginning point of 30 years' imprisonment from which the court can go upwards in terms of severity or downwards. However, when the sentencing notes are considered together with the precedents of the appellate courts, the guidelines are inconsistent with those precedents that we consider below.

In **Kizito Senkula v Uganda; (Criminal Appeal No. 24 of 2001) [2002] UGCA 36** the victim of the offence was 11 years old and the Court of Appeal held that a sentence of 15 years' imprisonment was appropriate. In **Katende Ahamad v Uganda; (Criminal Appeal No. 6 of 2004) [2007] UGSC 11** the appellant defiled his biological daughter of 9 years of age and the Supreme Court on a second appeal imposed a sentence pf 10 years' imprisonment after deducting a period of 2 ½ years the appellant had spent in lawful custody prior to his conviction. Further in **Lukwago Henry v Uganda; (Court of Appeal Criminal Appeal No 0036 of 2010) [2014] UGCA 34 (16 July 2014)**, the appellant was convicted of the offence of aggravated defilement of a girl of 13 years of age and this court upheld a sentence of 13 years' imprisonment. In **Ogarm Iddi v Uganda; (Criminal Appeal No. 0182 of 2009) [2016] UGSC 13**, the victim was 13 years old and this Court found a sentence of 15 years' imprisonment to be appropriate.

Considering the previous precedents of this Court and the fact the appellant is a person infected with HIV is the aggravating factor making the offence that of aggravated defilement. This is because the victim was 14 years old at the time of the offence according to the medical examination exhibit P1. PW1 Joseph Obbo testified that the victim was born in 1999. The offence occurred around September 2013. The appellant took the victim to his home after persuading her with money. He threatened to cut her with a panga (cutlass) and a knife if she left for her home after he committed the sexual act upon her. He kept her for over a

week and kept her as a "wife". During this time, he committed the sexual act with her multiple times.

We have further considered the decision of this court in **Anguyo Siliva Vs Uganda: CACA No. 0038 of 2014**. The appellant had been convicted of aggravated defilement and sentenced to 27 years' imprisonment. The victim was a girl under the age of 14 years and the appellant was infected with HIV. At the material time, it was established that the victim was aged 7 years. The appellant committed the offence on three separate occasions from 2008 to 2011. He also threatened to kill the victim if she reported the incident. The victim was defiled by her stepfather who violated her trust thereby. The appellant was a young man at 32 years of age. The court found that a sentence of 25 years' imprisonment would be appropriate.

A person who commits the offence of aggravated defilement is liable to suffer death. To give indications of how seriously Parliament considers the offence of defilement, section 129 (2) of the Penal Code Act gives a ceiling of possible maximum imprisonment term for the offence of attempted defilement and provides that:

> (2) Any person who attempts to perform a sexual act with another person who is below the age of eighteen years commits an offence and is on conviction, liable to imprisonment not exceeding eighteen years.

If the maximum penalty for attempted defilement is 18 years' imprisonment, what would be the penalty for the offence when it is committed? On the other hand, the law prescribes a maximum penalty of death, followed by imprisonment for life and followed by a term of years where the offence is committed in the order of severity with the death penalty being the maximum penalty possible. In the circumstances, the learned trial judge intended to spare the appellant the maximum penalty and life imprisonment which is next in severity to the death penalty.

In the circumstances, we find that a sentence of 26 years imprisonment would be harsh and excessive in the circumstances. We allow the appeal against sentence and set aside. Exercising the powers of this court under section 11 of the Judicature Act, we would impose a fresh sentence.

Taking into account both the aggravating factors and the mitigating factors set out by the learned trial judge which we have quoted, we would find that a sentence of 18 years' imprisonment would be appropriate in the circumstances. From this period, we would subtract the period of 2 ½ years that the appellant spent in pre-trial detention. Accordingly, we sentence the appellant to a term of 15 ½ years' imprisonment, which term would commence from the time of his conviction and sentence by the High Court on 10th March 2016.

Dated at Mbale the 18th day of March 2022

Hellen Obura

Justice of Appeal

Catherine Bamugemereire

Justice of Appeal

Christopher Madrama

Justice of Appeal