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. 038 OF 2017

BETWEEN

WAMALA MEDDIE alias TAATA MZEE :::::::::::::::::::: APPELLANT

AND

UGANDA :: RESPONDENT

(Appeal from the Judgement of Nyanzi Yasin, J, sitting at Kampala delivered on 6th February, 2018)

JUDGMENT OF THE COURT

Introduction

1] The appellant was charged and tried for the offence of aggravated defilement contrary to section 129(3) and 4(a) of the Penal Code Act Cap.120 (PCA). It was stated in the indictment that on the 23rd day of March, 2013, at Bwaise, Kisenyi Zone in Kawempe Division Kampala District, the appellant performed a sexual act with NA, a girl aged eight years

2] On 6/2/2017, the appellant indicated his decision to plead guilty to the charge and opted to enter into a plea bargaining agreement to negotiate his sentence. On the same date, the prosecutor reported that the negotiations had failed and prayed for the trial to commence before the same Judge that same day. When the Court retired into chambers to record NA's evidence, the prosecutor again reported that the appellant had agreed to change his plea to guilty. The Judge directed for the plea to be retaken and then recorded the appellant's plea of guilty. Before his conviction, the appellant agreed to the following facts as stated by the prosecutor:

"The victim NA who was present in court, was on that date aged eight years and a pupil at Jolly Primary School. The victim and appellant were neighbours at Bwaise Kisenyi zone in Kawempe Division where NA resided with her father Seteba Mohammad. On the 23/3/2013, as NA was playing with her friends Sophia, Mariam and Taju, the appellant called her to his home. He asked her to prepare food but while cooking the food, he called her into the house. He closed the door, and ordered her to remove her clothes and knickers, took her to his bed and had sexual intercourse with her. NA returned home and informed her step mother who also informed the father. When NA was asked, she revealed the truth. She was taken to police and the case was reported. On 2/4/2013, a request was made on PF 3A by Kawempe Police Station for the examination of NA. On the 2/4/2013 NA was examined by Dr. Male Mutumba at MK Medical Centre in Bwaise. His findings were that she was under 12 years of age because of her physical appearance and her dentation (sic) of 24. It was found in her genitals, there was a torn posterial wall of the hymen membrane at 6:00 O'clock. The cause of the injuries was a blunt force trauma. The doctor in addition advised that there should be further screening in HIV and prophetic (sic) antibiotics. He signed and sealed the PF3. On the 5/7/2013, the appellant was upon the request of Kawempe Police Station examined by Dr. Barungi T. C of Forensic Consultation Clinic on Bombo road. He was found to be 45 years of age, of normal mental status. The appellant was further examined and found to be HIV negative".

3] It is upon the above facts that the appellant was convicted and sentenced to 12 years and 6 months' imprisonment. He was aggrieved by the sentence and lodged an appeal to this court, on the following ground:

> That the learned trial Judge erred in law and fact when he meted out a manifestly harsh, excessive and illegal sentence against the appellant.

Representation

4] At the hearing of the appeal, the appellant was represented by learned counsel Henry Kunya of Henry Kunya & Co. Advocates on State brief, while the respondent was represented by Counsel Caroline Marion Acio a Chief State Attorney from the Office of the Director of Public Prosecutions (DPP). Both counsel filed written submissions as directed by Court.

Ground one

Submissions for the appellant

5] Counsel for the appellant began his submissions by pointing us to the settled position on the powers of an appellate court with regards to sentences issued at trial. He submitted that we many not interfere with the sentence imposed by the trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed being manifestly excessive, or so low as to amount to a miscarriage of justice. He referred to the case of **Kiwalabye versus Uganda, SC Criminal Appeal NO. 143 of**

2001 which was cited in **Kimera Zaverio versus Uganda, CA Criminal Appeal No. 427 of 2014**.

6] Counsel then contended that the appellant had been on remand for a period of 3 years and 6 months, was a first time offender. He also alluded to the fact that the appellant had a family of two children under the care of one of his friends following his wife's death, and that he was also looking after his mother. Further that he readily pleaded guilty to the indictment and therefore never wasted court's time. That given those circumstances, the sentence of 15 years' imprisonment imposed on the appellant by the learned trial Judge was manifestly harsh and excessive.

7] Counsel then cited for comparison a few cases where lesser sentences were given. For example, in **Katende Ahmed versus Uganda, CA Criminal Appeal No.6 of 2004** an appellant who had defiled his nine-year-old daughter on several occasions, was sentenced to 10 years' imprisonment, which sentence was confirmed by the Supreme Court. In **Kizito Senkula versus Uganda, SC Criminal Appeal No. 24 OF 2001,** where the Supreme Court on second appeal, reduced a sentence of 15 years to 13 years' imprisonment for an appellant who defiled an 11-year-old child. Counsel emphasized that the cited decisions were pronounced after full trial and then argued that since the appellant in the instant case readily pleaded guilty to the offence, he deserved a comparatively more lenient sentence.

8] Counsel then referred to Article 23(8) of the Constitution to submit in addition that the sentence was illegal for failure to take into

account the full period which the appellant had spent on remand. In particular, that the trial Judge sentenced the appellant to 15 years' imprisonment from which he deducted 3 years and 6 months but ended up imposing a sentence of 12 years and 6 months which was an error. That the correct sentence should have been 11 years and 6 months.

9] In conclusion, counsel prayed that this honourable court be pleased to allow the appeal and the attendant sentence be substituted with an appropriate one as shall be judiciously determined, in a bid to meet the ends of justice.

Submissions for the respondent

10] In response, counsel for the respondent submitted that it is the duty of the first appellate court to rehear the case on appeal by reconsidering all materials which were brought before the trial court and make up its own mind. She referred to the case of **Bogere Moses and another versus Uganda, SC Criminal Appeal No. 1 of 1997** citing with approval, **Kifamunte Henry versus Uganda, SC Criminal Appeal No. 10 of 1997.**

11] Counsel submitted further that this Court or any other appellate court has power to vary a sentence passed by the lower court by reducing or increasing it. She in that regard referred to Section 34 of the Criminal Procedure Code Act (CPC), Section 132(1) of the Trial on Indictment Act (TID), and the case of **Busiku Thomas versus Uganda, SC Criminal Appeal No. 33 of 2011**. She further submitted that the sentence arises from exercise of the discretionary powers of the trial Court and as such, the appellate court may only

interfere if it is evident the trial Court 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. She based those arguments on the decision of **Livingstone Kakooza versus Uganda, SC Criminal Appeal No. 17 of 1993** cited with approval in **Naturinda Tamson versus Uganda, SC Criminal Appeal No. 25 of 2015.**

12] Respondent's counsel in particular disagreed with the argument that the sentence was manifestly harsh and argued that it was in fact consistent with sentences passed in other similar cases for the aggravating factors outweigh the mitigating factors. She argued that the appellant, a 45-year-old man, one old enough to be NA's father, defiled a very young girl of eight years. That being NA's a neighbour, he betrayed the community trust and responsibility. Counsel continued that considering that the maximum sentence for aggravated defilement is death, and that the Constitution (Sentencing Guidelines for Courts of Judicature)(Practice)(Directions)) 2013 (Sentencing Guidelines) provide for a range of up to 35 years' imprisonment, the sentence of 15 years' imprisonment was not illegal, harsh and excessive, but instead, fell within the legal sentencing range provided for by the Sentencing Guidelines.

13] Counsel submitted further that at pages 22-23 of the record of proceedings, the trial Judge took into consideration all the mitigating factors, pronounced sentence and then deducted the period spent on remand. She agreed that there was clearly an arithmetic error in the sentence, but which would not make it illegal. Counsel then prayed

that the error be corrected and the right sentence be handed on the appellant.

14] Counsel submitted further that the sentence the appellant received was consistent with other sentences passed in similar cases and did not violate the uniformity principle. She in that regard referred to the case of **Anguyo Siliva versus Uganda, CA Criminal Appeal No. 0038 of 2014** where a sentence of 21 years for the offence of aggravated defilement was imposed. She also referred to the case of **Magoro Hussein versus Uganda, CA Criminal Appeal No. 0261 and 0305 of 2016** where this court upheld a sentence of 20 years for a single sexual act on a girl aged 5 years.

15] In conclusion, counsel contended that this appeal has not established the existence of any facts, the basis upon which the appellate court may interfere with the sentence passed by the lower court. He prayed that this appeal be dismissed and the sentence of the lower court be altered to 11 years and 6 months upon a proper calculation.

Decision of Court

16] We have carefully studied the court record, considered the submissions for either side, as well as 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 (COA Rules).** We do agree with and follow the decision of the Supreme Court in **Kifamunte Henry vs. Uganda, SC**

Criminal Appeal No. 10 of 1997, 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 weighing and considering it."

17] We also agree with both counsel submissions that sentencing always remains a matter for the discretion of the trial 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. Court may also interfere where the trial court fails 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. See for example: **Kiwalabye Bernard versus Uganda; SC Criminal Appeal No. 143 of 2001).**

18] It was submitted for the appellant that the learned trial Judge arrived at a manifestly harsh and excessive sentence given the mitigating factors, and the fact that the appellant readily pleaded guilty without wasting court's time. Counsel in addition argued that the sentence was illegal for failure by the Judge to take into account the full period which the appellant had spent on remand. Conversely, respondents' counsel submitted that the sentence was neither manifestly harsh nor excessive because the 15 years given were far below the maximum sentence of death prescribed for the offence of aggravated defilement, and also fell well within the sentencing range provided for by the Sentencing Guidelines. That notwithstanding, respondent's counsel conceded that there was an arithmetical error

in subtracting the period spent on remand, and prayed for the correct sentence to be substituted for that error.

19] Perhaps it may be useful to first record what was offered in mitigation for the appellant. Appellant's counsel stated that the appellant who had been on remand for three years and six months, pleaded guilty, which is a demonstration of his remorsefulness. That by pleading guilty, he had reduced the high cost of imprisonment to the State. That since the death of his wife, his children are now in the custody of a friend and he still has an old mother to care for. Further that, the offence of defilement carries a penalty of death. In addition that the appellant who was at the material time roughly six times older than the victim, should have presented himself as a father to this young victim. That he was in addition a neighbour, expected by society to take charge and direct young ones in the right way. He instead showed this child, the wrong way.

20] The trial Judge made a rather lengthy sentencing ruling. We shall consider excerpts that we consider useful to address the contention that he gave little or no attention to the mitigating factors. At pages 22 to 24 of the record, he stated in part as follows:

"I have had the chance to hear the Principal State Attorney Nyanzi Gladys on aggravating factors. I have also heard counsel Sarah Awero Asiimwe for the defence in mitigation. I also heard the rare opportunity to hear Namutebi Aisha in her own soft innocent voice asking for a sentence of 50 years and the reasons she gave for it. I heard the mother of the victim who didn't talk much to court but by reason of demeanor, no better language was needed to understand that she had been revelry (sic)disappointed and was in agony. I also talked to the convict himself. Out of that interaction, this court came up with the following conclusions; "That the offence that was committed was a

serious offence but the circumstances of the commission of the offence was an aggravating circumstance. This being (sic) the accused being 40 years 5 times older than the victim aged 8 years...

For those reasons I agreed with State that this offence was committed in aggravating situation and will deserve some harshness, but ..... the accused person without any ado pleaded guilty that means given a chance, he knows he did a wrong thing and he won't (sic) do it again. I also take it that incarceration serves two purposes; one, being punitive and other one to reform the convict. There is no scientific proof that people who are incarcerated for a very long period of time reform better and other ones who incarcerated for reasonably short period of time do not reform unless scientifically proved, the idea of longer periods with very long incarceration has never been very appealing to me. (Sic) Emphasis applied.

21] It is clear in the ruling that the Judge gave attention to the aggravating and mitigating factors in equal measure. He may have reproduced more of what was presented by the prosecutor, but he was clear that he heard both counsel, and indeed, he did include some of what was submitted in mitigation. We have emphasized those comments above. According to the decision in **Basiku versus Uganda, CA Criminal Appeal No. 33/2011,** a decision on whether a sentence was so manifestly excessive as to amount to an injustice, will depend on the circumstances of each case. Having perused the record, we do agree with the trial Judge that the aggravating factors far outweighed the corresponding mitigating factors. The appellant, a 45-year-old married man, a former local leader and a father himself, sexually ravaged a child of eight years. It was a serious offence, and as pointed out by the Judge, notoriously rampant. In our view, the mitigating factors by comparison, significantly paled under such circumstances.

22] We note that the appellant's counsel appeared to consider his client's plea of guilty as a strong factor that the Court should have put into consideration and given a more lenient sentence. We agree that offering a plea of guilty very early in the trial should be considered as an important mitigating factor. That is because it indicates remorse and the offender's willingness to own up for their wrong deed, and perhaps willingness to reform. That said, the defence should not expect a plea of guilty to be a free ticket to an automatic light sentence, especially with respect of serious offences as was the case here. The punitive and deterrent aims of sentencing must be equally held in high regard. We must also not fail to appreciate that under paragraph 21(e) of the Sentencing Guidelines, a plea of guilty is only one of many mitigating factors that a Court may take into consideration before sentencing the convict. In this case, the trial Judge gave much attention to the guilty plea and did consider it while pronouncing a sentence.

23] One other useful way of confirming whether the sentence was manifestly harsh or excessive is by applying the consistency principle enunciated in the decision of **Aharikundira Yustina vs Uganda, Supreme Court Criminal Appeal No. 27 of 2015** and from guidance of the Sentencing Guidelines. According to the third Schedule of the Sentencing Guidelines, the sentencing range for aggravated defilement after considering both the aggravating and mitigating factors, is 30 years to death as the maximum sentence. Therefore, a sentence of 15 years would in fact appear lenient.

24] Further, the sentence is in tandem with similarly placed sentences in previous convictions. For example, in **Ninsiima Gilbert versus Uganda, CA Criminal Appeal No. 216 of 2015**, an appellant convicted of 30 years' imprisonment for aggravated defilement had his sentence reduced to 15 years. In **Kizito Senkula versus Uganda, CA Criminal Appeal No. 24 of 2001,** this Court upheld a sentence of 15 years where a victim of the same offence was aged 11 years old. Yet in **Ogram Iddi versus Uganda, SC Criminal Appeal No. 0182 of 2009,** this Court upheld a sentence of 15 years' imprisonment for the offence of aggravated defilement for a victim of 13 years old.

25] It is our conclusion then that the sentence of 15 years' imprisonment was not manifestly harsh and excessive as advanced by counsel for the appellant.

26] There was in addition contest against the term the appellant is to serve after Article 28(3) of the Constitution was applied. At page 23 of the record the trial Judge stated as follows:

"I have therefore considered a period of 3 years and 6 months the accused person has been on remand by provision of Article 2(a)(7) sub Article 8, subtracted it from 15 years, I would have sentenced him to and I accordingly sentence him to a period of 12 years and 6 months' imprisonment. You have the right to appeal against this sentence.
For clarity of the prison authority, the convict is sentences to a period of 12 years and 6 months having considered by reason of Article 28(1)(8), the three and a half years he has been on remand".

It is evident that when computing the sentence, the trial Judge made an error. After deducting three years and six months that the appellant had spent on remand, he should have arrived at a sentence

of 11 years and six months, instead of 12 years and six months. Appellant's counsel considered the latter an illegal sentence one that could not stand. We disagree. Although the law did not define what an illegal sentence would be, we consider that it would be one that is forbidden by the law. We would in that regard consider the definition of the term *"illegal"*, which is defined to be *"that which is forbidden by law"* or *"an act that is forbidden by law"*[1]. A wrong computation would be the result of human error but not an act with illegal intentions. That mistake is the type that can be corrected under Rule 36(1) COA Rules which provides as follows:

"A clerical or arithmetical mistake in any judgment of the court or any error arising in it from an accidental slip or omission may, at any time, whether before or after the judgment has been embodied in a decree, be corrected by the court concerned, either of its own motion or on the application of any interested person so as to give effect to what was the intention of the court when judgment was give".

27] In conclusion, having found that the sentence of 15 years was neither manifestly harsh nor illegal, we have no reason to interfere with the decision of the trial Judge. However, we have agreed with both counsel that through a mistake, the trial Judge imposed a wrong, but not an illegal sentence. The appeal would thus succeed in that regard. We therefore proceed to invoke Section 11 of the Judicature Act and Rule 36 COA Rules to order that after deducting three years and six months, being the period he spent on remand before his conviction, the appellant shall serve a term of 11 years and six months' imprisonment with effect from the date of his conviction.

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[1] Black's Law Dictionary 10th Edition. B. A. Garner at page 864.

28] Consequently, this appeal has succeeded in part.

Dated at **Kampala** this ..... day of 2023

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HON. ELIZABETH MUSOKE

JUSTICE OF APPEAL

.....

HON. CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

.....

HON. EVA K. LUSWATA

JUSTICE OF APPEAL