THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Cheborion Barishaki, Hellen Obura, Eva K. Luswata, JJA)

CRIMINAL APPEAL NO. 0118 OF 2020

BETWEEN

WALUSIMBI HENRY ::APPELLANT

AND

UGANDA :: RESPONDENT

(Appeal from the Judgment of the High Court sitting at Entebbe in Criminal Session Case No. 240 of 2014 by Hon. Justice Elizabeth Ibanda Nahamya delivered on 29th June, 2014)

JUDGMENT OF THE COURT

Introduction

1] The appellant was indicted with aggravated defilement c/s 129(3) and 4(a) (a) (c) of the Penal Code Act, and upon him pleading guilty, he was convicted on his own plea of guilty and sentenced to 13 years and 7 months' imprisonment. The particulars of the offence as set out in the indictment are that on the 2nd day of March, 2013 at Zana Makindye Wakiso District, the appellant performed a sexual act with a girl aged 7 years' old, who for the purposes of this appeal we shall refer to as PHI.

2] According to the record, the appellant admitted the facts of the case contained in the summary of evidence dated 11/9/2013 which were related by the prosecutor at the trial. It was stated in brief that PHI, resided at Zana in Wakiso District with her mother one Rejoice Isaac, the complainant. The appellant had before the incident resided with the complainant and her family for a period of one and a half years. He had informed the complainant that he was a total orphan as his parents were killed during the Rwandan Genocide. On 3/3/2013 while the complainant was bathing PHI, she told her not to bathe her private parts because she was feeling a lot of pain. The complainant inquired from PHI what had happened and the child informed her that the appellant had defiled her from the boys' quarters. The complainant waited for the appellant to return home, and the following morning she asked him about PHI's allegations. The appellant admitted touching PHI's clitoris (private parts). The accused was arrested and taken to Lubowa police station. On 5/3/2013, the victim was medically examined and confirmed to be aged 7 years. She had inflammation around the clitoris and vagina. The appellant was also examined and found to be 21 years of age and mentally normal. He admitted defiling the victim in his charge and caution statement.

3] At his trial, the appellant pleaded guilty, was convicted and sentenced to 15 years' imprisonment, from which the trial Judge deducted the period spent on remand, and sentenced him to 13 years and 7 months' imprisonment.

4] 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 when she imposed a manifestly harsh and excessive sentence against the appellant.*

Representation

5] At the hearing of the appeal, the appellant was represented by Mr. Kunya Henry 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 has considered when deciding the appeal.

Submissions for the appellant

6] Mr. Henry Kunya sought, and the Court granted him leave under **S.132 (1) (b) of the Trial on Indictments Act (TIA),** to appeal against sentence only. He then drew our attention to the powers of the Court, to interfere with a sentence imposed by the trial court which has exercised its discretion. He in that regard referred to the decisions in **Kiwalabye versus Uganda, SC Criminal Appeal No. 143 of 2001** that was cited in **Kimera Zaverio versus Uganda, CA Criminal Appeal No. 427 of 2014**.

7] Mr. Kunya submitted that in imposing discretionary custodial sentences, there is need to impose a sentence commensurate to

the seriousness of the offense. He submitted that in the instance case, the offense was mitigated by a number of factors that were put to the trial Judge and as shown in the plea bargaining agreement. That those included (*inter-alia)* that the appellant was a young first time offender who had performed highly at his A levels, was remorseful, and capable of reforming. In addition, that he readily pleaded guilty, signed a plea bargaining agreement which saved court's time and scarce resources. He had also already been on remand for one year and 5 months.

8] Counsel added that in view of the above compelling mitigating factors, the sentence imposed although legal, was excessive. That although the Judge appeared to have considered those factors when sentencing the appellant, imposing a custodial sentence of 13 years to a 21-year-old remorseful convict, amounted to denying him a chance to reform and make good use of his life and future. Counsel argued further that it would not be in the interests of justice to deter the appellant from learning from his mistakes for keeping him in prison would expose him to "hardcore" inmates from whom he would pick worse habits.

9] In support of his submissions, counsel cited the decision in **Kabatela Steven versus Uganda, CA Criminal Appeal No. 123 of 2001** cited with approval in **Bikanga Daniel versus Uganda, Criminal Appeal No.38 of 2000 [2005].** In that case, this court reduced a term of 10 years' imprisonment for the offence of defilement to 5 years for the reason that the Judge had not taken into account the age of the appellant. Counsel added that since

the appellant had remained on remand for a period of 1 year and 5 months, and in addition served eight 8 years of his sentence, that was a term long enough for him to have learnt from his mistakes and should meet the ends of justice. He accordingly moved Court to allow the appeal and order for the immediate release of the appellant.

Submissions for the Respondent

10] Ms. Sherifah Nalwanga opposed the appeal. In her view, the sentence imposed was neither manifestly harsh nor excessive in the circumstances. She further pointed out that the offence of aggravated defilement carries a maximum sentence of death. She in addition, made reference to the Constitution (Sentencing) Guidelines for Courts of Judicature) (Practice Directions) 2013 (hereinafter the Sentencing Guidelines), that advise a sentencing range for the same offence starting at 35 years' imprisonment, subject to an increase or decrease, depending on the aggravating and mitigating factors presented for any given case.

11] Ms. Nalwanga drew our attention to page 13 of the record, at which the Judge considered information relating to the effect of the defilement on PHI. In particular information related by the State that she no longer trusted male persons including her father, which was devastating to the father and resulted into him developing high blood pressure. Ms. Nalwanga in addition alluded to the age difference of 14 years between PHI and the appellant, the fact that she would grow up when detesting sex and could

shun marriage. In her view the Judge equally considered the aggravating and mitigating factors, before sentencing the appellant. In comparison to the current facts, counsel referred to this Court's decision in **Twinamatsiko Peter versus Uganda, Criminal Appeal No. 073 of 2010** which followed **Kasibante Semanda Moses versus Uganda, CA Criminal Appeal No. 068 of 2015**. The Court upheld a sentence of 20 years' imprisonment for an appellant who was convicted on his own plea of guilty for defiling a 7 and half year girl. She concluded that the current sentence was in comparison, lenient.

12] In conclusion, Ms. Nalwanga prayed that this Court upholds the sentence of 13 years and 7 months.

Analysis and our decision

13] The issue for this court's determination is whether the trial Judge imposed a sentence that was manifestly harsh and excessive in the circumstances of this case. We have in that regard, carefully studied the court record, considered the submissions for either counsel, and the law and authorities cited therein. We are mindful that this appeal is governed by the provisions of **Rule 30(1) (a)** of the Rules of this Court which provides as follows:

> *(1) On any appeal from the decision of the High Court acting in the exercise of its original jurisdiction, the court may-*
>
> *a. Reappraise the evidence and draw inferences of fact;*

14] We are accordingly required to carefully and critically review the record of the High Court and re-appraise the evidence in order to make inferences of fact but without disregarding the decision of the High Court. See for example, **Kifamunte Henry versus Uganda, Supreme Court Criminal Appeal No. 10 of 1997.**

15] We also agree with both counsel on their submission on the settled legal position that an appellate court's powers to intervene and set aside a sentence is limited. This Court in the decision of **Olar Joseph Peter versus Uganda, CA Criminal Appeal No. 30 of 2010** that cited with approval the earlier decision of **Kiwalabye Bernard versus Uganda, SC Criminal Appeal No. 143 of 2001** held as follows:

> *"The appellate court is not to interfere with sentence imposed by the trial court where the trial court exercised its discretion on sentence, unless the exercise of that discretion is such that it results in the sentence imposed to be 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 circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."*

Also see: **Livingstone Kakooza versus Uganda, SC Criminal Appeal No. 17 of 1993**. Alive to the above-stated duty and limitations, we shall proceed to resolve the grounds of appeal.

16] At the trial, the appellant pleaded guilty and offered to bargain his sentence by entering into a plea bargaining agreement. By doing so, he fully committed himself to its provisions, including the negotiated sentence. It is provided in Rule 12(5) of the Judicature (Plea Bargain) rules that;

> *"A Plea Bargain Confirmation shall be signed by the parties before the presiding Judicial officer in the Form set out in the Schedule 3 and shall become part of the court record and shall be binding on the prosecution and the accused."*

17] The general consensus of this and the High Court has been that by their nature, plea bargain agreements create an agreement between the prosecutor and the accused with all the features of an agreement in the law of contract. See for example, **Agaba Emanuel & 2 Others versus Uganda, Criminal Appeal No. 139 of 2017,** cited with approval in **Tamuzadde Hamidu versus Uganda, CA Criminal Appeal No. 456 of 2014**. That being so, parties are bound and should only be allowed to avoid the agreement and appeal only in very extreme cases. In **Abiti Moses versus Uganda, Criminal Appeal No.286 of 2015** this Court noted that;

> *"In cases of plea of guilty, as in the instant case, no appeal lies there from; except where the legality of the plea or sentence is in issue. Plea bargain serves to benefit both the accused person and the prosecution. It enables an accused person to face lesser charges than he or she would have, had there been no such bargain. The other benefit is that the resultant sentence would be less than what the court would otherwise have imposed,*

had the conviction resulted from a full trial. The law seizes the trial Court with the responsibility to guide the plea bargain process; and ensure that the resultant agreement is devoid of vitiating factors as would render the process a nullity. Where a plea bargain outcome results from some misunderstanding, by the accused person, of the consequences of the bargain, then the plea bargain is defective; and must be revoked."

18] It is plain from the appeal and Mr. Kunya's submissions that no contest was raised against the agreement or the appellant's decision to participate in the plea bargain process generally. Mr. Kunya's complaint is that the sentence imposed on the appellant was excessive as there was no consideration of the mitigating factors. Contrary to those submissions, this Court has previously held that severity of a sentence cannot be a valid ground of appeal because in plea bargain proceedings, the parties negotiate and agree voluntarily. See: **Lwere Bosco versus Uganda, Criminal Appeal No. 531 of 2016.** We hold the same view. The appellant who was at the material time represented by Mr. Gumisiriza freely negotiated his sentence and then signed the agreement. Negotiations of the sentence must have entailed a discussion of both the aggravating and mitigating factors. We have confirmed that those were clearly indicated in the agreement and also considered by the Judge in her sentencing ruling.

19] We would for that reason find no merit in the one ground of appeal.

20] Our decision notwithstanding, we have observed that there was an anomaly in the sentence imposed by the Court. It is shown at page 18 of the record that the parties agreed on a sentence of 18 years. The Judge appeared to have side stepped that term, and instead sentenced the appellant to a lesser term of 15 years' imprisonment. When sentencing the appellant she stated as follows:

> *"I have read the Plea Bargain Agreement signed by both Parties and the Accused which stipulates 18 years' imprisonment.....I am also enjoined under Para 36 to consider the mitigating factors such as remorsefulness of offender, whether he is 1st offender with no previous conviction; the offender plea of guilty and other factors. I note that he is remorseful and readily pleaded guilty; is a young man of 22 years now and had a promising future. This Court should assist in your rehabilitation. I note Counsel Gumisiriza's submission read you can reform. You have been on remand for 1/2 years. In the spirit of fairness, consider that you have shown remorse and given your bright future but also taking into consideration the effects on the 7 years old victim and her family, I will not make out an 18 years' imprisonment term. I will be lenient. You have been on remand for 1 year. I hereby sentence you to 15 years' imprisonment. The period already spent on remand of 1 year shall be deducted; you will therefore serve an imprisonment term of 13 years 7 months. You have the right of appeal within 14 days".*
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> *"Signed: Hon. Lady Justice Elizabeth Ibanda Nahamya 29/7/2014"*

21] It is evident that the trial Judge accepted part of the agreement between the parties, that is, that the appellant pleaded guilty. However, she did not accept the sentence that was recommended to the Court and instead, imposed a more lenient sentence that in her opinion, suited the circumstances of the case. Her decision amounted to a rejection of the agreement and that being the case, Rule 13 of the Plea Bargain Rules would apply; the provisions of the agreement would be void, and the matter would have been referred back for retrial before another Judge.

22] That said, the appellant here was sentenced on 29/7/2014, more than two years before the PB Rules came into force on 2/5/2016. The Judge was not bound by the Rules which cannot be applied retrospectively. However, at the time, what later were enacted into the PB Rules were merely guidelines that were being tested by trial courts to see whether the plea bargain agreements would work in our criminal justice system. Even then, decisions of this Court that subsequently interpreted the Rules, would provide good guidance on the matter. In **Agaba Emanuel & 2 Others** (supra) it was held that:

> *"..... the court plays the role of a regulator of the agreement to ensure that the agreement conforms to the needs of the justice of the case. But the court is not privy to the agreement and cannot redefine it. What the court may do is to reject a plea bargain agreement where it is satisfied that the agreement may occasion a miscarriage of justice. ...It is because of the seriousness accorded to a plea bargain that the rules prohibit the substitution of*

a judge imposed sentence in the context of plea bargain context." (sic)

Similarly, this Court in **Aria Angelo versus Uganda, Criminal Appeal No. 439 of 2015**, this court observed that:

> *"The rules give the judicial officer the opportunity to superintend over the proceedings to ensure there is no miscarriage of justice or abuse of the process making it a mockery of justice. The judge or judicial officer may recommend a particular sentence which in his or her opinion serves the justice of the case. The above notwithstanding, the judicial officer does not have the discretion to impose his or her own sentence."*

23] We hold the view then that once the Court allowed the trial to proceed by a plea bargain, then the powers of the Judge to impose a sentence of her own ceased. Thereby, the resultant sentence of 15 years imposed by the Court (before deducting the period of remand) would be illegal, and it is thereby set aside.

24] Our decision above has not extended to the validity of the agreement. In our view, our duty would be to invoke the powers of this Court under section 11 of the Judicature Act, in order to sanction what was agreed by the parties in the plea bargaining agreement. The parties agreed to a term of 18 years. However, confirming that term would mean that this Court has enhanced the sentence upwards from what the High Court imposed. Such a decision can only be made after a formal application was made for enhancement and then handled during hearing of the appeal, which was not the case. Thus, it will be prejudicial to the appellant

to impose that sentence now. The option to reject the Plea Bargain agreement and order a re-trial, will also prejudice the appellant who has now served nearly nine years of his sentence.

25] Thus in the interests of justice, and taking into account that the appellant pleaded guilty to the offence, we instead invoke our powers above to pronounce a sentence that we find appropriate in the circumstances. We shall when making a decision, be guided by the consistency principle which points us towards previous sentences handed down in cases with nearly similar facts to the case before us.

26] In **Lukwago Henry versus Uganda, CA Criminal Appeal No. 0036 of 2010 [2014 UGCA 34],** the appellant was convicted on his own plea of guilty for defilement of a 13-year-old girl and sentenced to 13 years' imprisonment. This Court upheld the sentence as appropriate. Yet in **Babua Roland versus Uganda, CA Criminal Appeal No. 303 of 2010 [2016] UGCA 34,** the appellant defiled his niece aged 12 years and at the relevant time, under the care of his wife. He was sentenced to life imprisonment which this Court considered harsh and excessive and substituted it for 18 years' imprisonment. In **Mbotto versus Uganda, CA Criminal Appeal No. 37 of 2019 [2023] 26,** this Court imposed a sentence of 18 years (before deducting the period spent on remand) for an appellant who pleaded guilty to defiling a victim of six years.

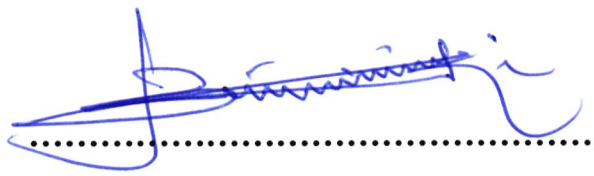
27] We in addition consider the aggravating and mitigating factors presented for the appellant at the end of his trial. The appellant defiled a seven-year-old girl three times causing her much psychological harm for it was reported she became fearful and generally fears any male (including her father) and her performance in school was affected. Her father was equally traumatized and after the incident, was regularly treated in hospital. He incurred expenses of treating the victim of a sum of nearly Shs. 8 million. Conversely, the appellant a young man of 22 years had no previous record and readily pleaded guilty. Shortly before committing the offence, he had completed his A Level exams and hoped to join university to study medicine on a government scholarship. His counsel prayed Court to consider the period spent on remand and impose a lenient sentence.

28] The aggravating circumstances appear to be grave. Defilement is a serious and rampant offence for which commensurate punishment is justifiable. This child and her parents suffered considerable trauma. However, the appellant a first offender, one who readily pleaded guilty to save court's time and resources, showed much remorse for his actions. He was aged only 22 years at the time he offended and by doing so, foolishly dashed his promising future in the respectable career of medicine. We are persuaded that his remorsefulness and young age are both compelling factors to gain some lenience from this Court. Previous cases sourced above, show that a sentence range of 13 to 18 years has been preferred for those who have pleaded guilty for defilement.

29] Therefore, taking note of all the above circumstances, we find a sentence of 12 years' imprisonment appropriate in the circumstances. Pursuant to Article 23 (8) of the Constitution, we now deduct the period of 1 year and five months that the appellant had spent in prison at the time he was convicted. The appellant is therefore hereby sentenced to a term of 10 years and seven months' imprisonment, with effect from the 29th June 2014, the date on which he was convicted.

30] Consequently, this appeal has succeeded in part.

Dated at **Kampala** this 25th day of January, 2023



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HON. CHEBORION BARISHAKI

JUSTICE OF APPEAL

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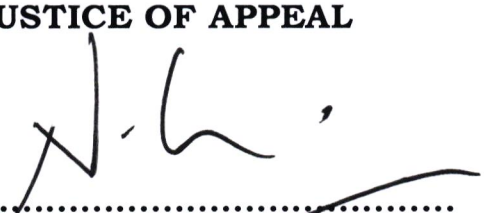
HON. HELLEN OBURA

JUSTICE OF APPEAL



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HON.EVA K. LUSWATA

JUSTICE OF APPEAL