THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT JINJA

(Coram: Kiryabwire, Kibeedi & Mugenyi, JJA)

CRIMINAL APPEAL NO. 369 OF 2017

SSERUYANGE SAM ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

(Appeal from the High Court of Uganda at Mukono (Mutonyi, J) in Criminal Case No. 493 of 2017)

JUDGEMENT OF COURT

A. **Introduction**

1. Mr. Sam Sseruyange ('the Appellant') was indicted for the offence of aggravated defilement contrary to section 129(3) and (4)(a) and (c) of the Penal Code Act, Cap. 120. He pleaded not guilty at the commencement of the trial but subsequently elected to change his plea. He was thereupon convicted on his own plea of guilty and sentenced to thirty years' (30) imprisonment.

2. The uncontested facts at trial were that on the 17th day of July 2014, at Fairway Primary School, Lutengo, Nama Subcounty in Mukono district, the Appellant who was the Deputy Head teacher and a Luganda teacher of the 9 year old victim, performed a sexual act with the victim. The victim had arrived late at school and found the Appellant in the classroom while the other pupils had gone for the school assembly. The Appellant directed the victim to follow him to the teacher's quarters where the victim was warned not to make an alarm and defiled.

3. The Appellant was dissatisfied with the sentence imposed by the trial court and lodged the present appeal against sentence only on the singular ground that '***the learned trial judge erred in law when she passed a harsh, excessive, illegal and unconstitutional sentence***.'

4. At the hearing, Mr. Martin Asingwire appeared for the Appellant while Mr. Joseph Kyomuhendo, a Chief State Attorney, represented the Respondent.

B. **Parties Legal Arguments**

5. It is argued for the Appellant that the sentence imposed by the trial judge has no basis in law and is in contravention of Article 28(8) and (12) of the Constitution. Learned Counsel cited **Sundya Muhamudu & 568 Others v Attorney General, Constitutional Petition No. 24 of 2019** contends for the proposition that insofar as a life sentence, which is the second most severe punishment, translates to a period of twenty years, any sentence above that is illegal. It is argued that the Constitutional Court did in that case cite with approval **Tigo Stephen vs Uganda, Criminal Appeal No. 8 of 2009** to adjudge sentences between 21 years and 73 years' imprisonment to have no enabling legislation in breach of Article 28(8) and

(12) of the Constitution. To that extent, the sentences were equated to 20 years' imprisonment.

6. With regard to the illegality of the sentence, the trial judge is faulted for not arithmetically deducting the 3 years and 2 months that the Appellant had spent on remand in arriving at an appropriate sentence, as was espoused in **Rwabugande Moses vs Uganda, Criminal Appeal No. 25 of 2014**, **Nyangasi Dalton Apollo vs Uganda, Criminal Appeal No. 74 of 2015** and **Abelle Asuman vs Uganda Supreme Court Criminal Appeal No 66 of 2016**.

7. In relation to the mitigating factors available to the Appellant, it is argued that at sentencing the victim's parents considered a 20-year term sentence to be appropriate given the Appellant's apparent remorse, as did the assessors too. In addition, the Appellant had since become a born again Christian, accepted responsibility for the offence but pleaded for leniency as he was the sole provider of his brother's children. The trial judge is faulted for ignoring these circumstances in deference to the aggravating factors thus imposing a harsh sentence.

8. Conversely, the Respondent does concede the illegality of the sentence for failure to comply with Article 23(8) of the Constitution as construed in **Rwabugande Moses vs Uganda** (supra), which propounded the arithmetic deduction of time spent on remand from the sentence imposed on a convict.

9. However, in response to opposite party's submission on the **Tigo** case, learned State Counsel contends that the Supreme Court did in **Ssekawooya Blasio vs Uganda, Criminal Appeal No. 14 of 2014** dispel the notion that a sentence of life imprisonment was equivalent to a 20-year term sentence when it found as follows:

> In our view, it would be absurd, for a convict sentenced to a capital offence of murder to be deemed to have been sentenced to a period of 20 years imprisonment, as the Appellant contends, when the lesser offence of manslaughter still attracts a maximum sentence of life imprisonment under section 190 of our Penal Code Act, Cap 120, Laws of Uganda.

10. Counsel drew a distinction between a sentence of life imprisonment and one of imprisonment for life to argue that the latter not the former sentence is the second

most severe sentence. It is argued, in any event, that the decision in **Sundya Muhamudu and 568 others vs Attorney General** (supra) is the subject of a pending appeal before the Supreme Court.

C. **Determination**

11. This being a first appeal, it is the duty of this Court is to reconsider all material evidence that was before the trial Court and reach our own conclusions but bearing in mind that we did not have the opportunity to see and hear the witnesses testify. See **Kifamunte Henry vs Uganda Supreme Court Criminal Appeal No. 10 of 1997**. This Court recognises the trial judge's discretion in sentencing convicts before them, hence in **Kyalimpa Edward vs Uganda, Criminal Appeal No. 10 of 1995, the Supreme Court** referred to **R vs. De Haviland (1983) 5 Cr. App. R(s) 109** and held as follows:

> An appropriate sentence is a matter for the discretion of the sentencing Judge. Each case presents its own facts upon which a Judge exercises his discretion. It is the practice that as an appellate Court, this Court will not normally interfere with the discretion of the Trial Judge unless the sentence is illegal or unless Court is satisfied that the sentence imposed by the Trial Judge was manifestly so excessive as to amount to an injustice: **Ogalo s/o Owousa vs. R (1954) 21 EACA 270 and R vs. Mohammed Jamal (1948) 15 EACA 126**.

12. The trial court discharged itself as follows at sentencing:

> *The main purpose of sentencing function of the Court is threefold. It should serve as a deterrent, punitive and rehabilitative. A deterrent sentence aims at denouncing unlawful conduct and separating the Offender from society where necessary. A punitive sentence promotes a sense of responsibility by the convict after serving the sentence. While a rehabilitative Sentence helps him to re-integrate into society after serving his sentence. The convict was a 49 year old man who abused the sanctity of a 9 year old pupil from his school where he was teaching. The school is a crucial environment where children spend a lot of their time learning, socializing and acquiring social and acceptable behavioural skills. It is therefore absurd that the convict instead of teaching his victim acceptable behaviour, chose to sexually abuse the little angel. Violence against children occurs in all settings from the home to the neighbourhood, the school and community. Many acts of sexual violence against children go undetected or are under reported. Some parents even commercialize the crime by protecting the perpetrators. It is the duty of this Court therefore to pass sentences that are aimed at protecting children from sexual abuse that knows no boundaries. School children are not immune*

from all forms of sexual abuse. Sexual abuse caused a lot of emotional pain. The victim in this case was introduced to sexual intercourse at a very tender age. The convict shamelessly put on a condom, exposing his manhood to the little girl who thought he was removing a chocolate for her to eat I suppose. He ruthlessly ravished the little girl and after he was satisfied told her to get out of his room and go away. Feeling vulnerable and abused by her own teacher whom she respected as a father, she could not stand the pain. She was crushed both physically and spiritually. She went home where she felt secure. She was scared after being betrayed by a man who pretended to be friendly. This Court of course got the opportunity to get the whole story on how the convict meticulously planned to sexually abuse the victim. Before he changed his plea, the victim came to Court to testify against him. She narrated how he used a friendly approach by giving her little money of Ug. Shs. 500/= earlier on promising to take her on a tour without payment. These favours made the child get used to him without any suspicion. No wonder she was deeply hurt that she could even attend class after the sexual act. The convict in his absurdity allowed the victim to come and narrate the ordeal reminding her of the worst nightmare in her life. It was as if he wanted to be reminded of the sexual encounter with the little girl. Court found his conduct very atrocious. His attitude towards this child was monstrous and exhibited his depraved mind which does not in any way attract leniency from this Court. He should have spared the little girl from testifying and helped her forget the calamity that befell her. Court appreciates the fact that he changed his plea at the 11th hour and attempted to quote scriptures as he pleaded for leniency. As a Judge and pastor, I have a spirit of discernment and I can discern both the humble and contrite spirit and the arrogant and deceptive one. Satan and his Agents know scripture when Jesus was tempted in the wilderness by the devil in the book of Mathew 4:3-11, the Devil used Scripture to tempt Him in verse 4:6 quoting what is written in Psalms 91:11. In Mathew 4:6 it is written ***"And says to Him, if you be the son of god, Cast yourself down for it is written, He shall give his Angels charge concerning you and in their hands, they shall bear you up least at any time you dash you [sic] foot against a stone****". **But Jesus also answered with scripture telling Satan that it is written again, you shall not tempt the Lord your God** (Mathew 7:7). Considering the relationship between the convict and the victim where he was a person in authority over her, the age difference of 40 year, the premeditation as exhibited by his conduct before committing the crime and the need to protect vulnerable school children from teachers with depraved mind, this Court cannot be bluffed by the scripture quoted by Satan's Agent. My discernment tells me that change of plea is not coming from a humble and contrite mind but a deceptive mind with a view of earning undeserved leniency. In the result, the convict being a teacher who breached the trust of the parents and his victim he is sentenced to 30 years imprisonment being the starting sentencing range for Aggravated Defilement.*

13. Quite clearly, the trial judge did not apply the constitutional imperative in Article 23(8) of the Constitution to deduct the period spent on remand from a convict's sentence. This is conceded by State Counsel and renders illegal the sentence imposed on the Appellant. Furthermore, the learned judge did not consider the mitigating factors in this case, save that the Appellant had pleaded guilty. With utmost respect, she was also seemingly oblivious to the need for consistency at sentencing as prescribed in clause 6(c) of the *Constitution* (*Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* ('the Sentencing Guidelines'), which enjoins a sentencing court to '**take into account the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances**.'

14. It thus becomes this Court's inescapable duty to interfere with the sentence handed down by the trial court. *See* ***Livingstone Kakooza vs. Uganda, Criminal Appeal No.17 of 1993*** *(SC) and* ***Jackson Zita vs. Uganda, Criminal Appeal No. 19 of 1995*** *(SC).* We do therefore set aside the sentence imposed on the Appellant and, pursuant to section 11 of the Judicature Act, Cap. 13, undertake the re-sentencing thereof.

15. It is a renowned rule of judicial practice that a plea of guilt should attract some leniency at sentencing. In this case, the trial judge sentenced the Appellant to thirty years imprisonment. We respectfully do not think this sentence aptly captures the degree of leniency anticipated for a plea of guilt, but are equally cognizant of the fact that the Appellant only accepted responsibility for his actions at the tail end of the prosecution case.

16. In terms of the mitigating factors, it is recognized that the Appellant was a remorseful first offender and a guardian to his brother's young children, who sought the forgiveness of the trial court and public, and asked to be returned to the society as a testimony that there are repercussions for sin. Furthermore, the victim's mother considered a 20-year sentence to have been adequate penalty for his actions while her father proposed a lighter sentence. The Sentencing Guidelines recognize that the views of a victim or his/ her family are pertinent, therefore we so take them into account as we consider an appropriate sentence.

17. However, the aggravating factors are that the convict was a deputy headteacher and a teacher to the 9-year-old victim. The convict had over time cultivated the trust of the victim and thereafter preyed on her vulnerability by defiling her. Counsel proposed that the victim was bruised both physically and psychologically yet the Appellant put her through a heart-rending testimony before owning up to his actions, a wastage of court's time and resources.

18. We are additionally alive to the need for consistency in sentencing. In **Apiku Ensio vs Uganda, Criminal Appeal No. 751 of 2015** a 25-year term sentence for aggravated defilement was considered by this Court to have been harsh and manifestly excessive, and reduced to 20 years' imprisonment. In **Ninsiima vs Uganda, Criminal Appeal No. 1080 of 2010**, the Court upheld a range of 15 to 18 years for aggravated defilement, and reduced a 30-year sentence to 15 years' imprisonment. Similarly, in **German Benjamin vs Uganda, Criminal Appeal No. 142 of 2010** a sentence of 20 years was substituted with one of 15 years, while in **Candia Akim vs Uganda, Criminal Appeal No. 181 of 2019**, the Court upheld a sentence of 17 years imprisonment for the aggravated defilement of an 8 year old by her stepfather. We take due cognizance of the decisions in those cases, which suggest a sentencing range of 15 – 18 years for the offence of aggravated defilement.

19. However, in **Kamugisha Asan vs Uganda, Criminal Appeal No. 212 of 2017,** the same Court sentenced an appellant who defiled a 3-year-old girl to a 23-year custodial sentence, which was reduced to 22 years on account of the one year that the appellant had spent on remand. We do not find much difference between the circumstances of that case and those before us presently (the age difference between the victims notwithstanding), given the blatant abuse of a position of trust by the Appellant. Consequently, he would have similarly earned himself a sentence of 23 years' imprisonment but having pleaded guilty that sentence is reduced to an 18-year custodial sentence, to which we would deduct the three years and two months spent on remand.

D. **Disposition**

20. In the result, the Appeal against sentence is hereby allowed. The sentence of 30 years' imprisonment is hereby substituted with a custodial sentence of 18 years. In accordance with the constitutional prerogative delineated in Article 23(8) of the Constitution, we would deduct the period of three (3) years and ten (10) months spent on remand to yield a sentence of fifteen (15) years and ten (10) months to run from 19th September 2017, the date of conviction.

It is so ordered.

Dated and delivered at Kampala this 21st **day of** Feb **, 2024**

Geoffrey Kiryabwire

Justice of Appeal

Muzamiru M. Kibeedi

Justice of Appeal

Monica K. Mugenyi

Justice of Appeal