

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA**

**Criminal Appeal No. 3 of 2019**

(Arising from Entebbe Court Criminal Case No. 769 of 2019)

<b>ALLENY TOBBY</b>	: : : : : : : : : : : : : : : : : :	<b>APPELLANT</b>
<b>VERSUS</b>		
<b>UGANDA</b>	: : : : : : : : : : : : : : : : : :	<b>RESPONDENT</b>

**BEFORE HON. MR. JUSTICE MICHAEL ELUBU**

**JUDGMENT**

The Appellant, **Alley Toby**, brings this Appeal against sentence. He pleaded guilty to a charge of Defilement c/s 129 (1) of **the Penal Code Act** and HW Mary Babirye, Chief Magistrate of Entebbe, found him guilty and sentenced him to a fine of 3,000,000/- (three million shillings) or 6 years imprisonment in the alternative.

The background to this matter is that on the 13<sup>th</sup> of November 2019, the appellant was produced before the Chief Magistrates Court of Entebbe. It was alleged that on the 8<sup>th</sup> day of October 2019, at Bunono village, Katabi Town Council in Entebbe, he had sexual intercourse with Abonyo Dolly a girl under the age of 18 years.

The appellant pleaded guilty. The facts were that the victim was a 17 year old girl studying at Air force Secondary School. Her brother, Jaspa did not find the victim at home. He later found her in the room of the appellant lying on his bed. The victim told the police that she had sexual intercourse with the appellant. The medical report was tendered in court and established that the victim's hymen was long ruptured.

There were no injuries or signs of inflammation. The accused admitted the commission of the offence and was produced in court where he pleaded guilty.

The chief magistrate held and found that considering the way the offence was committed, and the fact that the appellant pleaded guilty, she would sentence him to a fine of 3,000,000/- (three million shillings) or 6 years imprisonment as an alternative.

Being dissatisfied with the sentence of the lower Court, the appellant filed this appeal with the following grounds:

1. The learned trial magistrate erred in law in sentencing the appellant to 6 years or a fine of 3,000,000/- (three million shillings) which is harsh and manifestly excessive in the circumstances.
2. That the trial magistrate erred in law and in fact when she did not consider the mitigating factors presented by the appellant.

### **Submissions**

Counsel for the appellant wrote a letter to this court, stating that she was unable to prosecute the appeal. In her view, considering the maximum sentence was 18 years, and the age difference between the appellant and the victim, the sentence given was too lenient.

### **Determination**

I will handle the grounds jointly.

After conviction, the prosecution argued that the offence was rampant and on the rise. It was therefore necessary to send out a deterrent message to men defiling girls.

In mitigation, it was the prayer of the appellant he did not waste the courts time and had pleaded guilty. That he is remorseful and accepts his actions. That he was a father of 2 children and also provided for his siblings. That he could reform. That he should

be released so that he would preach the word against committing such offences. He prayed for a short sentence.

The complainant stated that the victim was only in Senior 1. He also stated that he had been telling or warning the appellant to stop defiling the victim.

The trial Court took note and considered the way the offence was committed and sentenced him as above.

The principle on appeal against sentence has been stated as follows:

The Supreme Court in **Kiwalabye versus Uganda (Criminal Appeal No. 143 of 2001)** stated:

*The appellate court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the 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 circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle.*

It was also held by the Supreme Court in **Kamya Johnson Wavamuno vs. Uganda Criminal Appeal No. 16 of 2000,**

*It is well settled that the Court of Appeal will not interfere with the exercise of the discretion unless there has been a failure to exercise discretion, or a failure to take into account a material consideration or an error in principle was made. It is not sufficient that members of the court would have exercised their discretion differently before passing sentence.*

This Court has considered the circumstances of this case. It is not true that the trial court ignored the appellant's submissions on mitigation. They were taken into account as stated by the learned trial magistrate in her sentencing orders. The court was therefore alive to its duties as a sentencing court.

A sentence is a matter for the discretion of the trial court which applies its judicial mind to the law, facts and what is just in the particular circumstances of the matter before court. The court should not act on whims.

Having considered the findings of the trial court, I am unable to fault the learned trial magistrate on her sentence in this matter. The sentence was lawful and justified in the circumstances. There is no indication that the court acted with a material irregularity or that the sentence was manifestly excessive.

This court therefore confirms the sentence and orders of the lower court.

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**Michael Elubu**

**Judge**

**20.07.2022**