THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

[Coram: Tumwesigye & Dr. Kisaakye, JJSC.; Tsekooko, Okello & Kitumba, Ag. JJSC]

Criminal Appeal No. 33 of 2011.

Between

BUSIKU THOMAS ═══════ APPELLANT.

And

U G A N D A ═══════ RESPONDENT.

{Appeal from the judgment of the Court of Appeal at Mbale (Kavuma, Nshimye & Arach – Amoko, JJA..) dated 29th June, 2011, in Criminal Appeal No. 230 of 2004}

Judgment of the Court.

Busiku Thomas, the appellant, was convicted by the High Court at Mbale, of the offence of defilement contrary to Section 123 (1) of the Penal Code. He was sentenced to a term of twelve years imprisonment. He appealed to the Court of Appeal against both the conviction and the sentence. The Court of Appeal dismissed the appeal and enhanced the sentence of imprisonment to twenty years. The appellant has now appealed to this Court against that decision.

The facts of this case as found by the trial judge and accepted by the Court of Appeal are simple. The appellant lived in Bunamubi Village, Buwangani Parish in the former Mbale District. Wataka Mary, (PW1), the victim of the defilement, and her mother Mariba Rose (PW2) also lived in the same village where the latter carried on the business of selling Enguli (Waragi). PW1 and PW2 lived in a separate home from that of the appellant. Late on the evening of 11th June, 2003, at about 08:30pm, PW1 proceeded on a call of nature in a toilet which was about ten metres away from her mother's residence. The appellant, who also shared the same toilet, got hold of PW1 and took her to his residence where he defiled her. Because PW1 delayed to return from the toilet for about 30 minutes, PW2 got concerned and started searching for her. PW2 could not trace her in the toilet. After 30 minutes, PW2 saw PW1 coming from the appellant's house. PW1 reported to PW2 that the appellant had defiled her. PW2 examined PW1 and noticed blood on the latter's underpants. She also saw a liquid on PW1's body which liquid looked like semen. PW2 alerted people around. The group arrested the appellant as he was moving away from his house. The appellant was taken to the police and was

eventually charged with the offence of defilement. He was subsequently tried by the High Court, at Mbale, convicted and sentenced, as earlier stated, to imprisonment for a term of twelve years. He appealed to the Court of Appeal which enhanced the sentence to 20 years; hence this appeal.

During the hearing of the appeal, the appellant was represented by Mr. Kasirivu Y. (on state brief) while the respondent was represented by Ms. A. Nabaasa, a Principal State Attorney, (PSA), in the Directorate of Public Prosecutions. The memorandum of appeal had three grounds. However Mr. Kasirivu abandoned grounds 2 and 3 which we dismissed. Mr. Kasirivu then argued the first ground which, after it was amended, reads as follows—

> ***"The learned Appeal Judges erred in law when they enhanced the prison sentence of the appellant from twelve years to twenty years."***

Submissions by Counsel:

In his brief submissions, Mr. Kasirivu contended that the Court of Appeal erred when it enhanced the appellant's sentence from twelve years to twenty years. He submitted that because the respondent in the Court of Appeal had not cross-appealed in respect of the sentence imposed by the trial judge, it was irregular for the Court of Appeal to enhance the sentence. He relied on the decision of this Court in **Mugasa J. vs. Uganda (Supreme Court Criminal Appeal No. 10 of 2010) (**unreported). He urged Court to allow the appeal and set the appellant free immediately.

Ms. Nabaasa, PSA, opposed the appeal and submitted that Mugasa's case (supra) is distinguishable. She submitted that this Court has previously held that the Court of Appeal can enhance sentence where proper procedure is followed, such as—

a) If there is a cross appeal; and
b) If the respondent asks for enhancement of a sentence during submissions.

The learned Principal State Attorney submitted that during the hearing of the appeal in the Court of Appeal, the Senior Principal State Attorney who appeared for the respondent asked the Court of Appeal to enhance the sentence. Ms. Nabaasa relied on section 11 of the Judicature Act, Section 132 (1) (d) of the Trial on Indictments Act and Rule 32 (1) of the Rules of the Court of Appeal Rules for the view that the Court of Appeal had powers to enhance the sentence. She contended that the appellant's counsel in the Court of Appeal was not ambushed as submitted by the present counsel for the appellant and that in the Court of Appeal, appellant's counsel did not exercise his right to respond to the submissions of the Senior Principal State Attorney who represented the DPP. Ms. Nabaasa, (PSA), cited the decision of this Court in **Kyewalabye vs. Uganda *(Supreme Court Criminal Appeal No. 143 of 2001)*** where principles under which an appellate court can reverse a decision of a

lower Court are set out. She also referred to **Semanda & Another vs. Uganda, (Court of Appeal Criminal Appeal No. 70 of 2013).** The learned Principal State Attorney contended that it was unnecessary for the state to cross-appeal against sentence imposed by the trial judge. She urged Court to uphold the decision of the Court of Appeal. A day after hearing the appeal, Ms. Nabasa filed three authorities and a two page written statement of arguments reflecting her after-thoughts asking this Court (in her own words) that—

> *"..... this honorable Court pronounces itself on the procedure to be followed if the **appellate Court is to vary the lower Court decision.** I also implore your Lordships to consider the fact that the Director of Public Prosecutions (DPP) has no right to appeal against a lenient sentence as envisaged under Art. 134 (2) of the 1995 Constitution read together with S. 132 (1) (c) of the Trial on Indictments Cap. 23. It is therefore arguable that since the DPP cannot initiate the appeal process in case of a legal but lenient sentence such as in the instant case, then it may not be legally possible to assume such a right at any stage of the same process by way of cross-appeal."*

These are interesting views because there is no clear statutory provision empowering the DPP to institute a cross-appeal regarding a lenient sentence of imprisonment. It would have been useful if these views had been raised during the oral submissions. Counsel for the appellant could have had opportunity to respond. But of course the simplest answer is that the DPP could cause through his Minister relevant laws to be amended.

Mr. Kasirivu replied to the oral submissions. He relied on the decision of this Court in **Kizito vs. Uganda (Supreme Court Criminal Appeal No. 24 of 2001)** where this Court held that it is improper for a court to enhance a sentence because a convict was not remorseful.

Consideration:

The law which regulates the exercise of criminal appellate jurisdiction in the Court of Appeal is clear. The principal law is Section 132 of the Trial On Indictments Act.

> S. 132. *of Trial On Indictments Act is headed **Appeals to the Court of Appeal.** The relevant parts of subsection (I) read as follows:—*
>
> ***(1) Subject to this Section—***
>
> ***(a) an accused person may appeal to the Court of Appeal from a conviction and sentence by the High Court in the exercise of its original jurisdiction, as of right on a matter of law, fact or mixed law and fact.***
>
> ***(b) an accused person may, with leave of Court of Appeal, appeal to the Court of Appeal against the sentence alone imposed by the High Court, other than a sentence fixed by law;***
>
> ***(c) where the High Court has, in the exercise of its original jurisdiction, acquitted an accused person, the Director of Public Prosecutions may appeal to the Court of Appeal as of right on a matter of law, fact or mixed law and fact.***

and the Court of Appeal may—

(d) confirm, vary or reverse the conviction and sentence;

(e) in the case of an appeal against the sentence alone, confirm or vary the sentence;

Section II of the Judicature Act which is headed ***Court of Appeal to have powers of the Court of original jurisdiction states—***

> ***"For the purpose of hearing and determining an appeal, Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the Court from the exercise of the original jurisdiction of which the appeal originally emanated."***

From these provisions, the role of the Court of Appeal in Criminal Appeals is clear. What is not so obvious is the role of the Court about sentence when a convicted person does not appeal against sentence or where a respondent such as the state (or the DPP) does not cross-appeal formally. As contended by the learned Principal State Attorney, it would appear that the state and or the DPP does not have clear statutory powers to lodge a cross-appeal against sentence in Criminal Appeals. Can the State or the DPP, therefore, use the opportunity provided by the right of reply during arguments in Court to ask the Court of Appeal to enhance sentence. If the Court of Appeal has powers under S. 132 (1) (e) to confirm or vary a sentence after hearing an appellant we find no rational basis why DPP should not ask for enhancement when the DPP replies to the appellant's arguments during the hearing of an appeal against sentence provided the DPP notified Court and the appellant in advance before the hearing day.

In the Court of Appeal ground four of the appeal was about sentence. It was framed in the following words—

> *"The learned trial judge in sentencing the appellant to twelve (12) years imprisonment was harsh given the circumstances of this case."*

The following passage shows how the Court of Appeal considered arguments from both sides on that ground—

> ***"Regarding the sentence, Mr. Okwanga, Senior Principal State Attorney, submitted that the case was a serious abuse of the hospitality of a good neighbour. Considering the age of the victim, the sentence should actually be enhanced because 12 years is too low for a man of* 30 years *who defiled a 7 year old child."***

He relied on the decision of this Court in the case of **Sergent Chanbera Dickson vs. Uganda — Criminal Appeal No. 284 / 03** and proposed that the sentence be enhanced to 20 years.

Mr. Oging who was counsel for the appellant in the Court of Appeal, made a brief reply in which he strongly disagreed with the proposal to enhance the sentence. His rather simplistic contention was that the practice of enhancing sentences by the Court has the effect of discouraging convicts from lodging appeals. According to him, this is not a very good development in our laws because convicts will suffer and die in silence for fear that their sentences will be enhanced. He urged the Court of Appeal to desist from applying the precedent set in the case of **Sergent Chanbera Dickson (supra).**

The Court of Appeal considered those submissions and stated—

> *"This Court has power to interfere with any sentence imposed by the trial Court if it is evident that the trial Court acted on wrong principles or overlooked some material factor or the sentence is illegal or is manifestly excessive or low as to amount to a miscarriage of justice. See:* ***Ogalo s / o Owora vs. R [1954] 24 EACA 70,*** *followed in* ***Mbowa Issa vs. Uganda Criminal Appeal No. 14 of 2001*** *(unreported).*
>
> *In the instant case, the sentence of 12 years imprisonment for the offence of defilement whose maximum sentence prescribed by law is death, is clearly a lawful sentence. As to whether it is manifestly excessive to amount to miscarriage of justice depend on circumstances of each case.*
>
> *Having considered the mitigating factors raised by the appellant's counsel before the learned trial judge and before us during the hearing of this appeal, we think that there is no justification for the criticism of the trial judge. We agree with Mr. Okwanga that there were aggravating factors which justified the sentence imposed by the trial judge. The guiding principle is that the sentence must not only befit the offence but also the offender. Further, Court takes judicial notice of the fact that defilement is not only a capital offence, but it is also rampant. The appellant preyed upon a seven year old minor and exposed her to sexually transmitted diseases including the dreaded HIV / AIDS. Moreover this incident is bound to have a lifelong emotional effect on her.* ***He was even not remorseful.*** *The sentence of 12 years is for that reason not excessive at all in the circumstances. It is, in our view on the lower side, we consider a custodial sentence of 20 years to be appropriate. We therefore invoke court's powers under* ***S. 11*** *of the Judicature Act and* ***S. 132*** *of the Trial on Indictments Act to enhance the sentence to 20 years imprisonment. The conviction is upheld and a custodial sentence of 20 years is substituted for that of 12 years imprisonment hauled (Sic) down to the appellant by the learned trial judge save the custodial sentence shall run from the date the appellant was first sentenced."*

The question for us to answer is whether the Court of Appeal had powers to enhance the sentence of imprisonment and if yes, whether there was justification for the enhancement of the sentence.

Clearly in the exercise of its powers, the Court of Appeal can, under Section 132 (1) (e) of the Trial On Indictments Act vary a sentence imposed by the High Court. Mr. Kasirivu, counsel for the appellant, relied on **Mugasa case** *(supra)* and contended that the Court of Appeal erred when it

enhanced the sentence imposed by the High Court in as much as the state had not cross-appealed regarding that sentence.

Ms. Nabaasa, the learned Principal State Attorney, submitted that the **Mugasa case** is distinguishable from the present case. She contended that in the present case whereas during hearing in the Court of Appeal counsel for the state addressed the Court of Appeal, counsel for the appellant did not exercise the right of reply in that Court. (With great respect, the latter part of her submission is incorrect. The Record of Appeal for each justice on the panel shows clearly that the appellant's counsel (Mr. Oging) in the Court of Appeal did indeed make a strong a rejoinder to the reply by state counsel and strongly objected to the proposed enhancement of the sentence.) The PSA relied on S. 132 (1) (d) of the Trial On Indictments Act, S.11 of the Judicature Act and Rule 32 (1) of the Court of Appeal Rules *(supra)* to support her arguments.

The facts in the **Mugasa case** *(supra)* are generally similar to those in the present Criminal Appeal. The appellant there defiled a young girl aged six years. The appellant was charged with and convicted of the offence of defilement. He was sentenced to imprisonment for 17 years. He appealed to the Court of Appeal. After hearing the appeal, the Court of Appeal enhanced the sentence of imprisonment from 17 years to 25 years. This Court heard the appeal against, *inter alia,* that enhanced sentence to 25 years and allowed the appeal. This is how this Court considered the appeal in **Mugasa case—**

> *"This Court associates itself with the views expressed by the Court of Appeal. However, proper sentencing procedure must be followed when varying sentences imposed by lower courts."*

The Court then referred to and quoted Section 11 of the Judicature Act upon which the Court of Appeal relied when enhancing the sentence. This Court went on—

"It should be noted that Section 34 of the Criminal Procedure Act also provides to the same effect as Section 132 (1) of the Trial on Indictments Act, in that it empowers an appellate Court with powers to ***"reduce or increase the sentence by imposing any sentence provided by law for the offence."***

It is therefore, clear that the Court of Appeal or any other appellate Court has power to vary a sentence imposed by the lower Court by reducing or increasing it. The question in this appeal is whether the ***Court of Appeal followed the correct procedure*** *before enhancing the sentence against the appellant.*

It will be recalled that the State did not appeal against the sentence ***nor did it request for its enhancement.*** *The Court of Appeal on its own volition indicated to the parties at the time of hearing*

the appeal that it intended to enhance the sentence which it considered too lenient. The Court then invited parties to address it on the proposed enhancement of sentence."

Their lordships continued—

"The issue is whether the Court of Appeal adopted the proper procedure. A similar issue was considered by the Kenyan Court of Appeal in the case of ***JJW vs. Republic*, Criminal Appeal No. 11 of 2011 [2013] i.e. KLR.**

The appellant was convicted of manslaughter and sentenced to seven years imprisonment by a Chief Magistrate, in Kisumu. The appellant appealed to the Kenya High Court against both conviction and sentence. The appeal against conviction was dismissed but the sentence was enhanced to 10 years on the ground that it was too lenient. The appellant appealed to the Kenya Court of Appeal against sentence only.

The appeal was opposed by the State which neither filed a cross-appeal nor sought enhancement of the sentence during the hearing of the appeal. The court did not warn the appellant that the sentence of seven years would be enhanced, but it did so in its judgment. The State did not support the enhancement, considering the procedure was unlawful.

In its judgment, the Kenya Court of Appeal observed,

> ***"We too think that the circumstances of the case called for more severe sentence than what was awarded. However, what we do not appreciate is the manner in which the learned judge enhanced the sentence. It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under section 554(g)(ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times, this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross- appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence, only by warning him that he risks enhanced sentence at the end of hearing of his appeal. "***

In that appeal, the Kenya Court of Appeal held that the sentence imposed by the High Court was unlawful because the prosecution had not argued for enhancement of sentence, nor appealed against

the sentence passed by the Chief Magistrate, nor did the Court grant an adjournment to enable the appellant to prepare adequately for his defence.

This Court concluded that the Court of Appeal erred in enhancing the sentence against the appellant without following the proper procedures. It held that the sentence imposed by the Court of Appeal was unlawful, and so set that sentence aside.

After we had heard submissions in this appeal, next day the Principal State Attorney provided three Court of Appeal decisions. These are ***Ssemanda Christopher & Another vs. Uganda (Court of Appeal Criminal Appeal No. 77 of 2010); Olara John Peter vs. Uganda (Court of Appeal Criminal Appeal No. 1035); Sgt. Canbera Dickson vs. Uganda (Court of Appeal Criminal Appeal No. 284 of 2003).*** In the first two decisions, the **Kyewalabye case** is cited as a decision of this Court by which this Court is supposed to have set out guidelines or principles under which appellate courts can interfere with sentence. However, in **Sgt. Canberra's case** it is implied that **Kyewalabye case** is a decision of the Court of Appeal. That seems to be the true position. The Principal State Attorney urged this Court to pronounce itself on the procedure appellate courts should follow when varying a sentence imposed by lower courts. We do not think that we can set a universal stand in view of the provisions of S. 34 of Criminal Procedure Act and S. 132 of Trial on Indictments Act. Be that as it may, it is our considered opinion that this Court pronounced itself on the procedure to be followed in such a situation in **Mugasa case** *(supra).* Most recently we summarized the proper procedure in our decision in **Weitire Asanasio vs. Uganda** ***(Supreme Court Criminal Appeal No. 11 of 2010).*** We stated at page 8 of our typed judgment—

> *"Similarly, in **Mugasa case (**supra) this Court found that the Court of Appeal had not followed the proper procedure to be followed before enhancing the sentence, and accordingly declared unlawful the sentence imposed by the Court of Appeal and set it aside.*
>
> *In the instant appeal, there was no cross-appeal against sentence by the prosecution. We note that in fact the prosecution in the Court of Appeal urged the Court to maintain the sentence of 12 years imprisonment imposed by the High Court. We also note that the Court of Appeal did not give advance warning to the appellant that it was likely to enhance the sentence. The appellant seems to have been completely taken by surprise. This should not be allowed to happen in a criminal trial. It is important that proper opportunity be accorded to appellants to adequately prepare their defenses. It is in the interest of Justice to do so."*

Consequently, this Court allowed the appeal, set aside the sentence of life imprisonment and substituted it with a sentence of 12 years improvement.

We now turn to the effect of a convict's failure to show remorse. Mr. Kasirivu cited the case of ***Kizito Senkula vs. Uganda (Supreme Court Criminal Appeal No. 24 of 2001)*** where this Court

agreed with the former East Africa Court of Appeal about reference by judges (as was done by the Court of Appeal in this appeal) to absence of remorse as a basis for enhancing a sentence. This Court referred to the record of the trial judge relating to the sentencing in **Kizito case.**

> ***"Court:*** *Sentence – Reasons for it.*
> ***He is a first offender. However, he is a first offender who has started his journey in criminality in a high gear. What he did to this girl was to say the least treacherous. He introduced her to sex at such a young age of 11 years. Inspite of the message of the castration to be meted out to such men, accused appears to be unconcerned about it. He has not, in the least, looked <u>repentant</u> for what he did. He has a large family of 7 children, but the heinous offence he committed weigh down such a mitigating factor. He spoils other parents' children and wants his to be highly regarded. It is important that deterrent sentence be imposed in this case considering the circumstances under which it was committed. The sentence should fit both the crime and the offender.***
>
> ***In the premises, the most leniency this Court can extend to an accused who on the face of it is un-repentant is to reduce the sentence from death to a term of fifteen (15) years imprisonment, the period spent on remand since 15-05-97 inclusive."***

Then the Court continued "as we have already mentioned, the appellant appealed against the sentence to the Court of Appeal. In the instant case, the Court of Appeal did not consider the trial judge's remark that the appellant was **unrepentant.** It did not do so, probably because, according to the record, such a remark was not the subject of a complaint by the appellant as it has been before us."

This Court then referred to the decision of the East Africa Court of Appeal in **Mattaka case** thus—

> *"In* ***Mattaka and Others vs. Republic (1971) E.A 495,*** *(supra), four of the six appellants were convicted of treason and the remaining two were convicted of misprision of treason. In sentencing the second, third and fifth appellants, the trial judge stated that there appeared to be a complete absence of penitence and that this could be taken into account when passing sentence. In its criticism of this approach to sentencing, the East Africa Court of Appeal stated at page 512."*
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> ***"With respect, we regard this as misdirection in law. A person who has pleaded not guilty and has maintained his innocence throughout and, who intend to appeal cannot be expected to express repentance, which would amount to a confession of guilt. A person who has been found guilty may believe himself innocent as a matter of fact or law, and that belief may be upheld by an appellate court. If, however, lack of repentance could be treated as an aggravating factor, the right of appeal would be fettered, because the convicted person would, in effect, be put to a choice, whether to risk a heavier sentence by maintaining his innocence or to abandon his right of appeal in the hope of leniency.***
>
> ***The position is analogous to that when a person is pleading to a charge. It is well established law that a plea of guilty springing from genuine repentance may be treated as a factor in mitigation. It is equally well established that the fact that a person has pleaded not guilty may not be treated as an aggravating factor, because that would derogate from the right of every accused person to be tried on the charge laid against him."***

Notwithstanding the misdirection by the trial court in that case, the East Africa Court of Appeal did not interfere with the sentences imposed on the appellants, because the appellants had been convicted of treason, one of the most serious crimes in Tanzania, the maximum sentence for which was death. All the appellants were of good character, but the nature of the offence was such that it demanded a severe sentence, both as a deterrent and also as a punishment for the individual. If the treasonable plot had succeeded, the whole of Tanzania might have been thrown into a state of complete chaos and resulted in the death of many of its citizens. In the circumstances, the Court of Appeal for East Africa found no reason to interfere with the exercise of the trial court's discretion in the matter, and the appeal against the sentence was dismissed.

With due respect it is our considered opinion that in the present case it was a misdirection in law for the learned Justices of Appeal to have regarded the appellant's absence of repentance as an aggravating factor in sentencing him. With respect, the learned Justices of Appeal failed to direct themselves on the matter when they held (at page 19 of their typed judgment) that ***"he was not even remorseful. The sentence of 12 years is for that reason not excessive at all in the circumstances. It is; in our view, on the lower side, we consider a custodial sentence of 20 years to be appropriate."*** Obviously the Court enhanced the sentence basically because the appellant did not show remorse. We agree with the view of the law as stated in **Mattaka's case (supra).** Absence of repentance by an accused person should never be an aggravating factor in considering what sentence the trial court should impose. We agree that what the appellant did to the child victim is bad and must be condemned but the inevitable conclusion we can draw is that the decision of the Court of Appeal was heavily influenced by the misdirection about absence of remorse. In any case we have not been shown any evidence on the record of appeal to prove whether the appellant was aware of the need to be remorseful.

Our laws have principles to be followed. Both under the Criminal Law, Criminal Procedure Law and even under Constitutional Law, a litigant who intends to challenge a decision of a lower Court ought to give notice so that the opponent can prepare and respond to the challenge.

In our considered opinion, appellant's failure to repent should not be a factor for imposing a higher sentence. In the present case, the state did not cross-appeal against sentence which is understandable because of absence of statutory provision of laws the state took the opportunity of the appeal against sentence by the appellant and asked the Court of Appeal to enhance the sentence. The most important aspect is that neither the state (respondent) nor the Court of Appeal warned the appellant before the hearing that the sentence would be enhanced.

We have been persuaded that the Court of Appeal erred. We are satisfied that the conclusions reached by the Court of Appeal are in the circumstances not justified.

We allow the appeal, set aside the decision of the Court of Appeal.

We restore the sentence of twelve years imposed by the High Court.

We would like to make a observation. The Trial On Indictments Act was promulgated by Decree in 1971 when there was no Parliament. The Decree essentially reproduced basics of the Criminal Procedure Act. Those who drafted the Decree provided for appeal against sentence by a convicted person under S. 132 (1) (a). The convict has a right to appeal against sentence only with the leave of the Court of Appeal under S.132 (1) (b). Interestingly, the DPP is allowed to appeal only where an accused person has been acquitted and even so "on a matter of law, fact or mixed law and fact" [see S. 132 (1) (c)]. If it is considered proper or desirable for the DPP to appeal against sentence, the state should seek for Section 132 of TID to be amended to provide for this. It is the state which should take necessary steps.

As a result this appeal is allowed and the sentence of twelve years imposed by the High Court is restored

Dated at **Kampala** this **24th** day of **…March…... 2014.**

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J. Tumwesigye
Justice of the Supreme Court.

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Dr. E. Kisaakye
Justice of the Supreme Court.

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J.W.N. Tsekooko
Ag. Justice of the Supreme Court.

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G.M. Okello
Ag. Justice of the Supreme Court.

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C.N.B. Kitumba
Ag. Justice of the Supreme Court.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: TUMWESIGYE &KISAAKYE, JJ.S.C.;
TSEKOOKO, OKELLO & KITUMBA Ag. JJSC)

CRIMINAL APPEAL NO.33 OF 2011

BETWEEN

BUSIKU THOMAS :: APPELLANT

AND

UGANDA :: RESPONDENT

[Appeal from the judgment of the Court of Appeal at Mbale (Kavuma, Nshimye & Arach-Amoko, JJA.) dated 29th June, 2011, in Criminal Appeal No. 230 of 2004)

JUDGMENT OF DR. KISAAKYE, JSC.(DISSENTING).

The appellant, (Thomas Busiku) was found guilty by Mwondha,J. (as she then was) of having defiled Wataka Mary, a girl aged 7 years only, on 11th June 2003. He was sentenced to 12 years imprisonment. His appeal to the Court of Appeal against both his conviction and sentence were unsuccessful and instead, the Court of Appeal enhanced his sentence to 20 years imprisonment.

Being dissatisfied with that decision, the appellant lodged a second appeal in this Court based on the following three grounds of appeal:

(i) The learned Appeal Judges erred in law when they enhanced the prison Sentence of the appellant from 12 years to 12 years(sic)

(ii) The learned Appeal Judges erred in law when they held that the appellant was properly identified by the victim.

(iii) The learned Justices of appeal erred in law when they held that the evidence of PW1 was properly corroborated by the evidence of PW2.

At the time of hearing the appeal, the appellant abandoned the Grounds 2 and 3 and only remained with ground one which he amended to read as follows:

"The learned judges erred in law when they enhanced the prison sentence of the appellant from 12 years to 20 years."

I have had the benefit of reading in draft the majority Ruling of the Court in this appeal. This Court has allowed this appeal basing on two grounds, the first being that the Court of Appeal enhanced the appellant's sentence because the appellant did not show remorse. The second ground is that the Court of Appeal erred when it followed the wrong procedure in enhancing the sentence of the appellant from 12 years to 20 years without the Court or the Director of Public Prosecutions (hereinafter referred to as the DPP), having given the appellant adequate warning before the hearing that his Sentence could be enhanced. With due respect to my learned brothers and sister, I respectfully disagree with this majority decision.

Accordingly, I would dismiss this appeal and confirm the sentence of 20 years for the reasons given in this Judgment.

Submissions of Counsel

Counsel for the appellant contended that the enhancement by the Court of Appeal of the appellant's sentence from 12 years to 20 years was irregular because there was no cross-appeal from the respondent. Relying on the decision of this Court in ***Mugasa Joseph v. Uganda, Supreme Court Criminal Appeal No. 10 of 2010***, he submitted that enhancement of sentence when there is no cross appeal would tantamount to ambushing the appellant. Counsel for the appellant further urged this Court to set aside the sentence imposed by the Court of Appeal since the Court of Appeal erred in enhancing the sentence against the appellant without following the proper procedures.

Ms. Caroline Nabasa, the Principal State Attorney who represented the DPP opposed the appeal. She submitted that ***Mugasa Joseph v. Uganda (supra***), where the DPP did not pray for enhancement of the appellant's sentence and where this Court held that the proper procedure was not followed by the Court before it enhanced Mugasa's sentence was distinguishable from the instant case. The learned Principal State Attorney submitted that in the present case, the DPP asked for enhancement of the appellant's sentence at the Court of Appeal and the Court also considered the aggravating factors before evoking its powers under sections 11 and 132 of the ***Judicature Act*** and ***the Trial on Indictments Act***, respectively, to enhance the appellant's Sentence. Counsel also relied on Rule 32 of the Court of Appeal Rules which gives the Court of Appeal power to vary decisions of the High court. Counsel concluded by submitting that the appellant was not ambushed. The DPP's representative cited several Court of Appeal decisions in support of the DPP's case.

Consideration of the Appeal

I will now proceed to consider the different aspects of the parties' submissions in as far as they relate to my reasons for reaching a different decision from my learned brothers and sister.

1. *Competence of the Appeal*.

Before I proceed to consider the merits of this appeal, I need to highlight a matter of law but which was not properly canvassed at the hearing of this appeal, but which is important to consider and dispose of. Section 5(3) of the Judicature Act, Cap 13, Laws of Uganda provides persons whose convictions have been upheld by the Court of Appeal, a right to appeal to this court, as follows:

"In the case of an appeal against a sentence and an order other than one fixed by law, the accused person may appeal to the Supreme Court against the sentence or order, on a matter of law, not including the severity of the sentence."

As I noted earlier, the appellant lodged his appeal to this Court on three grounds. At the hearing of this appeal, he abandoned his first two grounds to this Court where he was challenging his conviction and only remained with one where he challenged the enhancement of his sentence. The question that arises therefore is whether this appeal did not become an appeal against Sentence when the appellant abandoned the first two grounds of appeal.

In **Bonyo Abdul v. Uganda, Criminal Appeal No. 07 of 2011**, this Court recently dismissed an appeal against a sentence of life imprisonment on grounds that the appeal was not permitted under section 5(3) of the Judicature Act. This was after this Court found no merit in the other two grounds of appeal.

While I have some reservations about the constitutionality of section 5(3) of the Judicature Act, it still remains on our statute books. It is therefore incumbent on us, in a case like this, to demonstrate how this appeal differs from the Bonyo appeal, to enable it to stand, after the appellant voluntarily withdrew the other two grounds. The majority have not provided reasons why this appeal should be entertained by this Court given our recent decision cited above. My view is that this is an appeal against the severity of sentence, not

its legality and that it, like the Bonyo appeal, also comes under the ambit of section 5(3) of the Judicature Act. Therefore, it ought to have been dismissed on this ground.

2. Merits of the Appeal

Contention that the Court of Appeal erred in law when it enhanced the appellant's sentence from 12 years to 20 years.

The appellant faulted the Court of Appeal for having erred in law when they enhanced the prison sentence of the appellant from 12 years to 20 years.

It is not in dispute that the Court of Appeal has powers to confirm or vary a Sentence imposed by the High Court under several provisions of the law, which include section 132(1) of the ***Trial on Indictments Act***; section 34 of the ***Criminal Procedure Code***; and Rule 32(1) of the ***Judicature (Court of Appeal) Rules***.

For example, section132 (1) of the ***Trial on Indictments Act, Cap 23*** provides, in the relevant part, for appeals to the Court of Appeal from the High Court as follows:

> ***"(1) Subject to this section—***
>
> ***(a) an accused person may appeal to the Court of Appeal from a conviction and sentence by the High Court in the exercise of its original jurisdiction, as of right on a matter of law, fact or mixed law and fact;***
>
> ***(b) …;***
>
> ***(c) where the High Court has, in the exercise of its original jurisdiction, acquitted an accused person, the Director of Public Prosecutions may appeal to the Court of Appeal as of right on a matter of law, fact or mixed law and fact,***
>
> ***and the Court of Appeal may—***
>
> ***(d) confirm, vary or reverse the conviction and sentence;***
>
> ***(e) in the case of an appeal against the sentence alone, confirm or vary the sentence.***

On the other hand, section 34(2) of the ***Criminal Procedure Code, Cap 116***, also provides as follows:

> ***"Subject to subsection (1), the appellate court on any appeal may—***
>
> ***(a) reverse the finding and sentence, and acquit or discharge the appellant, or order him or her to be tried or retried by a court of competent jurisdiction;***
>
> ***(b) alter the finding and find the appellant guilty of another offence, maintaining the sentence, or with or without altering the finding, reduce or increase the sentence by imposing any sentence provided by law for the offence; or***
>
> ***(c) with or without any reduction or increase and with or without altering the finding, alter the nature of the sentence."***

In ***Mugasa v. Uganda (Supreme Court Criminal appeal No. 10 of 2010)***, this Court recognized the powers of the Court of Appeal to vary a sentence imposed by the High Court under the Criminal Procedure Code when we observed as follows:

> ***"…Section 34 of the Criminal Procedure Code Act also provides to the same effect as Section 132(1) of the Trial on Indictments Act, in that it empowers an appellate Court with powers to "reduce or increase" the sentence by imposing any sentence provided by law for the offence"***

Furthermore, section 11 of the ***Judicature Act, Cap 13*** also empowers the Court of Appeal with powers of the Court of original jurisdiction as follows:

> ***"For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."***

Lastly, Rule 32(1) of **the Judicature (Court of Appeal) Rules** also provides for general powers of the court as follows:

> ***"On any appeal, the court may, so far as its jurisdiction permits, confirm, reverse or vary the decision of the High Court, or remit the proceedings to the High***

Court with such directions as may be appropriate, or order a new trial, and make any necessary, incidental or consequential orders, including orders as to costs."

In ***Kifamunte Henry v. Uganda, (Supreme Court Criminal Appeal No.10 of 1997),*** this Court reaffirmed the role of the Court of Appeal when considering first appeals as follows:

"We agree that on first appeal from a conviction by a Judge, the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate 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 judgment appealed from but carefully weighing and considering it."

All the above provisions of the law clearly bring out the role of the Court of Appeal in Uganda's criminal justice system. Even the majority Ruling of Court has acknowledged that in exercise of its powers, the Court of Appeal can, under Section 132(1)(e), vary a sentence imposed by the High Court.

It therefore follows that based on the provisions of the law cited above, the whole trial process up to the Sentence imposed by the trial court is under scrutiny when a matter is appealed. This means that the Court of Appeal is not only empowered to review the evidence and reach its own conclusion whether justice has been served or not or whether there has been a miscarriage of justice. Rather, the Court of Appeal is also empowered to review the Sentence imposed by the High Court and to vary the Sentence imposed, where it finds it appropriate to do so.

Having discussed the law relating to the powers of the Court of Appeal to vary the appellant's sentence, I will now proceed to examine the next contention of the appellant in the following section.

Contention that the appellant was ambushed by the DPP when they sought enhancement of his sentence

Turning to the appeal under consideration, it was also argued for the appellant that the enhancement of his sentence amounted to ambushing him. The question that arises from this contention is whether the appellant was ambushed by the DPP.

Before considering the merits of the appeal, I find it appropriate to summarize the submissions and proceedings at the Court of Appeal that preceded the enhancement of the appellant's sentence.

Ground 4 of the appellant's ground of appeal at the Court of Appeal was framed as follows:,

> *"The learned trial judge in sentencing the appellant to 12 years imprisonment was harsh, given the circumstances of this case."*

Submitting on this ground, counsel for the appellant stated that the 12 year sentence imposed on the appellant was on the harsh side in the circumstances and was not befitting the offender and did not warn such mothers to desist from such practice. Counsel further submitted that the victim's mother should have indulged in a less risky business. He called upon the Court of Appeal to set the appellant free.

In reply to the submissions of appellant's counsel, counsel for the respondent submitted that under section 11 of the Judicature Act, the Court of Appeal had powers to correct any imbalances in the interests of justice, considering the circumstances under which the offence was committed. According to counsel, the Court of Appeal could enhance the sentence because aggravating circumstances necessitated the enhancement. Counsel listed the aggravating circumstances as being the age of the victim (7 years), the age of the appellant (30 years), the appellant abusing the hospitality of the victim's parents since he was a very close neighbor to the victim who would even borrow a toilet and drink from there.

The learned PSA concluded by asserting that the Court of Appeal had a duty to send a clear message to the society so that parents of victims of defilement appreciate that the Court viewed the offence of defilement seriously. He then asked Court for an enhancement from 12 years to 20 years.

In exercising his right of reply, counsel for the respondent opposed the enhancement because it would have the effect of discouraging the convicts from lodging appeals, hence making them suffer and die in silence. Counsel also submitted that the respondent should have filed a cross-appeal if he felt that the sentence was too low.

At the end of the submissions, the Court of Appeal adjourned the matter stating that it would give the judgment on notice. The Court did not put the appellant on Notice that it would consider enhancing the sentence. It just retired to consider the submissions of the parties and give a Ruling.

It is important to note that in replying to the state's case calling for the enhancement of the sentence, counsel for the appellant opposed the enhancement on two grounds only. The first ground was that the enhancement would discourage appellants from pursuing appeals. The second ground was that the respondent should have filed a cross-appeal

As it is clearly evident from the above submissions of the parties at the Court of Appeal highlighted above, the DPP specifically sought for enhancement of the appellant's sentence in his submissions. This was done, during the hearing of the appeal and in response to ground 4 of Appeal, where the appellant was challenging his sentence of 12 years for defiling a 7 year old girl. The appellant replied to the DPP's submissions and urged Court not to enhance his sentence.

Taking into account the record of appeal which shows the proceedings before the Court of Appeal, I do not find any merit in the appellant's contentions that he was ambushed by either the DPP or the Court.

Contentions that the Court of Appeal relied on the appellant's lack of remorsefulness to enhance his sentence

The appellant faulted the Court of Appeal Justices for wrongfully taking into account the appellant's lack of remorsefulness in enhancing his Sentence to 20 years. The majority of this Court has agreed with the appellant's submissions, relying on, among others, the Tanzanian case of ***Mattaka & others v. Republic [1971] E. A. 495***, where the Court of Appeal for East Africa considered the issue of absence of repentance for the appellants who had been convicted of treason.

In the ***Mattaka case (supra)***, the Court observed as follows:

> ***"A person who has pleaded not guilty and has maintained his innocence throughout and who intends to appeal cannot be expected to express repentance, which would amount to a confession of guilt. A person who has been found guilty may believe himself innocent as a matter of fact or law and that belief may be upheld by an appellate Court. If however, lack of repentance could be treated as an aggravating factor, the right of appeal would be fettered, because the convicted person would, in effect, be put to a choice, whether to risk a heavier sentence by maintaining his or her innocence or to abandon his right to appeal in the hope of leniency."***

With all due respect to the learned Justices of the East African Court of Appeal, I am not persuaded by this persuasive authority which also arose from Tanzania and is not binding

on Ugandan Courts. I am not persuaded by the Court's reasoning because it is not necessary true that all convicted persons would abandon their right of appeal if they knew that the trial Court can, among others, take into account the fact that such a convicted person is not repentant or remorseful. What criminals who have been found guilty by a Court of competent jurisdiction will do or not do, does not necessarily depend on the trial Judge or the appellate Court. It cannot therefore be true that the hands of a trial judge or even an appellate Court should be tied when it is exercising its Constitutional duty of sentencing a person convicted of a crime by speculating about what the convicted persons will do or not do. When a Court properly seized of jurisdiction finds an accused person guilty of a crime as charged, the trial Judge is bound to impose the Sentence in accordance with the law on such a person. By doing so, the trial judge will be completing the trial process.

I am not aware of any legal principle which fetters the powers of a trial Judge from properly exercising his sentencing powers because the matter may go on appeal. When indeed the convicted person elects to appeal either his conviction or sentence or both, the appellate Court will be seized with jurisdiction to hear his appeal and to either allow it or dismiss it.

Counsel for the appellant also heavily relied on this Court's decision in ***Kizito Senkula v. Uganda, (Supreme Court Criminal Appeal No. 24 of 2001)*** to fault the Court of Appeal's decision to enhance his sentence to 20 years on grounds of remorsefulness. I am also aware that the majority have also relied on this authority to agree with the appellant. They in particular relied on the Court's holding that "*absence of repentance by an accused person should never be an aggravating factor in considering what sentence the trial Court should impose*."

In the ***Kizito Senkula*** appeal, this Court upheld the sentence of the appellant despite the fact that the learned Trial Judge had, among other things, considered lack of repentance on the part of the appellant. In so doing, the Court held as follows:

> ***"…it was a misdirection of law for the learned trial judge to have regarded appellant's absence of repentance as an aggravating factor in sentencing him. Equally, with respect, the learned Justices of Appeal failed to direct themselves on the matter... However, we are of the view that in the instant case, the misdirection by the trial court and the failure of the learned Justices of Appeal to***

direct themselves on the matter, did not cause a failure of justice. There were legitimate aggravating factors which the learned trial Judge took into account, namely, that what the appellant did to the victim was treacherous and that he spoilt her when he introduced her to sex at such a young age of 11 years."

Like in the ***Senkula case (supra)***, the East African Court of Appeal in **the Mattaka case**, while agreeing with the appellants that the trial Judge was wrong to consider the absence of penitence in considering their sentence, nevertheless declined to set aside their sentences.

Clearly, as the above two authorities indicate, the mere fact that a trial court or even the Court of Appeal considered lack of remorsefulness or penitence, *per se*, when considering the Sentence to impose on a person who has been convicted of a crime, does not necessarily warrant the quashing or reversing of the sentence, unless there has been a failure or substantial miscarriage of justice. The Court is even more inclined to decline to set aside or vary the sentence where there are other legitimate aggravating factors that the Judge or the Court of Appeal took into account, as was the case in the appeal under consideration.

Furthermore, this Court's decision of ***Kizito Senkula (supra)*** notwithstanding, it would appear to me that this decision is no longer good law, to the extent that it precluded a trial Court from taking into account a convicted person's lack of penitence or remorsefulness at the sentencing stage.

In 2013, the then Chief Justice of Uganda, acting under the powers vested in him by Article 133(1)(b) issued the ***Constitutional (Sentencing Guidelines for Courts of Judicature) Practice Directions, Legal Notice No. 8 of 2013*** , to "*ameliorate the challenges that the Courts were grappling with when sentencing*."

It is important for this Court not to lose sight of these guidelines whose purpose was stated in paragraph 5 thereof as "**to promote respect for the law in order to maintain a just, peaceful and safe society and to promote initiatives to prevent crime."**

Towards this end, the Sentencing Guidelines urge courts as follows:

"(1) …

(2) For the purposes of subparagraph (1), the court shall in accordance with the sentencing principles pass a sentence aimed at -

(a) denouncing unlawful conduct;

(b) deterring a person from committing an offence;

(c) separating an offender from society where necessary;

(d) assisting in rehabilitating and re-integrating an offender into society;

(e) providing reparation for harm done to a victim or to the community; or

(f) promoting a sense of responsibility by the offender, acknowledging the harm done to the victim and the community."

Paragraph 6 also provides for the General sentencing principles as follows:

"Every court shall when sentencing an offender take into account—

(a) the gravity of the offence, including the degree of culpability of the offender;

(b) the nature of the offence;

(c) the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances;

(d) any information provided to the court concerning the effect of the offence on the victim or the community, including victim impact statement or community impact statement;

(e) the offender's personal, family, community, or cultural background;

(f) any outcomes of restorative justice processes that have occurred, or are likely to occur, in relation to the particular case;

(g) the circumstances prevailing at the time the offence was committed up to the time of sentencing;

(h) any previous convictions of the offender; or

(i) any other circumstances court considers relevant."

In the case of defilement, Paragraph 34 of the Guidelines requires the following factors to be taken into account by the Sentencing Court.

"(a) the age of the victim and the offender;

(b) the nature of the relationship of the victim and the offender;

(c) the violence, trauma, brutality and fear instilled upon the victim;

(d) the remorsefulness of the offender;

(e) ***operation of other restorative processes; or***

(f) the HIV/AIDS status of the offender."

Worth noting is that under Paragraph 34(d) of the Guidelines, remorsefulness of the offender is one of the factors that a Court is required to take into account when it is considering a sentence for a person who has been convicted of defilement. Although these Guidelines were not in place by the time the High Court and the Court of Appeal sentenced the appellant, they codified existing procedures and factors that Courts were required to take into account when sentencing a person convicted of a crime.

Turning to the present appeal, I find, contrary to the contentions of the appellant, that the Court of Appeal did not enhance the Sentence basing on the appellant's lack of remorsefulness. The learned Justices of Appeal actually laid down the principles and factors on which they based their decision as follows:

> ***"Having considered the mitigating factors raised by the appellant's counsel before the learned trial judge and before us during the hearing of this appeal, we think that there is no justification for the criticism of the trial judge. We agree with Mr. Okwanga that there were aggravating factors which justified the sentence imposed by the trial judge. The guiding principle is that the sentence must not only befit the offence but also the offender. Further, Court takes judicial notice of the fact that defilement is not only a capital offence, but is also rampant. The appellant preyed upon a seven year old minor and exposed her to sexually transmitted diseases including the dreaded HIV/AIDS. Moreover this incident is bound to have a lifelong emotional effect on her. He was not even remorseful. The sentence of 12 years is for that reason not excessive at all in the circumstances. It is, in our view on the lower side, we consider a custodial sentence of 20 years to be appropriate."***

As is clearly evident from the above quotation, the learned Justices of Appeal clearly pointed out the aggravating factors they took into account before they enhanced the appellant's Sentence, which included the age of the victim being 7 years only, the fact that the appellant had exposed the young victim to sexually transmitted diseases including HIV; and the fact that the defilement was bound to have a lifelong emotional effect on the victim.

I therefore do not agree that the Court enhanced the sentence solely because the appellant was not remorseful. The Court gave its reasons which are in the quotation I cited. Mere use of one word "reason" should not be interpreted to negate all the aggravating factors the Court relied on. Besides, it may as well be a typing error to have omitted "s" which would be consistent with the entire reasoning of the Court. We should not forget that the victim was just 7 YEARS OLD and the appellant was 30 years. The Court was dealing with a conviction of aggravated defilement.

I therefore find that the Court of Appeal did not err in law when it considered the appellant's lack of remorsefulness as one of the relevant factors in determining whether the appellant's sentence of 12 years should be confirmed or enhanced to 20 years.

Whether the appellant suffered a substantial miscarriage of Justice when his sentence was enhanced

Even if the appellant had proved that the Court of appeal followed the wrong procedure in enhancing his sentence, this would still not be sufficient ground for this Court to reverse the appellant's sentence.

Under section 34(1) of the Criminal Procedure Code Act, the appellant is also required to show that he had suffered a substantial miscarriage of Justice. This section provides as follows:

"The appellate court on any appeal against conviction shall allow the appeal if it thinks that the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on the ground of a wrong decision on any question of law if the decision has in fact caused a miscarriage of justice, or on any other ground if the court is satisfied that there has been a miscarriage of justice, and in any other case shall dismiss the appeal; except that the court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

In my view, no substantial miscarriage of justice occurred when the Court of Appeal enhanced the appellant's sentence. To warrant reconsideration by the appellate Court, a miscarriage of justice must be substantial. In ***Kifamunte Henry v. Uganda, Supreme Court Criminal Appeal No.10 of 1997*** this Court stated as follows:

"Provided that the court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred"

Bearing in mind the gravity of the offence committed by the appellant on a 7 year old defenseless child, the supposedly irregular procedure followed by the Court of Appeal in enhancing a sentence could be cured by the provisions of Section 34(1) of the Criminal Procedure Act.

It is therefore my view that if there was any irregularity in the procedure the Court of Appeal followed in enhancing the appellant's Sentence, such irregularity does not warrant a reduction of the Sentence from 20 years to 12 years. The Court of Appeal acted properly when it enhanced the unduly lenient sentence which the High Court had imposed on the appellant, for defiling a 7 year old girl. The Court of Appeal had a duty to impose a sentence that was befitting of the crime committed. Just as this Court concluded in ***Kizito Senkula (supra***), there was no miscarriage of justice occasioned to the appellant in the present case to warrant a reversal of his enhanced sentence.

Contention that the Court of Appeal failed to follow the correct Procedure before it enhanced the appellant's sentence.

Counsel for the appellant contended that the appellant was not given sufficient notice to prepare for his defense to the DPP's prayers. Furthermore, he contended before this Court that the Court of Appeal enhanced his Sentence without following the proper procedure. In ***Mugasa* (supra),** this Court emphasized the need for an appellate Court to follow "proper Sentencing Procedures" when it is varying a sentence imposed by a lower Court. In that case, the DPP did not seek for enhancement of the sentence of 17 years, which the High Court had imposed on the appellant for defiling a 6 year old girl. Rather, the Court of Appeal, on its own volition, basing itself on the powers conferred on it by Section 11 of the Judicature Act, enhanced the sentence from 17 years to 25 years, after it had informed parties of its intention to do so and invited them to make submissions to that effect, which they did. We found the Court of Appeal at fault for having moved on its own volition to enhance Sentence, when the DPP had not prayed for the same. This question is again before us in this appeal under consideration.

First of all, it should be remembered that the appeal before the Court of Appeal had been filed by the appellant, who came to Court duly prepared to argue his ground on the appropriateness of the 12 year sentence he was appealing from.

Secondly, it should also be remembered that appellant was not only appealing against conviction but also his sentence. So he cannot deny the fact that he could not foresee the possibilities of variation of his sentence by the Court of Appeal coming up. Any reasonable appellant should expect his or her conviction to be quashed or varied and his or her sentence to be either reduced or increased.

Thirdly, the appellant, who was represented by counsel at the Court of Appeal, should have anticipated the DPP's response and prepared his defense accordingly. The DPP's arguments could have been either that the sentence that had been imposed by the High Court was appropriate or that it was lenient and should be enhanced.

Fourthly, it should be noted that there are no statutory provisions in our laws that lay down a specific standard that must be followed by the Court of Appeal in varying a sentence imposed by a trial Court or any lower court by a higher Court. Indeed the majority Ruling of Court shows that the Court declined to set a universal standard to be followed when varying a sentence imposed by lower court.

With all due respect, I am of the view that the present appeal is distinguishable from the Kenya case, ***JJW v. Republic, Criminal Appeal No. 11 of 2011 [2013] i.e KLR.*** In that case, the state neither filed a cross-appeal nor sought for enhancement of sentence. The Court of Appeal accordingly allowed the appeal on grounds that although the High Court had powers to enhance the appellant's sentence, he had not been given adequate notice by either the state filing a cross-appeal or by the Court warning him either before the hearing of the appeal or at the commencement of the appeal that the sentence was likely to be enhanced.

In the present case, the DPP specifically requested for enhancement during the hearing of the appeal and the appellant specifically responded to the DPP's arguments while exercising his right of reply.

The appellant got enough notice when the DPP raising the issue of enhancement. In the event that the appellant, who was represented by Counsel felt that he was caught unaware by the DPP's submissions in reply, he had the right to seek for an adjournment to enable him prepare a more detailed reply to the arguments of the DPP on enhancing his Sentence. In the absence of such a request, the Court of Appeal cannot be faulted for not granting the appellant more time. The issue of ambush or the wrong procedure therefore does not arise in this appeal.

Appellants who appeal take upon themselves the risk of having their sentences varied. In the majority of cases, where the Court of Appeal opts to exercise its powers to vary, it is the appellants who benefit. This is because in the majority of these cases, the conviction is

quashed or the Sentence is reduced. In the event that the Court of Appeal had done the usual and reduced the appellant's sentences downwards from 12 years, it is very unlikely that he could have argued that he was not given enough notice to prepare for the downward variation of his sentence. It cannot therefore be right that when the Court of Appeal is reducing the sentence it does not need to give the appellant prior notice, but when the Court is raising an appellant's sentence, it is required by law to give the appellant advance notice of its intention to do so. I have not found any statutory provisions imposing such a duty on the Court of Appeal.

For all the reasons given above, I am unable to find that the Court of Appeal erred in law in the procedure it followed to enhance the appellant's sentence to 20 years. The appellant was properly heard by the Court. His submissions are on record. The decision to enhance the Sentence can only be reached after the Court of Appeal has re-evaluated the evidence and reached its own conclusion with respect to the conviction and the sentence an appellant was given. Hence, requiring the Court to give advance Notice than was given would be to require it to pre-judge the appeal. It cannot possibly be before the hearing of the appeal. So, requiring the appellant to make submissions in response to those made by the DPP where the DPP is seeking enhancement, should have sufficed.

Alleged violation of the Appellant's Right to a Fair Hearing

It was argued that enhancing appellants' sentences on appeal will discourage criminal appellants from exercising their constitutionally guaranteed right of appeal against their convictions and sentences and that in the long run, it will negate their rights and also prejudice them as against their fellow convicted persons who may have got more lighter sentences but who opted not to appeal. It was further argued on behalf of the appellant that enhancing the appellant's sentence in the manner that the Court of Appeal did violated the appellant's right to a fair hearing.

I am fully aware that Article 28 (1) of the Constitution provides for the right to a fair hearing. It is indeed true that the right to a fair hearing is not only recognized as one of the fundamental human rights under our Constitution, but it is also given special status as one of the rights from which there cannot be any derogation as envisaged under Article 44 of our Constitution.

However, in my view, the right to a fair hearing should not only encompass the rights of the accused person or convicted person during the sentencing stage. It should also encompass the rights of the victim of the crime as well as public interest. As it was rightly observed by the Constitutional Court of South Africa in ***S v Jaipal 2005 (4) SA 581 (CC),*** ***(para 29)***

"The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instill confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime."

With all due respect to the appellant's arguments, these contentions cannot be used to justify the reversal of the Court of Appeal's decision in this case. As I earlier discussed, Secondly, the appellant was heard before the Court of Appeal, which is an independent and competent court vested with powers to vary a sentence imposed by the lower court downwards or upwards where it deems it fit to do so. The appellant's constitutional right to a fair hearing was therefore not violated when the Court enhanced his sentence to 20 years.

Contention that the Court of Appeal should not have considered the DPP's prayers because no right to cross-appeal is vested in the DPP

It was contented on behalf of the appellant that the Court of Appeal erred when it enhanced the appellant's Sentence on the basis of the DPP's prayers, when no right to cross-appeal against a conviction exists for the DPP.

Article 120 of the Constitution of Uganda provides for the functions of the DPP. Under Article 120(3)(b) of the said Constitution, the DPP is empowered to institute criminal proceedings "a*gainst any person or authority in any Court with competent jurisdiction other than a Court Martial."*

In the exercise of the functions conferred on the DPP, he is further required under Article 120(6) of the Constitution to have regard to:

"…the public interest, the interests of the administration of justice and the need to prevent abuse of legal process."

It is indeed true that there is no statutory provision giving the DPP a right to appeal against a lenient sentence. However, the fact that the DPP has audience with the Court in replying to the submissions of an appellant in a criminal matter also means that he has a right to make submissions on conviction and the sentence imposed by the High Court. When a party decides to appeal against a decision of the trial judge on the ground that the sentence imposed on him or her was harsh or excessive, the expected and natural response of the party opposing the appeal would be to state that the sentence imposed was appropriate or to call for an enhancement. More so, as officers of Court, counsel for the respondent had a duty to inform Court that the justice of the case demanded a more severe sentence to deter others who were thinking of going the same way. In my opinion, the unavailability of the DPP's right to appeal does not take away the DPP's right to be heard when replying to the

appellant's claim. It also does not take away the Court's duty to evaluate all the evidence before it and to reach its own conclusion, not only whether to uphold the conviction but also on the appropriateness of the sentence that was imposed.

By the DPP raising the issue of enhancement he was putting into consideration the public interests and interests of the administration of justice. There is need to balance the rights of the appellant and those of the society (represented by the DPP). As a result there is need to also recognize the interests of society in the criminal justice system through appreciating the office of the DPP. Since the DPP represents the interests of society in the criminal justice system, variance in sentence should not favour the appellant alone and leave the society (represented by the DPP) sidelined. Court should not be seen to apply different standards on the DPP from those of the appellant. This would, in my view, result in the Court giving different treatment to litigants before it.

It therefore follows that the absence of a specific right to cross-appeal by the DPP does not warrant a reversal of the sentence that was varied by the Court of Appeal basing on the DPP's submissions calling for enhancement of sentence.

Whether there was justification on the part of the Court of Appeal to interfere with the sentence imposed by the trial court?

The last question that I need to consider is whether there was justification on the part of the Court of Appeal to interfere with the sentence imposed by the trial court? I would answer this question in the affirmative.

The majority Ruling of the Court also recognizes that the Court of Appeal has powers under section 132(1)(e) of the Trial on indictments Act to confirm or vary a sentence after hearing the parties. There is therefore no rational basis why the DPP should not ask for enhancement when the DPP replies to the appellant's arguments during the hearing of an appeal against sentence.

The majority Ruling however qualifies this request for enhancement by requiring the DPP to give notice to the Court and the appellant in advance before hearing day. This is placing an onerous burden on the DPP which is not required under the Constitution or the Trial on Indictment Act or the Court of Appeal Rules to do so. The majority itself did not cite under what law it is drawing this legal requirement on the part of the DPP. If this Court makes a finding of an error of law being made, it should point out the provisions of the law that were breached and clearly define the error.

Similarly, the majority has not provided the DPP or the Court of Appeal with the proper guidelines they are each expected to follow before a sentence enhancement is sought or made respectively.

What if the Court decides to enhance the sentence on its own volition? What kind of Notice should Court give to the appellant since there is no specific provision of the law providing for such or what form the Notice should be, and for what duration?

Article 126(2) (e) of the Constitution enjoins Courts to administer substantive justice without undue regard to technicalities. This is especially so when one puts into consideration the offence that the appellant committed on a defenseless young girl of 7 years old.

As I noted before, the appellant, aged 30 years had been convicted of defiling a 7 year old. The facts that were accepted by the Court of Appeal were that the appellant was a neighbor to the victim's mother and they shared the same toilet facilities. The appellant had been sentenced to 12 years by the High Court.

A review of the appeals which this Court has heard clearly confirms that the sentence of 12 years only the trial court had imposed on the appellant was unduly lenient when it is compared to the age of the victim and the circumstances in which he took advantage of his victim to defile her. For instance in ***Tongolo Musa v. Uganda, Criminal Appeal No. 07 of 2008***, this Court upheld a sentence of 20 years imprisonment for having defiled a 7 year old girl. Similarly, in ***Tigo Stephen v. Uganda, Criminal Appeal No. 7 of 2008***, this court also upheld a similar sentence for a similarly aged victim of defilement. In ***Bukenya Joseph v. Uganda, Criminal Appeal No. 7 of 2010***, the appellant was sentenced to life imprisonment for having defiled a 6 years old girl. Lastly, in ***Ocan Alex v. Uganda, Criminal Appeal No. 13 of 2010***, this Court upheld a sentence of 17 years for the defilement of a 7 year old girl.

Clearly, as the Court of Appeal observed, defilement is still very rampant in Uganda. This is in spite of the legal reforms that were made to enhance the maximum sentence of aggravated defilement to death. The need for young girls to be protected by the law from sexual violence cannot therefore be overstated.

It should also be further noted that the presumption of innocence guaranteed to a person accused of a crime, ends when the accused person is found by an impartial court guilty of the offence he or she was charged with. From this point onward, the interests of justice demand that the Courts should not only take into account the rights of the convicted person, but also the interests of the victim and the society as a whole. Upon conviction, the

victim should take centre stage in guiding the Court to determine the most appropriate sentence the convicted person deserves for the wrong he committed to the victim. In the appeal under consideration, the wrong committed was not only against the victim but also the people of Uganda, who constitute society. By committing a crime against its child and thereby impacting on that child's potential to become a useful and productive citizen who contributes to national development, the society also becomes a second victim.

This Court will be setting a very dangerous precedent to reverse the appellant's enhanced sentence from 20 years which was imposed by the Court of Appeal back to 12 years that were imposed by the High Court. This is especially so, where there is no evidence on the court record to show that there was a miscarriage of justice suffered by the appellant. Even with the 20 years sentence imposed by the Court of Appeal, the appellant who was 30 years at the time he committed this offence, had been spared the maximum sentence of death, which is prescribed for the offence of aggravated defilement.

Meanwhile, not much concern has been shown for the plight of the victim of his crime, a 7 year old girl, whose innocence was violated and who will have to live with the trauma and all the psychological effects associated with sexual abuse for the rest of her life! In the absence of an order for compensation to the victim of this crime for the wrong she suffered, as envisaged by Article 126 (2)(c) of the Constitution, the best this Court can do to recognize the terrible wrong that the appellant did to this innocent child is to uphold the enhanced sentence of 20 years.

Article 34(7) of the Constitution of Uganda provides that "***the law shall accord special protection to orphans and other vulnerable children.***"

Furthermore, Article 21(1) of the Constitution guarantees young girls the equal protection of the law, while Article 45 of the same Constitution also incorporates other human rights and freedoms although they may not be specifically mentioned in the Constitution. The Convention on the Rights of the Child, which Uganda ratified, is one such Convention which provides additional rights for children. Under Article 34 of the said Convention, Uganda as a State Party to the Convention undertook to "*protect children from all forms of sexual abuse and to take such appropriate measures as are necessary to prevent the coercion of a child to engage in any unlawful sexual activity*.'

Such measures, in my view, should include the prosecution and punishment of persons convicted of defiling young girls appropriately. Given the obligations on the part of the Uganda as a State to protect its children from sexual abuse, it becomes imperative for Courts of law to ensure that convicted sexual offenders are appropriately punished with sentences that send out a very clear message that defilement and sexual abuse of young children will not be tolerated in Uganda. One way to do this will be through our judgments and sentences we render.

This duty on the Court could not have been better put than in the Namibian case of ***S v Kadhila (CC 14/2013) [2014] NAHCNLD 17 (12 March 2014)***, where Liebenberg, J. rightly observed as follows:

> ***"The sanctity of life is a fundamental human right enshrined in law by the Namibian Constitution and must be respected and protected by all. The courts have an important role to play in that it must uphold and promote respect for the law through its judgments and by the imposition of appropriate sentences on those making themselves guilty of disturbing the peace and harmony enjoyed in an ordained society; failing which might lead to anarchy where the aggrieved take the law into their own hands to take revenge."***

Courts of law should not, as has frequently been the case, allow a situation where the rights of a convicted person overshadow the rights of the victim of crime during the sentencing stage. In determining the appropriate sentence to be imposed on the convicted persons, Courts of law should always ensure that justice is done to both the convicted person as well as the victim of the crime. The dictates of Article 126(2) require Courts to ensure that justice is done to all in accordance with the law, values, norms and aspirations of the people.

The people of Uganda, through their duly appointed representatives, already spoke when they enacted the 1995 Constitution and created the Court of Appeal with powers to hear, confirm or reverse convictions and Sentences imposed by the High Court. The people of Uganda also spoke through their representatives when Parliament passed the amendments to the Penal Code Act and created the offence of aggravated defilement with a maximum Sentence of death. In my view, the aspirations of the people of Uganda, which we, as a

Court are required to take into account under Article 126(1) of the Constitution, are that young girls should be protected from sexual violence.

It may as well be that the people's representatives need to speak again more directly and emphatically by giving the DPP power to file cross-appeals. But before they do, I am of the view, that we should use the current Constitutional framework which vests judicial power in the Courts on behalf of the people of Uganda to ensure that not only convicts but also victims get justice from the Courts. One way to do this is make sure that we interpret the permissive provisions that allow not only the Court of Appeal but also this Court to reverse, confirm or vary decisions of lower courts, in a manner that will ensure that justice is done not only to persons who have been properly convicted and sentenced under the law, but also to victims of crime.

Before I take leave of this appeal, I would like to underscore two important matters. First of all, I am of the view that time has come for us to reform our criminal justice system like it has been done in several other jurisdictions, to have the sentencing stage to be de-linked from the trial stage and to allow for the participation of victims of crime at the sentencing stage. By accommodating the victim during the sentencing phase, the Court will be better informed about the impact of the crime on the victim, and therefore be able to achieve proportionality in sentencing and balance between the interests of society and of the accused. Courts must ensure that an appropriate balance is struck to protect not only the rights of persons convicted of crimes but also the rights of victims of those crimes. As the South African Supreme Court of Appeal rightly observed in paragraph 16 in ***State v. Vuyisile Matyityi 2011 1 SACR 40 (SCA),*** *an enlightened and just penal policy also needs, among others, to be victim centered.*

The second point relates to the issue of consistency and parity in Sentencing. There is need for this Court to ensure consistency in our sentences, in line with the objectives of the **Constitution** ***(Sentencing Guidelines for Courts of Judicature)(Practice) Directions, 2013"*** that were put in place by the then Chief Justice, Odoki, CJ.

In ***Bonyo(supra),*** where the appellant aged 27 years old was convicted of aggravated defilement of a 14 year old because he had HIV, we affirmed his sentence of life imprisonment on ground that the sentence was legal and that his sentence could not be looked into because of section 5(3) of the Judicature Act.

In this present appeal where the appellant was 30 years and the victim 7 years, we are reversing a 20 year enhanced Sentence on a technicality that the Court of Appeal did not

give the appellant proper Notice before enhancing the Sentence, without citing any law which states which forms such Notice is supposed to take. This is so even where the Court of Appeal followed our earlier decision of *Mugasa (supra)*.

Bonyo was HIV positive but the victim was not infected. In this case, the appellant was infected with gonorrhea but the victim was not infected. Does this factor alone explain this disparity in their Sentences? If that is the case, should we not as a Court at least distinguish the broad disparity between the sentences we confirmed on Bonyo from the one we are confirming in this appeal?

Turning to the present appeal, the sentence of 12 years which had been given to the appellant (Busiku) was clearly on the lower side when one takes into account the age of the victim, the maximum sentence for the offence of aggravated defilement which is death and the previous decisions of this Court where we have been confirming high sentences for similarly aged victims.

Conclusion

With due respect to my learned colleagues, I respectfully find that the Court of Appeal did not err in law when it enhanced the sentence of the appellant from 12 years to 20 years. I would accordingly dismiss this appeal.

Dated at Kampala this ..24th..... day of .....March..... 2015.

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HON. JUSTICE DR. ESTHER KISAAKYE

JUSTICE OF THE SUPREME COURT