

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA SITTING AT MASAKA**  
**CRIMINAL APPEAL NO. 265 OF 2014**

**SSUUNA FRANK:..... APPELLANT**

**VERSUS**

**UGANDA ..... RESPONDENT**

*(Arising from the judgment of Justice Margaret Oguli Oumo in  
Masaka High Court Criminal Session Case No. 17 of 2011)*

**CORAM: HON. JUSTICE EGONDA NTENDE, JA**

**HON. JUSTICE, HELLEN OBURA, JA**

**HON. JUSTICE, STEPHEN MUSOTA JA**

**JUDGMENT OF THE COURT**

The appellant was indicted, tried and convicted of the offense of  
Aggravated Defilement C/S 129(3) (4)(a)(b) of the Penal Code Act.

**Background**

The victim, Nakato Joan, was 7 years old at the time the offence was  
committed at Buwunga subcounty-Masaka District. On 30<sup>th</sup> October  
2011, the victim was at a party with her step mother when the  
appellant lured her into a house with 1000/= and proceeded to defile  
her.

The appellant was sentenced to 19 years imprisonment and being  
dissatisfied, he filed this appeal against sentence only on the  
following grounds;

1. The learned trial Judge erred in law and fact when she  
sentenced the Appellant to 19 years imprisonment which was  
manifestly harsh and excessive in the circumstances, and  
occasioned a failure of justice.

2. The learned trial Judge erred in law when she failed to deduct from the sentence the period the Appellant had spent on remand.

The appellant abandoned ground 2.

## 5 **Representation**

At the hearing of this appeal, Mr. Innocent Wanambugo appeared for the appellant while Ms. Akasa Amina appeared for the respondent.

### **Submissions of the appellant**

10 Counsel sought leave of court which was granted under section 132(1b) of the Trial on Indictments Act to proceed with the appeal against sentence only.

Counsel submitted that the appellant pleaded guilty at trial and as such the sentence of 19 years imprisonment was harsh and excessive in the circumstances. He cited the case of **R Vs Haan [1967] 3 ALL ER 618** in which it was held that the plea of guilty offered at the commencement of the trial must attract lenience. In addition, that the appellant was a 1<sup>st</sup> offender with no previous record of bad conduct.

20 That the appellant was 21 years at the time of commission of the offence and at such a young age, he had capacity to reform and contribute positively to society. At the time of conviction, the appellant had spent one year and 5 months on remand and it was reported that whereas the appellant was HIV positive, he was not aware of his status at the particular time of commission of the offence. That whereas the trial Judge was alive to these mitigating factors, a sentence of 19 years imprisonment imposed on him was harsh and excessive.

30 He cited the case of **Lubanga Emmanuel vs. Uganda, COA Criminal Appeal No. 124 of 2009** in which this court maintained a sentence of 15 years imprisonment against an appellant who had pleaded guilty to a charge of aggravated defilement of a child of one year who may have also been exposed to HIV. In conclusion, counsel prayed that the sentence imposed on the appellant be reduced accordingly.

## **Submissions of the respondent**

Counsel for the respondent opposed the appeal and submitted that the trial court considered all the mitigating factors as raised by  
5 counsel for the appellant. That the learned trial Judge was actually being lenient to the appellant by not giving him the maximum sentence and as such, the 19 year sentence was deserving and appropriate. In addition, the victim was only 7 years at the time the  
10 then 21 year old appellant infected her with the HIV virus. The victim also sustained very serious injuries in her private parts. Considering all these factors, counsel submitted that a sentence of 19 years was appropriate.

Counsel cited **Okello Geoffrey vs. Uganda Supreme Court Criminal Appeal Number 34 of 2014** where the victim was 16 years and the  
15 only aggravating factor was that the appellant in that case was a teacher in the victim's school. A sentence of 22 years was confirmed. In addition, the case of **Tigo Steven vs. Uganda; Supreme Court Criminal Appeal Number 8 of 2009** where the victim was 6 years old and a sentence of 20 years was confirmed by the Supreme Court.

20 It has been consistently held in numerous cases both by the Supreme Court, this court and the Court of Appeal for East Africa, and more specifically in the case of **Livingstone Kakooza v Uganda SC Criminal Appeal No. 17 of 1993 [unreported]** that:

25 *'An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration: See Ogalo S/O Owoura v R (1954) 21 E.A.C.A. 270.'*

30 The foregoing principles are equally applicable in the instant case. The sentencing order of the trial judge states;

*"The court took into account the following facts in determining the sentence; that the convict is a first offender. That the convict has been*

on remand for 1 year and 5 months. The convict pleaded guilty and didn't waste time. The accused has no previous record and is likely to reform. Court also considers aggravating factors in that, the child was only 7 years old, and therefore vulnerable. The offence carries death sentence. The convict committed the offence in a violent manner given the grave injuries of the child which exposed her to HIV since he is HIV positive. Such crimes are common in the community and a deterrent sentence has to be imposed to send a message to the convict and other would be defilers as such the girl child has to be protected from chasters who have made the community difficult for the girl child to grow from thus blocking all opportunities for them to advance. In the circumstances court sentences the convict to 19 years imprisonment."

The maximum sentence for the offence of aggravated defilement is death. It appears the learned trial Judge reached for a 20 year imprisonment sentence considering the fact that the appellant had spent 1 year and 5 months on remand. This, in our view, was harsh considering that the appellant pleaded guilty and did not waste court's time. We therefore set it aside.

This court has the same powers as the High Court, under Section 11 of the Judicature Act. It states,

*'11. Court of Appeal to have powers of the court of original jurisdiction.*

*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'*

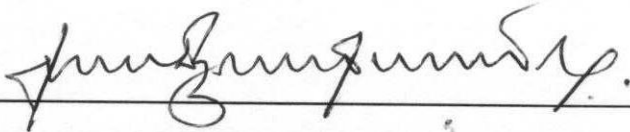
In the instant case the appellant was a first offender. He spent 1 year and 5 months on remand prior to his conviction. He was 21 years old, a very young man, at the time of the commission of offence who pleaded guilty, capable of reform and was remorseful. Nevertheless he violently committed a very serious offence whose maximum punishment is death. In addition, he is HIV positive and as such exposed the 7 year old victim to the virus.

We are satisfied that a sentence of 19 years was harsh as it did not take into account the mitigating factors as a whole. It is thus set aside and substituted therefore a sentence of 15 years imprisonment from the date of conviction which is 24/04/2014. This sentence meets the ends of justice in this case. The appeal against sentence is therefore allowed.

We so order.

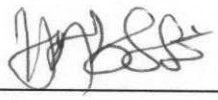
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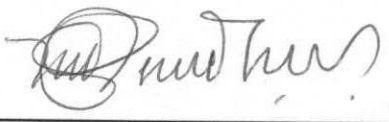
**Hon. Justice Egonda Ntende, JA**

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**Hon. Justice, Hellen Obura, JA**

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**Hon. Justice, Stephen Musota JA**

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