THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: ARACH-AMOKO; MWANGUSYA; OPIO-AWERI; MUGAMBA; JJSC; NSHIMYE; AG.JSC]

CRIMINAL APPEAL NO. 20 OF 2016

OUMO BEN alias OFWONO::::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

UGANDA::RESPONDENT

[Appeal arising from the judgment and decision of the Court of Appeal at Kampala (Kasule, Buteera, Cheborion, J.J.A), dated 25th February, 2016 in Criminal Appeal No.349 of 2010]

JUDGMENT OF THE COURT

This is a second appeal. Oumo Ben *alias* Ofwono, the appellant was indicted, tried and convicted by the High Court of the offence of aggravated defilement contrary to section 129(3) & (4) (a) of the Penal Code Act. He was sentenced to 26 years imprisonment. He appealed to the Court of Appeal which upheld his sentence. Hence this appeal.

Background

The facts of this case as found by the courts below are that the appellant is the biological father of the victim, Apio Veronica. He lived with the victim and her mother in the same house at Acilo village, Atira sub-county, in Soroti district. The parents shared the same bed with the victim. On 21st October, 2006, at about 4.00am, the appellant asked the victim's mother, Ameso Claudia (PW2) for sexual intercourse but she declined, saying she was

going to church. He then had sexual intercourse with the victim who was sleeping next to him. At about 5 am, (PW2) touched the victim in the dark and realised that her buttocks were wet. She also touched the victim's vagina and felt some slippery substance which was actually semen. At the time the appellant was 27 years old and the victim was 3½ years old.

PW2 reported the incident to the Local Council authorities. Thereafter, the appellant was arrested by the Police. He was indicted with the offence of defilement. He denied the charge. He was convicted and sentenced accordingly. His appeal to the Court of Appeal was unsuccessful.

Grounds of Appeal

The Memorandum of appeal sets out the following grounds of appeal to this Court:

1. **The learned appellate justices erred in law when they failed to properly re-evaluate the evidence on record as a whole thereby arriving at a wrong conclusion.**
2. **The learned appellate justices erred in law when they allowed the appellant's counsel to abandon 3 grounds of appeal without seeking clarification and without taking into account the interests of the appellant thereby occasioning him injustice.**
3. **The learned appellate justices erred in law when they upheld a sentence of 26 years custodial imprisonment which was illegal and excessive given the circumstances.**

The appellant prayed that the appeal be allowed with orders that the custodial sentence of 26 years imprisonment was illegal and excessive given the circumstances and should be set aside.

Representation:-

Mr. Okwalinga Moses represented the appellant on state brief while Ms. Faith Turumanya, Assistant Director of Public Prosecutions appeared for the respondent. They filed written submissions and made brief oral highlights at the hearing.

During the hearing, Mr. Okwalinga abandoned grounds 1 and 2 of the appeal, after consulting the appellant. Consequently, both counsel argued ground 3 only.

Submissions:-

Mr. Okwalinga submitted that the sentence of 26 years was illegal since the lower courts did not expressly deduct the 3 years and 4 months period the appellant spent on remand, saying this was contrary to article 23(8) of the Constitution which provides that the remand period must be taken into account. Counsel relied on the decision of this Court in the case of **Rwabugande Moses v Uganda, SCCA No. 25 of 2014** where this Court held that the period spent on remand should be taken into account arithmetically. Counsel argued that failure to do so renders the sentence illegal.

Consequently, he invited Court to set aside what he said was the illegal sentence of 26 years and substitute it with a lesser sentence of 15 years. He relied on the case of **Katende Ahamad v Uganda, SCCA No.6 of 2004** where this Court upheld a sentence

of 10 years in respect of a father who had defiled his 9 year old daughter and that of **Ntambala Fred v Uganda, SCCA No.34 of 2015** where this Court confirmed a sentence of 14 years in the case of the appellant who had defiled his 14 year old daughter.

Ms. Turumanya on the other hand opposed the appeal and submitted that the sentence of 26 years imprisonment imposed by the learned trial Judge and upheld by the Justices of the Court of Appeal was not illegal or excessive given that the offence of aggravated defilement attracts a maximum penalty of death.

Regarding the case of **Rwabugande** (supra), Ms. Turumanya submitted that this decision has been overtaken by the case of **Abelle Asuman v Uganda, SCCA No.66 of 2016** where this Court held that the Constitution does not provide that the taking into account of the period spent on remand should be done in an arithmetical way. She submitted that the authority of **Rwabugande** was therefore inapplicable to the appellant's case.

Secondly, Ms. Turumanya submitted that the appellant does not have a right of appeal against severity of sentence as section 5(3) of the Judicature Act allows him to appeal against sentence only on a matter of law.

Thirdly, she pointed out that the settled principle is that an appellate court is not supposed to interfere with sentences imposed in exercise of the trial court's discretion of sentencing, unless the sentence is manifestly excessive or so low as to amount to a miscarriage of justice or where the trial court ignores to consider an important matter which ought to have been considered in passing sentence. She submitted that the learned

Justices had rightly declined to interfere with the lenient sentence of 26 years since it was neither illegal nor excessive so as to amount to a miscarriage of justice and that they gave cogent reasons for their decision.

Ms. Turumanya therefore invited this Court to dismiss the appeal for lack of merit. She asked court to uphold the sentence.

Consideration of the Appeal by Court

We have addressed ourselves to the record of appeal, the submissions and the authorities which Counsel for both parties cited in support of their respective arguments.

We wish to state from the outset that this is an appeal against sentence and as a second appeal, this Court is empowered by dint of section 5(3) of the Judicature Act to consider issues of legality of sentence only, and not its severity. Section 5(3) of the Judicature Act reads:

> **"(3) 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 sentence or order, on a matter of law, not including severity of sentence".**

The appeal would fail for this reason alone, since the appellant's complaint includes excessiveness of the 26 years custodial sentence.

Secondly, the main contention by the appellant in this appeal is that the sentence was illegal because the lower courts did not arithmetically deduct the period spent on remand when passing

the sentence as required by article 23(8) of the Constitution and the **Rwabugande** decision. Article 23(8) of the Constitution reads:

> **"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."**

In **Rwabugande,** this Court guided as follows:

> ***"It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused."***

(the underlining is for emphasis)

In the instant case, the learned trial judge used the following words in sentencing the appellant:

> ***"I do however take into account the convict is a first offender and is still a young man of 28 years. He ought to be given an opportunity to reform and rejoin society so as to make some positive contribution. He has been on remand for 3 years and 4 months. Taking that into account and the other mitigating factors, I consider a***

sentence of 26 years imprisonment appropriate. Right of appeal against conviction and sentence explained."

The Court of Appeal upheld this sentence.

It is clear from the above that the trial judge specified that the appellant had spent 3 years and 4 months and that he had taken this fact into account in imposing a sentence of 26 years on the appellant. The sentence was given on the 19th March, 2010 by the High Court and upheld by the Court of Appeal on the 20th February, 2016. On the other hand, the case of **Rwabugande** that the appellant's counsel relied on was decided by this Court on the 3rd March, 2017.

Prior to the **Rwabugande** decision, the accepted interpretation of the expression *"taking into account"* the period spent on remand by the courts in imposing a term of imprisonment was not arithmetical. It did not necessitate a trial court to apply a mathematical formula by deducting the exact number of years spent by an accused person on remand from the sentence to be imposed by the trial court. **[See: Kizito Senkula v Uganda, SCCA no. 24 of 2001, Bukenya Joseph v Uganda, SCCA No.17 of 2010,Katende Ahamad v Uganda, SCCA No.06 of 2004.]**

For instance, in the case of **Katende Ahamad v Uganda** (supra), this Court gave the following guideline to the trial courts:

"When sentencing a person to imprisonment a trial judge or magistrate should say- 'Taking into account the period of .....years (months or weeks whichever is applicable) which the accused has already spent in

remand, I now sentence the accused to a term of .... years(months or weeks, as the case may be)"

Most importantly, it should be noted that after **Rwabugande,** a number of authorities clarified the application of Article 23(8) in relation to **Rwabugande**. They include the case of **Abelle Asuman v Uganda, SCCA No.66 of 2016,** where this Court stated as follows:

"In Rwabugande, this court made it clear that it was departing from its earlier decisions in Kizito Senkula v Uganda, SCCA No. 24 of 2001, Bukenya Joseph v Uganda, SCCA No.17 of 2010, Katende Ahmed v Uganda, SCCA No.06 of 2004 which held that taking into consideration of the time spent on remand does not necessitate a sentencing court to apply a mathematical formula. This court and the courts below before the decision in Rwabugande (supra) were following the law as it was in the previous decisions above quoted since that was the law then. After the Court's decision in the Rwabugande case this court and the Courts below have to follow the position of the law as stated in Rwabugande (supra).

.....A precedent has to be in existence for it to be followed. The instant appeal is a Court of Appeal decision of 20th December, 2016. The Court of Appeal could not be bound to follow a decision of the Supreme Court of 3rd March, 2017 coming about four months after its decision. The case of Rwabugande (supra)

would not bind Courts for cases decided before the 3rd of March, 2017. "

(The underlining was added for emphasis)

Similarly, in the case of **Osherura Owen & Anor v Uganda, SCCA No.50 of 2015,** this Court noted that the authority of **Rwabugande** had calibrated the provisions of Article 23(8) of the Constitution in a language that leaves nothing to speculation. However it followed the doctrine of stare decisis and noted that:

"...the appellants in the appeal were convicted and sentenced on 26th April, 2012 and the Court of Appeal rendered its decision on 20th April, 2015. Needless to say it would be moot to suggest as the appellants appear to intimate that either the High court or the Court of Appeal could possibly have taken cognizance of Rwabugande Moses v Uganda(supra) a decision that was rendered in 2017." [See also: Duke Duke Mabaya Gwaka, SCCA No.59 of 2015]

In **Sebunya Robert & Anor v Uganda, SCCA No. 58 of 2016** this Court was emphatic that:

"Rwabugande does not have any retrospective effect on sentences which were passed before it by courts "taking into account the period a convict spends in lawful custody".

It is clear from the above cases that much as **Rwabugande** is now the current position of the law as far as article 23(8) of the Constitution is concerned, cases that were decided before

Rwabugande were still good law since that was the accepted position of the law by then in relation to article 23(8) of the Constitution. Prior to the Rwabugande decision, what was needed was for court to demonstrate that the period spent on remand had been taken into account.

Consequently, we find that the Court of Appeal did not err in upholding the trial Court's sentence as compliance with article 23(8) of the Constitution was clearly demonstrated by the trial judge in his judgment. We find that the sentence was legal and we have no basis for interfering with the same.

Thirdly, it is also a well-established principle that sentencing is a matter that rests in the discretion of the trial court and that a sentence must depend on the facts of each case. As a principle, this Court will not normally interfere with the exercise of discretion by the trial court unless it is demonstrated that the court acted on a wrong principle, ignored material factors, took into account irrelevant considerations, or on the whole that the sentence is illegal or manifestly excessive. This is aptly articulated in numerous authorities such as **Kiwalabye vs Uganda, SCCA No. 143 of 2001.** In **Rwabugande Moses v Uganda,** (supra) following the case of **Kyalimpa Edward v Uganda, SCCA No.10 of 1995** this court held that;

> ***"...an appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion and it is the practice that as an appellate court, this court will not normally interfere with the***

discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly excessive to amount to an injustice."

Mr. Okwalinga in his submissions relied on the case of **Katende Ahamad v Uganda** (supra) and **Ntambala Fred v Uganda** (supra) to invite this court to reduce the sentence of 26 years to 15 years.

It is trite that each case must be determined on its own merit and circumstances. In **Ntambala Fred v Uganda** (supra), the appellant defiled his 14 year old daughter. The trial court exercised its discretion and sentenced the appellant to 14 years and the appellate courts found no reason to interfere with the same.

In **Katende Ahamad v Uganda** (supra), the appellant had defiled his 9 year old daughter and was sentenced to 10 years. On appeal, this Court found that the lower courts had erred in the way they had sentenced the appellant because they did not take into account the period spent on remand. This Court therefore exercised its discretion, took into account the remand period and still sentenced him to 10 years.

In the instant appeal, the appellant defiled a toddler of 3½ years who was his daughter. The trial court considered the despicable circumstances of the case, took into account the period spent on remand and exercised its discretion to sentence the appellant to 26 years. According to paragraph 35 (d) and (i) of the Sentencing Guidelines, the tender age of the victim and knowledge of the

tender age thereof, are aggravating factors in determining the sentence for the offence of defilement.

Most importantly, it should be noted that the offence of aggravated defilement that the appellant was convicted of attracts a maximum penalty of death under sections 129, 130 and 133 of the Penal Code Act, (Cap 120).

Note should also be taken of the fact that under the 3rd Schedule to the Sentencing Guidelines, the sentencing range for aggravated defilement, the starting point is 35 years and ranges from 30 years up to death.

In our view, this sentence was lenient considering the age of the victim and the circumstances in which the appellant committed the offence. The offence was committed while the appellant's wife was sleeping on the same bed.

The cases relied on by counsel for the appellant are therefore distinguishable in the circumstances in view of the fact that the victims were much older than the one in this appeal.

We therefore find that the sentence of 26 years was neither illegal nor manifestly excessive.

Furthermore, we agree with the finding by the learned Justices of the Court of Appeal that the appellant was the biological father of the victim and is constitutionally enjoined to protect and care for her as a parent. They found that in defiling her he had failed in this duty. He violated article 31(4) of the Constitution which provides that:

"(4) It is the right and duty of parents to care for and bring up their children."

The appellant also contravened section 6(1) of the Childrens' Act (Cap 59) which provides that:

"(1) every parent shall have parental responsibility of his or her child."

In the result, we find no merit in this appeal and accordingly we dismiss it.

Dated at Kampala this 6th day of August 2019.

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Hon. Justice Arach-Amoko
JUSTICE OF THE SUPREME COURT

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Hon. Justice Mwangusya
JUSTICE OF THE SUPREME COURT

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Hon. Justice Opio-Aweri
JUSTICE OF THE SUPREME COURT

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Hon. Justice Mugamba
JUSTICE OF THE SUPREME COURT

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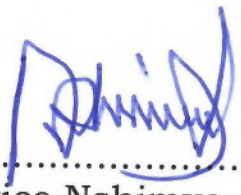

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Hon. Justice Nshimye

AG. JUSTICE OF THE SUPREME COURT

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