

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 219 OF 2010

(An appeal against Sentence of the High Court of Uganda at Mukono before His Lordship V. T. Zehukirize, J dated 20/09/2010 in Criminal Case No. 263 of 2010)

TUMWINE ALEX :::APPELLANT

VERSUS

UGANDA ::: RESPONDENT

**CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE HELLEN OBURA, JA
HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA**

JUDGMENT OF THE COURT

Introduction

This is an appeal from the judgment of the High Court of Uganda at Mukono in Criminal Session Case No. 263 of 2010 delivered on 20th day of September, 2010 by Zehukirize, J in which the appellant was convicted of aggravated defilement contrary to Section 129(3) and (4) of the Penal Code Act, Cap 120 and sentenced to life imprisonment.

Background of appeal

The facts as accepted by the learned trial Judge are as follows: -Namataka Fiona (PW2), the victim aged 6 years lived with her grandmother one, Nabukonde Beatrice (PW1), who owned a bar in which the appellant was a regular customer.

On 7/2/2009, PW1 went to her garden leaving PW2 and other young children at home. In the absence of PW1 the appellant came to her home as usual to have a drink.

While there, he grabbed the victim (PW2), placed her on his laps and had sexual intercourse with her. PW2 felt pain and cried telling the appellant to leave her. This attracted PW1's attention and she came home to find out what was happening only to find the victim on the appellant's laps. The appellant's trousers had been pulled half way down.

PW1 raised an alarm which attracted people including Kaduwa Peter (PW3). When confronted, the appellant denied having defiled the victim, but agreed to go to the LC's together with the victim, PW1 and PW3. They were eventually referred to the police station.

The appellant was detained while PW2 was taken to Kawolo Hospital for medical examination. The medical report revealed that the victim was six years old, her hymen had been recently ruptured with bruises in her private parts. The appellant was also examined by a doctor and found that he was 42 years old and was normal.

The appellant was subsequently indicted with the offence of aggravated defilement, tried, convicted and sentenced to life imprisonment by the learned trial Judge.

With leave of this Court granted under Section 132 (1) (b) of the Trial on Indictments Act, Cap 23, the appellant has now appealed against sentence. The sole ground is:-

- 1. The learned trial judge erred in law and fact when he sentenced the appellant to a period of life imprisonment which was manifestly harsh and excessive in the circumstance, and occasioned a failure of justice.***

Legal Representation:

At the hearing of this appeal, Mr. Wanambugo Innocent, learned Counsel appeared for the appellant on State Brief, while Mr. Ndamurani Ateenyi David, Senior Assistant Director of Public Prosecution appeared for the respondent. The appellant was in court.

Appellant's Submissions

Counsel for the appellant faulted the learned trial Judge for imposing a sentence of life imprisonment that was manifestly excessive, and for ignoring mitigating factors such as the fact that the appellant was a first offender, who had spent 1 year and 7 months on remand and was married with 6 children under his care.

Counsel further faulted the trial court for failing to address the question of uniformity in sentencing. He cited several cases where this Court and the Supreme Court have imposed lesser sentences for a similar offence although

there existed more aggravating factors. He referred us to *Naturinda Amon vs. Uganda, Supreme Court Criminal Appeal No. 95 of 2010* and *Ntambara Fred vs. Uganda, Supreme Court Criminal Appeal No. 34 of 2015*.

He prayed for a more lenient sentence and proposed a term of 14 years' imprisonment.

Respondent's Submissions

In reply, the learned Senior Assistant D.P.P, opposed the appeal and supported the sentence of life imprisonment. He contended that the learned trial Judge had been lenient as the maximum sentence for aggravated defilement was death. Further, that the learned trial judge had passed a lawful sentence after he had considered both the mitigating and aggravating factors, particularly the fact that this was a unique case where there was an age difference of 36 years between the appellant and the victim. He prayed this Court to confirm the sentence of life imprisonment.

Resolution by Court

We have carefully listened to the submissions from counsel on either side, and perused the court record and the law and authorities cited to us.

We are mindful of our duty as a first appellate Court, to re-evaluate all the evidence adduced at the trial and come up with our own conclusions on all issues of law and fact including sentence, bearing in

mind that the trial court had the benefit of observing the demeanor of the witnesses and we have not. **See Rule 30 of the Judicature (Court of Appeal Rules) Directions SI 13-10 and Bogere Moses vs. Uganda, Supreme Court Criminal Appeal No.001 of 1997.**

The principles upon which an appellate court should interfere with the sentence imposed by the trial court were considered in **Kizito Senkula vs. Uganda, Supreme Court Criminal Appeal No. 024 of 2001** where court observed:-

"... In exercising its jurisdiction to review sentences, an appellate court does not alter a sentence on the mere ground that if the members of the appellate court had been trying the appellant they might have passed a somewhat different sentence; and that an appellate court will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in James vs. R (1950) 18 EACA 147, it is evident that the judge has acted upon some wrong principle or over-looked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case."

The Supreme Court in **Kiwalabye vs. Uganda, Criminal Appeal No. 143 of 2001 (unreported)** expanded the principles further when it stated :-

"The appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence, unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in principle".

The ***Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*** provide guidance to courts on sentencing. Apart from the mitigating and aggravating factors, court may also consider other relevant factors.

We note that the maximum sentence for aggravated defilement is death. The Sentencing Guidelines (supra) give a sentencing range between 30 years imprisonment and death penalty. The above stated guidelines are to assist Courts of Judicature in having a uniform approach to sentencing as they come up with appropriate sentences. The ultimate responsibility to determine the appropriate sentence of a particular convict, however, lies with the court. Court does so by weighing all relevant factors and then exercising its discretion judiciously.

We shall be mindful of the above said principles, as we resolve this appeal.

From the perusal of the sentencing order, the learned trial Judge stated that:-

'I have considered submissions by both counsel and the convict's prayer. In particular I have noted that the convict is a first offender. However, he committed a serious offence to the prejudice of a young girl of 6 years. She will always be traumatized by this beastly act. The offence with which the convict has been convicted of carries maximum sentence of death. But due to prayers for lenience I will not impose such sentence. But the punishment should be such as to send clear message to the would

be defilers of these kids. Having considered all the continuous of this case and the period spent on remand I sentence the convict to imprisonment for life''.

We find that while passing sentence of life imprisonment, the learned trial Judge concentrated only on the aggravating factors and ignored any factors that would have mitigated the appellant's sentence.

The learned trial Judge therefore over looked material factors and in the result reached a wrong conclusion in respect of sentence.

In this case, we find that during sentencing, it was pleaded in mitigation that the appellant who was 42 years at the time of conviction had been on remand for 1 year and 7 months, he was a first offender and had six helpless children at home. As to the aggravating factors, we observe that the appellant committed a very grave offence of aggravated defilement that attracts death as the maximum penalty. We also take into account the fact that the appellant intentionally and violently defiled a six year old child who was greatly traumatized since the whole village came to know of the incident. The public must be protected against such acts of elderly men defiling young children.

Having noted the above, we are also conscious of the need for courts to maintain consistency in sentencing. In ***Owinji William vs. Uganda, Court of Appeal Criminal Appeal No.106 of 2013***, where the appellant defiled a 12 year old girl and never pleaded guilty, this court set aside a sentence of 45 years and substituted the same with one for 15 years imprisonment.

In another decision of ***German Benjamin vs. Uganda: Criminal Appeal No.142 Of 2010***, the victim aged 5 years was sexually ravaged mercilessly

by the appellant. The victim's mother found blood in her private parts soon after the defilement. She cried due to the pain. The appellant was 35 years and fit to be a father of the victim. Appellant had spent 4 ½ years on remand. He was a first offender. He showed signs of reform. This Court set aside the sentence of 20 years imprisonment and substituted the same with one of 15 years imprisonment.

In ***Rugarwana Fred vs. Uganda, Supreme Court Criminal Appeal No. 39/1995***, the Supreme Court upheld a sentence of 15 years as not being excessive where a 5 year old victim was defiled in a latrine by the appellant who was an adult.

In yet another decision in ***Bikanga Daniel vs. Uganda, Court of Appeal Criminal Appeal No. 038 of 2000 (unreported)***, the appellant had been convicted of defilement of a girl under 18 years of age. He detained the girl for two days in his house where he repeatedly defiled her. He was sentenced to 21 years imprisonment. On appeal the sentence was found to be harsh and excessive. It was substituted with a sentence of 12 years.

Having subjected the sentence imposed by the learned trial Judge in this case to fresh scrutiny, and having considered the record, the law and court precedents, we have come to the conclusion that the sentence of life imprisonment imposed on the appellant was harsh and excessive in the circumstances.

We find that a sentence of 15 years imprisonment would meet the ends of justice. It is appropriate and in line with sentences passed by courts in earlier similar cases. From the 15 years, we subtract the 1 year and 7 months spent

on remand. The appellant shall therefore, serve a term of 13 years and 5 months imprisonment from 20th September, 2010, the date of conviction.

We so order.

Dated at Kampala this....1st.....day of July.....2019.



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ELIZABETH MUSOKE

JUSTICE OF APPEAL



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HELLEN OBURA

JUSTICE OF APPEAL



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EZEKIEL MUHANGUZI

JUSTICE OF APPEAL