

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MASAKA
CRIMINAL APPEAL No. 0425 OF 2014**

(Arising from High Court of Uganda at Masaka Criminal Session Case No. 0055/2009)

TUSABE JOHN BOSCO :::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :::::::::::::::::::::::::::::: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Masaka before Musoke-Kibuka, J. delivered on 29th April, 2011 in Criminal Session Case No. 0055 of 2009)

**CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA
HON. MR. JUSTICE REMMY KASULE, AG. JA**

JUDGMENT OF THE COURT

Brief Background

The appellant was convicted of the offence of Aggravated Defilement contrary to section 129 (3) & 4 (a) of the Penal Code Act, Cap. 120 and was sentenced to life imprisonment by Musoke-Kibuuka, J in the High Court of Uganda at Masaka.

The background to that conviction and sentence was as follows:

The appellant was charged and committed to the High Court for trial on an Indictment containing the offence of Aggravated Defilement. He pleaded not guilty and the case proceeded for trial. After the prosecution had presented its case, the appellant was called upon to give his defence but he exercised his right to keep quiet and did not call any witnesses.

Thereafter, the learned trial Judge accepted the facts presented for the prosecution that the appellant, had, on the 2nd day of January, 2009 at Nkoni "A" village in the Masaka District performed a sexual act with NW (a minor) then under the age of 14 years. He convicted the appellant as indicted and



sentenced him as indicated earlier. Being dissatisfied with the decision of the High Court, the appellant lodged this appeal in this Court against sentence only on the ground that:

- "1. The learned trial Judge erred in law and in fact when he sentenced the appellant to imprisonment for life which sentence is harsh and manifestly excessive in the circumstances."**

Representation

At the hearing of the appeal, Ms. Namata Edith, learned Counsel, represented the appellant, who was in Court, on state brief; while, Ms. Joanita Tumwikirize, learned State Attorney from the Office of the Director of Public Prosecutions, represented the respondent. Counsel for both parties made oral submissions which this Court has considered in determining the present appeal.

Appellant's case

The appellant preferred this appeal against sentence only. For that reason, his counsel brought an application under **Section 132 (1) (b)** of the **Trial on Indictments Act, Cap. 23** and **Rule 43 (3) (a)** of the **Judicature (Court of Appeal Rules) Directions S.I 13-10** for leave to appeal against sentence only. Leave was accordingly granted.

Counsel submitted that the sentence imposed on the appellant was harsh and excessive for three reasons. First, that the sentence did not afford the appellant an opportunity for reform and reconcile with the victim and the community as he would be incarcerated for the rest of his life. Secondly, that the appellant was now a sickly man and it was harsh to keep him in prison for the rest of his life. Thirdly, that in imposing the sentence in question, the principle of maintaining consistency in sentencing was not followed by the learned trial Judge. Counsel cited the following authorities to buttress the foregoing point; **Kobusheshe vs Uganda, Court of Appeal Criminal Appeal No. 0110 of 2008** where this Court upheld the sentence of 17 years imprisonment imposed by the trial Court on the appellant, a 30 year old man for defiling a 5 year old girl. In **Ninsiima vs. Uganda, Court of Appeal Criminal Appeal No. 0180 of 2010** where this Court set aside a sentence of 30 years imprisonment imposed on the appellant by the trial



Court for Aggravated Defilement and substituted in its place a sentence of 15 years imprisonment. Counsel then asked this Court to set aside the sentence imposed by the trial Court as it was harsh and excessive in light of the authorities cited above and proposed that a sentence of 15 years imprisonment is substituted in its place.

Respondent's case

The respondent opposed the appeal and supported the sentence passed by the learned trial Judge. In her concise submissions, counsel contended that there was no justification to interfere with that sentence which was a product of the exercise of the learned trial Judge's discretion. She relied on **Kamya Johnson Wavamuno vs. Uganda, Supreme Court Criminal Appeal No. 0016 of 2000** for the legal position that an appellate court will not interfere with a sentence of the trial court unless there has been failure to exercise discretion or take into account material considerations or where an error in principle was made by the trial Court. Counsel then pointed out that all the material considerations in the appellant's case were considered including the mitigating factors, aggravating factors and the period he had spent on remand while attending trial. For that reason, counsel prayed that this Court finds that the present appeal had no merit, and to dismiss it and uphold the sentence imposed on the appellant by the trial Court.

Resolution of the Appeal

We have carefully considered the submissions of counsel for both parties, the court record as well as the law and authorities cited and those not cited which are relevant in the determination of the present appeal. This is a first appeal and we are alive to the duty of this Court as a first appellate court to reappraise the evidence and come up with our own inferences. See: **Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions S.I 13-10** and **Kifamunte Henry vs. Uganda Supreme Court Criminal Appeal No. 10 of 1997**.

The above stated duty is not lessened in appeals relating to sentence alone because even there the Court has to reappraise the exercise of the learned trial Judge's discretion. This oft-cited passage appears in **Ogalo s/o Owoura v. R (1954) 21 E.A.C.A. 270**:



"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 considerations."

The above passage lays down the guiding principles which must be taken into account prior to an appellate court interfering with the trial Court's discretion in sentencing. Further in **Kyalimpa Edward vs. Uganda, Criminal Appeal No. 0010 of 1995**, the Supreme Court referred to R vs Haviland (1983) 5 Cr. App. R (s) 109 and held as follows:

"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. 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 so excessive so as to amount to an injustice."

Further still, in **Kamy Johnson Wavamuno, Supreme Court Criminal Appeal No. 0016 of 2000**, the Court laid down these further guiding principles:

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

Another relevant guiding principle is that when this Court is reappraising the sentence passed by the trial Court, it has to ensure that the sentence followed the consistency principle. In **Aharikundira Yusitina vs. Uganda Criminal Appeal No. 0027 of 2015**, the Supreme Court observed as follows:

"It is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation."



We note that where this Court is satisfied that any of the above principles were not followed by the trial Court, it is duty bound to interfere with the sentence it imposed.

An allocutus prior to sentencing the appellant was carried out in the trial court where the following mitigating factors were presented; he was a first offender with no previous conviction; and he had been remanded in prison from where he attended trial for 2 years and 4 months.

The prosecution asked the trial Court to consider the following aggravating factors. The gravity of the offence committed by the appellant which attracted a maximum sentence of death. Court was also asked to consider the tender age of the victim of only three and a half years who must have endured a great deal of physical and psychological trauma from the assault in issue. Court was further asked to send a message that sexual assaults against young children should not be tolerated.

At page 33 of the record, the learned trial Judge had this to say when sentencing the appellant:

"This convict performed a sexual act against a girl of very tender age of 3^{1/2} years. Court has considered all available options in sentencing him. It has considered the two mitigating factors in his favour – being a first offender and having spent 2 years and 4 months on remand.

But even then, it appears from the facts and circumstances of this case that justice can only be done and also be seen to have been done if the convict spends the rest of his life in prison away from vulnerable children of the caliber of the victim in this case.

He is, therefore, sentenced to imprisonment for life."

The main complaint against the sentence of the trial Court in this appeal is that it was over and above the sentences usually imposed in previously decided cases. We have examined some of those cases below:

In **Ntambala Fred vs Uganda, Criminal Appeal No. 0034 of 2015**, the Supreme Court upheld a sentence of 14 years imprisonment for Aggravated Defilement which had been imposed by the trial Court and maintained by the Court of Appeal. The victim was 14 years old.

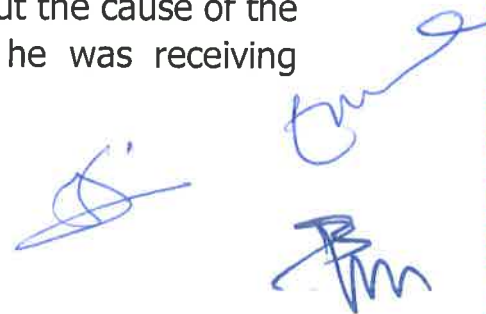


In **Komakech Samuel vs. Uganda, Court of Appeal Criminal Appeal No. 0440 of 2014**, a sentence of 16 years imprisonment imposed by the trial Court on the appellant, whose age was not indicated, but who had defiled an 8 year old girl was upheld.

In another case of **Kobusheshe vs Uganda, Court of Appeal Criminal Appeal No. 0110 of 2008**, the sentence of 17 years which the trial Court had meted on the appellant, a 30 year old man for defiling a 5 year old girl was upheld by the Court of Appeal.

We note that the sentencing range for aggravated defilement has been immutably set at a starting point of 30 years to death, whatever the mitigating factors by the Constitution (Sentencing Guidelines For Courts Of Judicature) (Practice) Directions, 2013. This Court, has however, previously stated that the said Sentencing Guidelines have to be applied taking into account the sentences imposed in past precedents of Court decisions where the facts have a resemblance to the case under trial. **See: Ninsiima Gilbert vs Uganda, Court of Appeal Criminal Appeal No. 0180 of 2010.**

The sentences imposed in the Court decisions we referred to earlier, for aggravated defilement, were in the range between 14 years and 17 years. For that reason, we find that in the circumstances, the sentence of life imprisonment which was imposed on the appellant for the same offence is harsh and excessive. We shall set it aside and proceed to determine an appropriate sentence in the circumstances. We observe that the higher end of sentences for aggravated defilement is 17 years imprisonment according to the precedents. However, in this case, we find that there is justifiable cause to depart from those precedents and enhance the sentence for aggravated defilement because of the tender age of the appellant's victim who was only 3^{1/2} years. In our view, any person who exposes the innocence of such a toddler to the depravities of sexual assault deserves to be met with a punishment that depicts society's disapproval of such conduct. We have also considered the sickly state of the appellant who we observed in court to be walking with difficulty and needing extra support from the prison warders to get by. The prison warders were not sure about the cause of the appellant's medical condition although they said that he was receiving treatment in prison.



On the whole a sentence of 22 years imprisonment is appropriate considering all the circumstances. From that sentence we shall deduct the period of 2 years and 4 months, which the appellant spent in prison on remand while attending trial. The appellant shall serve a term of imprisonment of 19 years and 8 months from the date of his conviction on the 29th day of April, 2011.

This appeal would be disposed of accordingly.

We so order.

Dated at Masaka this 9th day of Dec 2019.



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Elizabeth Musoke

Justice of Appeal



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Ezekiel Muhanguzi

Justice of Appeal



Remmy Kasule,

Ag. Justice of Appeal