THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL No. 316 OF 2009

(An appeal against sentence, upon conviction, by Katutsi J., in High Court Criminal Session Case No. 0143 of 2005 at Rukungiri)

BYAMUKAMA NABOTH ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

CORAM:

1. HON. MR. JUSTICE KENNETH KAKURU, J.A.

2. HON. MR. JUSTICE SIMON MUGENYI BYABAKAMA, J.A.

3. HON. MR. JUSTICE ALFONSE C. OWINY - DOLLO, J.A.

JUDGMENT OF THE COURT

The Appellant was convicted of the offence of aggravated defilement in contravention of section 129 (3) (a) and 4 (b) of the Penal Code Act; and sentenced to life imprisonment. Initially, he had appealed against both conviction and sentence. However, he abandoned the appeal against conviction; and, with leave of Court, now appeals against sentence only. He contends that the life sentence imposed on him for the offence of defilement is harsh and manifestly excessive in the circumstance; hence, he pleads with this Court to set the sentence aside and impose a lesser one.

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circumstance of the case. He pleaded with this Court to reduce the sentence to 25 (twenty-five) years in keeping with sentences in similar cases. However, State Counsel Alex Bagada, who appeared for the Respondent, opposed the appeal, and urged this Court to confirm the life sentence as being appropriate, owing to the fact that the Appellant was convicted of the offence of aggravated defilement; and had earlier been convicted of another offence of defilement, for which he was serving sentence at the time of this conviction.

It is now settled, that this Court can only interfere with a sentence imposed by a trial Court where the sentence is either illegal, is founded upon a wrong principle of the law, or Court has failed to consider a material factor, or is harsh and manifestly excessive in the circumstance - (*see James vs R. (1950) 18 E.A.C.A. 147, Ogalo s/o Owoura vs R. (1954)24 E.A.C.A. 270, Kizito Senkula vs Uganda - S.C. Crim. Appeal No. 24 of 2001, Bashir Ssali vs Uganda - S.C. Crim. Appeal No. 40 of 2003,* and *Ninsiima Gilbert vs Uganda - C.A. Crim. Appeal No. 180 of 2010*). Otherwise, this Court will not interfere with sentence imposed by a trial Court merely because it would have imposed a different sentence.

In the case of ***Kyalimpa Edward vs Uganda - S.C. Crim. Appeal No. 10 of 1995***, the Supreme Court, while laying the primary responsibility for sentencing on the trial Court, made further clarification on these principles governing interference by the appellate Court on sentence, as follows: -

or so low as to amount to a miscarriage of justice, or where a trial Court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence, or where the sentence imposed is wrong in principle."

Furthermore, in exercising its discretion during sentencing, while mindful that no two cases are committed under the same circumstance, Court must always be alive to the need to maintain consistency or uniformity in sentencing; see ***Kalibobo Jackson vs Uganda - C.A. Crim. Appeal No. 45 of 2001***, ***Naturinda Tamson vs Uganda - C.A. Crim. Appeal No. 13 of 2011***, ***Kyalimpa Edward vs Uganda*** (supra), and ***Livingstone Kakooza vs Uganda*** (supra). In ***Mbunya Godfrey vs Uganda - S.C. Crim Appeal No. 4 of 2011***, the Supreme Court stated that: -

"We are alive to the fact that no two crimes are identical. However, we should try as much as possible to have consistency in sentencing."

Accordingly then, in determining the sentence appropriate in the instant case before us, we have to be guided by sentences in cases similar with this one in the commission of the offence. We note that in ***Attorney General vs Susan Kigula & Others - S.C. Const. Appeal No. 1 of 2005***, the Court observed that murders are not committed under the same circumstance; and that murderers vary in character, as some are first offenders, while others are contrite. Hence, Court

sentence appropriate in the circumstance; but reduced it to 13 (thirteen) years since it was unclear whether the trial Court had taken into account the 2 (two) years the Appellant had been on remand.

In the case of ***Sam Buteera vs Uganda - S.C. Crim. Appeal No. 21 of 1994***, the Court confirmed sentence of 12 (twelve) years imprisonment as being appropriate for the defilement of a victim of 11 (eleven) years by an adult. In the ***Bashir Ssali vs Uganda*** case (supra), the Appellant was sentenced to 16 years in prison for defiling a school girl-child of P.3 class. However, of its own volition, the Supreme Court, raised and addressed the issue of legality of the sentence imposed on the Appellant. This was because the trial Court had not complied with ***Article 23 (8) of the Constitution***, which enjoins Courts to take into account the period a convict has spent in lawful custody, while sentencing him or her.

Accordingly, in that case, the Supreme Court took into account the four years the Appellant had spent on remand by the time of his conviction, and reduced the sentence from 16 to 14 years. In the instant case before us, it is evident that the Appellant was not a first offender, as he was already a convict serving sentence for another offence of defilement, by the time of the conviction against whose sentence he now appeals. We do appreciate why the trial judge did not direct his mind to the provisions of clause (8) of Article 23 of the

years in prison; and this takes effect from the 5th of June 2009, when he was sentenced by the trial judge.

We agree with the trial judge that this sentence runs concurrently with the sentence imposed in ***High Court Criminal Case No. 54 of 2008***, which he was already serving, when he was sentenced by the trial judge in the instant case before us.

Dated at Mbarara; this 6th day of December 2016

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1. HON. MR. JUSTICE KENNETH KAKURU, J.A.

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2. HON. MR. JUSTICE SIMON MUGENYI BYABAKAMA, J.A.

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3. HON. MR. JUSTICE ALFONSE C. OWINY - DOLLO, J.A.