THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM*:** ***HON. LADY JUSTICE A.E.N.MPAGI-BAHIGEINE, JA.

HON.LADY JUSTICE C.N.B.KITUMBA, JA.

HON.LADY JUSTICE C.K.BYAMUGISHA, JA.

CRIMINAL APPEAL NO.38/2000

BETWEEN

BIKANGA DANIEL::APPELLANT

AND

UGANDA::RESPONDENT

[***Appeal from a conviction and sentence of the High Court of Uganda at Masindi (*Ogoola J) *dated 8th September 1998 in HCCSC No.604/98***]

JUDGEMENT OF THE COURT

This is an appeal against sentence.

The appellant was charged with defilement contrary to **section 129(1)** of the **Penal Code Act**. It was alleged in the particulars of the indictment that on the 3rd April' 95 at Kibogo village, Mugarama subcounty in Kibale District he had sexual intercourse with **NAMAGEMBE NOWERINA,** a girl under the age of 18 years.

The prosecution's case was that on the day in question, at about 10.00 a.m, while the victim was coming from the well to fetch water, she met the appellant. He removed the jerrycan from her head and carried her away to his house where he had sexual intercourse with her. He detained her for two days during which time he had sexual intercourse with her several times. She made an alarm but no one came to her rescue. The appellant is alleged to have threatened whoever tried to come to her rescue. On

the 5th April '95 she was rescued by her father, Nyanzi (P.W.2) with the help of the police. The appellant was charged and later tried by the High Court at a session held at Masindi. At the trial, the prosecution adduced oral testimony of three witnesses, namely the victim (P.W.1), her father and the investigating officer, D/IP Ochaya Marino. The following pieces of evidence were admitted pursuant to the provisions of **section 66** of the **Trial on Indictments Act:**

1. The statement of the arresting officer (exhibit P.1).
2. The medical report on the examination of the victim and the appellant (exhibit P.2).
3. Police form No.17A requesting laboratory analysis of certain items of clothing and blood samples of the victim and the appellant (exhibit P.3).
4. Government Analyst's report on the requested items (exhibit P.5).
5. The sketch map of the scene of crime (exhibit P.6).

The appellant in his defence denied that the victim was found in his house as was alleged by the prosecution witnesses. Instead he told court on oath that on the 6th April when he opened his house after being requested to do so by the local council chairman of the area, the victim was standing outside with a jerrycan of water. He also claimed that there was a grudge between him and the family of the victim because he had made the sister of the victim pregnant, refused to marry her and to pay any dowry. The learned trial judge rejected his story convicted him as charged and sentenced him to 21 years imprisonment- hence this appeal.

The memorandum of appeal filed on his behalf has only one ground namely that: **"The sentence of twenty one years imprisonment passed by the learned trial judge on the appellant was harsh and excessive in the circumstances of the case".** When the matter came before us for final disposal Mr Mark Bwengye, learned counsel for the appellant, submitted that the appellant was a first offender, was 21 years old at the time of committing the offence but claimed that these factors were not taken into account by the trial judge. He also stated that at the time of sentence, the appellant was married with 4 children. He criticised the learned trial judge for what he called demonising the appellant by calling him a sex animal who showed no remorse throughout the trial.

He conceded that the sentence though legal was harsh and excessive in the circumstances of this appeal.

He cited to us some authorities in support of the appellant's case. The first was **Kabatera Steven v Uganda CACA No.123/2001(**unreported). The appellant was convicted of defilement and sentenced to 10 years imprisonment. On appeal to this court, it was argued that the learned trial judge failed to take into account the age of the appellant before imposing the sentence. In allowing the appeal on sentence this court said:

"The only factor that he did not take into account was the age of the appellant. We are of the opinion that the age of an accused person is always a material consideration that ought to be taken into account before a sentence is imposed."

The sentence of 10 years was substituted with one of 5 years.

The second case cited by learned counsel was **Sentamu James v Uganda CACA No.39/02(**unreported). The appellant, who was aged 19 years old, was charged, prosecuted and convicted of defilement contrary to **section 129(1)** of the **Penal Code Act.** He was sentenced to 8 years imprisonment. Being aggrieved by the sentence imposed, he appealed to this court. In allowing the appeal, this court took into account the factor that the complainant and the appellant were almost of the same age and were lovers. At the trial, the complainant admitted that the appellant was her boyfriend and had offered to marry her. He had introduced her to his relatives who regarded her as a wife although she was not. This court interfered with the exercise of discretion by the trial judge by imposing a sentence of 4 years imprisonment.

The third case is **Kalibobo Jackson v Uganda CACA No. 54/01.** The appellant was aged 25 years at the time he committed the offence of rape. He was sentenced to 17 years imprisonment. On appeal to this court, the sentence was reduced to 7 years imprisonment. The court found that the sentence of 17 years was so manifestly excessive as to cause a miscarriage of justice.

Learned counsel invited us to reduce the sentence to reflect the mitigating factors he pointed out.

In responding to the above submission, Mr Mulumba, Principal State Attorney, stated that the appeal has no merit. He pointed out, quite rightly in our view, that sentencing is at the discretion of the trial court and the appellate court should not interfere unless

the trial court acted on wrong principles. It has to be shown that the sentence was harsh or manifestly excessive. In the case of defilement, counsel stated, the maximum sentence is death and the trial judge could have imposed a sentence of 50 years. He claimed that the sentence was not manifestly excessive in view of the circumstances of the case. He invited us to dismiss the appeal.

We agree with the statement of the law that sentencing is a discretionary power that lies within the discretion of the trial court. Like all discretionary powers, it must be exercised judiciously and on good principles. To that extent, an appellate court will not interfere with the exercise of discretion, unless it is shown that there has been a failure to exercise discretion or a failure to take into account a material consideration or an error in principle was made. As for the sentence, it has to be shown that it is manifestly excessive in the circumstances of the case. It is not enough that members of the appellate court would have exercised their discretion differently.

In the matter now before us, the sentence imposed was legal. The issue is whether it is manifestly excessive as claimed by the appellant. In passing sentence the learned trial judge said:

"I have listened carefully to the pleas made above by the prosecution, the defence counsel, and the accused. I have taken all of them into consideration in arriving at the appropriate sentence in this case.

The depth, to which the accused sank, in this case as a sex animal, must be commensurate with the height to which his sentence is to be elevated. For one thing, he has amply demonstrated his eager proclivities towards harming society and hurting Mr Nyanzi's family repeatedly. For another he has throughout these proceedings showed no remorse whatsoever. On the contrary, he has appeared haughty, unashamed and callous. In this regard, it will be remembered that the accused frustrated any rescue efforts by the victim's mother when he threatened to cut her with a sword. Once put in prison by the long arm of the law, he promptly escaped- only to be recaptured forthwith. He is truly a danger to society. He is loose cannon that must be tamed. He must be put away, securely from society-in order to protect him from decent, law-abiding members of society and also to protect him from himself-by putting him into a cold storage for purposes of freezing his inordinate hot passions.

In view of the above factors, both mitigating and aggravating, I sentence the accused to 21 years (twenty-one years in prison. Hopefully after 21 years incarceration, this sexual machoman will have matured out of his childish escapade".

We note with concern the attitude and language of the learned trial judge in his approach and comments before he imposed the sentence in question. First an accused person who pleads not guilty to the charge, has no duty to show remorse. He maintained his innocence. Secondly, no evidence was given during the trial to the effect that the victim's mother or anyone else tried to rescue the victim at all. So the question of the appellant having chased her away or threatened to cut her with a sword was not in evidence. Thirdly the learned trial judge demonised the appellant by calling him a sex animal, *machoman* and one with inordinately hot passions. This, in our view was uncalled for.

Civil and judicial language must always be used in court whatever the circumstances of the case might be. The learned Principal State Attorney who represented the prosecution had cited some authorities to guide court. The learned judge did not follow them. He gave no reasons for not doing so. We think that there was failure to exercise discretion which made the sentence harsh and excessive in the circumstances of this appeal. For that reason we shall interfere with the sentence imposed. We consider that a sentence of 12 years would be appropriate in the circumstances of this appeal. The appeal is allowed. The sentence of 21 years imposed by the trial judge will be set aside and substituted with one of 12 years imprisonment from the date of conviction -08/09/89.

Dated at Kampala this 16th day of March 2005.

A.E.N.Mpagi-Bahigeine

Justice of Appeal

C.N.B.Kitumba

Justice of Appeal

C.K.Byamugisha

Justice of Appeal