

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA**

5 **CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.
HON. JUSTICE C.N.B. KITUMBA, JA.
HON. JUSTICE C.K. BYAMUGISHA, JA.**

CRIMINAL APPEAL NO. 217 OF 2003

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ZZIWA MOHAMMED:..... APPELLANT

VERSUS

UGANDA:..... RESPONDENT

15 *[An appeal from the sentence of the High Court held at Kampala (Rwamisazi-Kagaba, J.) dated 21/11/2002 in Criminal Session Case No. 126 of 2003]*

JUDGEMENT OF THE COURT

20 Zziwa Mohammed, the appellant has with leave of this Court appealed against a sentence of 5 years imprisonment

The facts that led to this appeal are as follows:-The appellant was a special hire taxi driver. On 24/9/2001 the appellant was hired by the victim's mother to take them to Rubaga Girls' School. While the victim's mother and her brother were in the headmaster's office the appellant and the victim struck a friendship. The victim got the appellant's telephone number.

25 On 26/9/2001 by prior arrangement the appellant took the victim to a lodge at Nakulabye where he defiled her. She became pregnant and the victim's mother learnt that it was the appellant who was responsible for the pregnancy. On his arrest the appellant readily admitted the offence. He was indicted for defilement and pleaded guilty. He was sentenced to 5 years imprisonment, and hence the appeal on the following ground.

“That considering the mitigating factors as were advanced on behalf of he appellant the sentence of 5 years ought to have included the period of nearly 2 years spent on remand.”

5 Mr. Seguya Samuel, the learned counsel for the appellant, submitted that the sentence of 5 years imprisonment was excessive and there was a miscarriage of justice. According to counsel since the victim was 15 years old, the appellant 29 years and the two parties appear to have consented the learned judge should have deducted from the sentence of 5 years imprisonment the period of 2 years which the appellant had spent
10 on remand. Ms Annet Koote learned Senior State Attorney supported the sentence.

The powers of sentencing are within the discretion of the trial court. The appellate court would not interfere with the sentence passed unless it is illegal. In the trial judge did not follow the correct principles or its manifestly harsh or excessive so as to occasion a miscarriage of justice. As was stated by the Supreme Court in **Kamya**
15 **Johnson Wavamuno vs. Uganda, Criminal Appeal No. 16 of 2000 at p. 17.**

**“It is well settled that the Court of Appeal will not interfere with the exercise of the discretion unless 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. It is not sufficient that members of the court
20 would have exercised their discretion differently before passing sentence.”**

In the instant appeal the learned judge took into consideration all relevant factors before sentencing the appellant. As rightly pointed out by the Senior State Attorney,
25 the judge took into consideration the fact that the appellant took advantage of a school girl .When passing sentence the judge stated thus:-

**After considering all the aggravating and mitigating circumstances against and in favour of the accused respectively, I feel the justice of the
30 case require a custodial sentence should be meted out to the convict. Young men should not be allowed ruin the liver of young innocent and unsuspecting females such as the victim in this case.**

“SENTENCE”

This convict shall serve a sentence of five (5) years imprisonment. This does not include the period he has been on remand.”

5 According to us the judge took into account the period the appellant had spent on remand as is required to do by article 23(8) of the Constitution. As stated by the Supreme Court in **Kizito Senkule Vs Uganda Criminal Appeal No. 24 of 2001** “to take into account” does mean a mathematical exercise. What is necessary is that the trial court makes an order of sentence that is not ambiguous..

This appeal lacks merit and is accordingly dismissed.

10 **Dated at Kampala this 6th day of February 2006.**

A.E.N. Mpagi –Bahigeine
JUSTICE OF APPEAL

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C.N.B. Kitumba
JUSTICE OF APPEAL

C.K. Byamugisha
JUSTICE OF APPEAL