

# REPUBLIC OF UGANDA

## IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

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### CRIMINAL APPEAL NO. 73 OF 2009

Bazirake

John:.....Appellant

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Versus

Uganda :.....Respon  
dent

**Coram: Hon. Mr. Justice Remmy Kasule, JA**

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**Hon. Mr. Justice Eldad Mwangusya, JA**

**Hon. Mr. Justice F.M.S. Egonda-Ntende, JA**

## JUDGEMENT

20 The appellant BAZIRAKE JOHN was tried by the High Court sitting at Fort Portal for the offence of Defilement **C/S 123(1)** of the Penal Code Act. It was alleged that he had had sexual intercourse

with ABIGABA JOVENTA a girl under the age of 18 years. Her actual age was five years at the time he was alleged to have defiled her. At the conclusion of the trial he was convicted of the offence as indicted and sentenced to thirteen years imprisonment. He appealed against the conviction and sentence. The memorandum of appeal had raised the following grounds:-

**1. That the trial Judge erred in law and fact when he failed to judiciously evaluate the evidence on record and consequently arrived at an erroneous decision that caused miscarriage of justice to the appellant.**

**2. That the learned trial Judge misdirected himself in law and fact when he relied on uncorroborated and circumstantial evidence to reach the decision to convict the appellant.**

**3. That the learned trial Judge erred in law and fact when he failed to find that the prosecution failed to prove its case to the required standard.**

**4. The sentence of 13 years imprisonment imposed on the appellant was harsh and excessive in the circumstances.**

At the hearing of the appeal Mr. Cosma Kateeba learned Counsel for the appellant, on the instructions of the appellant, abandoned all the grounds related to the conviction of the appellant. He applied to Court and was granted leave to argue the ground related to the sentence which in his submission was harsh and excessive. He submitted that Court had not taken into account the circumstances of the appellant who was aged 27 years at the time of the commission of offence and a long custodial sentence would adversely impact on his life.

Counsel invited this Court to consider the antecedents of the appellant who was a first offender, had spent five years on remand and had a family of which he was the sole bread winner.

5 On the other hand, Mr. Emmanuel Muwonge Principal State Attorney, for the respondent submitted that the sentence was not illegal or manifestly excessive considering that the appellant was convicted of a grave offence carrying a maximum death penalty. In his submission the sentence was lenient and prayed Court to enhance it under **S.34 (2)** of the Criminal Procedure Code.

10 We have considered the submissions of both Counsels. Mr. Kateeba cited the case of **NALONGO NAZIWA JOSEPHINE versus UGANDA Court of Appeal Criminal Appeal No. 06 of 2008** (unreported) in which the considerations for interfering with a trial Court's discretion in sentence were discussed. The Court of  
15 Appeal itself cited with approval the considerations in the case of **Ogalo s/o Owoura v. R (1954) 21 EACA 270** where the Court of Appeal for Eastern African held as follows:-

***“The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly  
20 established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by the trial Judge unless as was  
25 said in James v. R (1950) 18 E.A.C.A.147 ‘it is evident that the Judge has acted upon some wrong principle or overlooked some material factor’. To this we would also add a third criterion, namely that the sentence is manifestly excessive in view of the circumstances of the  
30 case: R v Shershewsky, (1912) C.C.A. 28 T.L.R. 364”.***

In the case of **Nalongo Naziwa** the Court of Appeal found that none of the criterion for interference with a trial Court's discretion

in sentence was met and a sentence of 18 years imprisonment for the offence of kidnapping with intent to murder which carries a maximum death sentence like the one before this Court was confirmed.

5 The trial Judge before passing the sentence of thirteen years made the following findings:-

**“the crime the convict was convicted of is rife, and was an abuse of the hospitality of Pw.1, the mother of the victim. I take into account that defilement cases, and of children as young as 5 years or thereabout is quite abundant. The sentence imposed must therefore send out a clear message that shattering the innocence of poor girls will be met with the decisive and merciless hand of the law.**

**The convict is therefore, giving allowance for the period he has been on remand, sentenced to 13 (thirteen) years imprisonment”.**

This Court finds no basis for the finding that the offence for which the appellant was convicted is rife and Mr. Muwonge conceded this fact. Apart from that and considering that the appellant had defiled a five year old girl we do not find that a sentence of 13 years was manifestly excessive as to warrant interference by this Court.

We are also of the view that the fact that the appellant has a wife and child is not a mitigating factor in a case of defilement of a five year old child because he was expected to treat the victim as his own child rather than ‘shatter her innocence’. The sentence was meant to send out a clear message to persons of the appellant’s ilk that no mercy will be shown to adults who defile girls as young as five years or below and we see no reason for interfering with it.

30 Mr. Muwonge, Principal State Attorney, prayed that this Court enhances the sentence of 13 years which to him was lenient. In

the first place we do not consider that a sentence of 13 years on top of the five years the appellant had spent on remand is inadequate as to warrant interference by this Court. The five years on remand was itself a violation of the appellant's constitutional right to a speedy trial. Secondly if the respondent had wanted this Court to enhance the sentence he should have appealed or cross appealed against it and advance grounds for it enhancement instead of waiting until the hearing of appeal and belatedly raise the issue of enhancement.

In the circumstances of this case the appeal against sentence is dismissed.

Dated at Fort Portal this ..... day of .....2014.

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**Hon. Justice Remmy Kasule  
Justice of Appeal**

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**Hon. Justice Eldad Mwangusya  
Justice of Appeal**

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**Hon. Justice F.M.S. Egonda-Ntende  
Justice of Appeal**

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