

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT ARUA**

**CRIMINAL APPEAL NO. 106 OF 2013**

*(Appeal against sentence passed on 04.07.2013 by the High Court At Arua (Yasin Nyanzi, J.) in Criminal Session case No. 101 of 2012)*

**OWINJI WILLIAM ::: APPELLANT**

**VERSUS**

**UGANDA ::: RESPONDENT**

**Coram: Hon. Mr. Justice Remmy Kasule, JA Hon. Lady Justice Hellen  
Obura, JA Hon. Mr. Justice Byabakama Mugenyi  
Simon, JA**

**JUDGMENT OF THE COURT**

The appellant was convicted of aggravated defilement contrary to Section 129(3) and 4(a) of the Penal Code Act. It was alleged that on 15.01.2010 at Got Laju Village, Nebbi District, the appellant had penetrative sex with the victim aged 12 years. Appellant denied the offence.

At the end of the trial the Judge convicted the appellant of the offence and sentenced him to 45 years imprisonment. Disatisfied with the sentence ,the appellant appealed against the sentence on ground that:-



The learned trial Judge erred in law and fact when he imposed a severe sentence of 45 years imprisonment in total disregard of mitigating factors.

On appeal learned Counsel Henry Odama appeared for the appellant on State brief and Senior State Attorney Adubango Harriet was for the State.

This Court granted leave to the appellant to proceed with the appeal against sentence only pursuant to Section 132(1) (b) of the Trial on Indictments Act.

For the appellant, it was submitted that the sentence of 45 years was too harsh and was imposed without the trial Judge considering in favour of the appellant the fact of his having been remorseful, his youthful age of 37 years and that he had spent 3years on remand.

Counsel for the respondent in opposition to the appeal contended that the trial Judge had been lenient as the maximum sentence for aggravated defilement was death. The trial Judge had passed a lawful sentence after being guided by the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013**, and after he had considered both the aggravating and mitigating factors, particularly the fact that this was a unique case where there was an age difference of 25 years

between the age of the appellant and that of the victim. Also the appellant was a close relative of the victim. Counsel prayed that the appeal be dismissed for lacking any merits.

Before we proceed to resolve the ground of the appeal, we feel it important to restate the facts of the case accepted by the Court as they had a bearing upon the sentence that was imposed.

The victim aged 12 years lived with her mother Pw5. The appellant's residence was near that of Pw5. The appellant was a son of the paternal uncle of the victim.

On 15.01.2010 the appellant persuaded the victim to accompany him to Lendu Forest to collect some timber and firewood. The two went deep in the forest. The victim collected some firewood, tied it and put it on her head ready to go home.

It is then that the appellant forcefully seized her, put her down, pushed up her skirt, undressed himself and had sex with her.

Due to pain the victim screamed, thus attracting the attention of Pw2 and another gentleman, who too were in the same forest, to come to where the screaming was. Pw2 saw the appellant on top of the victim carrying out the sexual act.

On realizing that he had been seen by Pw2, the appellant threatened the victim with a knife not to tell anyone as to what had happened, otherwise, she was to see the consequences if she ever did so. The appellant also promised to give some money to the

victim. He then disappeared in the forest.

Pw2 then tried to interact with the victim, but she ran away from him. She did not go back to her mother. She went to a neighbour's home. Pw2 reported what happened to the uncle of the appellant. The mother of the victim also came to know. She found the victim at a neighbour's home. The victim admitted to the mother as to how the appellant had had sex with her. The mother examined the victim and found semen on her private parts.

The father of the victim reported the matter to police. The victim was medically examined. Her hymen was ruptured.

The appellant was arrested on 17.01.2010. In sentencing the appellant the Court found as mitigating factors that the appellant was a first offender. He had also been on remand for 3 ½ years.

As to the aggravating factors the trial Judge considered that the appellant had used threats and violence in committing the crime. He was a relative of the victim. He was 37 years old while the victim was only 12 years old, thus an age difference of 25 years. The appellant had not shown that he was remorseful.

The trial Judge also noted that under the sentencing guidelines the starting sentence was 35 years imprisonment.

Taking all those factors into account the trial Judge sentenced the appellant to 45 years imprisonment.

In **Criminal Appeal No. 142 of 2010: German Benjamin vs Uganda**, this Court relying on the case of **Ogalo s/o Owoura v R [1954] 21 BACA 270** restated the principles upon which an appellate Court will exercise its appellate jurisdiction to review a sentence passed by the trial Court in the exercise of its discretion. These are that: an appellate Court is not to alter a sentence on the mere ground that if the members of the Court had been trying the appellant, then they might have passed a somewhat different no sentence. The appellate Court will interfere with the discretion exercised by a trial Judge if it is evident that the trial Judge acted upon some wrong principle or overlooked some material factor. There will also be interference where the sentence passed by the trial Judge is so low or is so manifestly excessive so as to amount to a miscarriage of justice.

The **Constitution (Sentencing Guidelines for Courts of Judicature (Practice) Directions, 2013** provide guidance to Courts on sentencing. According to the mitigating factors, relevant to the case before us, that the Court may consider, in defilement cases, are lack of pre-meditation on the part of the offender, remorsefulness of the offender, being a first offender, pleading guilty to the offence and the difference in age of the victim and the offender. Court may also consider other relevant factors.

The aggravating factors include the degree of injury or harm, whether the same was repeated to the victim, deliberate intent to infect the victim with HIV/AIDS, knowledge by the offender of

his/her HIV/AIDS status, the tender age of the victim, knowledge whether the victim is mentally challenged, degree of pre-meditation, use of threats, force or violence against the victim and other relevant factors.

The maximum sentence for aggravated defilement is death. The guidelines give a sentencing range from 30 years imprisonment up to death.

The above stated guidelines are to assist Courts of Judicature in making decisions as to sentencing. They are not binding upon the Courts. The ultimate responsibility to determine the sentence of a convict lies with the Court. That Court does so by exercising its discretion judiciously.

In sentencing this appellant the trial Judge considered the fact that the appellant was a first offender and that he had spent 3 ½ years on remand. These were the only mitigating factors he considered.

As to the aggravating factors, the trial Judge found the appellant to have used threats and violence against the victim, he was a relative to the victim, there was an age difference of 25 years between the

appellant's age of 37 years and the victim's tender age of 12 years. The trial Judge found no remorsefulness in the appellant.

On subjecting the sentencing proceedings to fresh scrutiny, we feel that the youthful age of the appellant, thus the possibility that he can reform in future, his being an orphan with a family of seven

children whom he supports, should have been considered as mitigating factors in favour of the appellant.

On the aggravating side, the trial Judge should also have considered the degree of injury physical and otherwise, that the victim suffered and the degree of pre-meditation that the appellant employed so as to ravish the victim.

**The Supreme Court in Jackson Zita v Uganda SCCA 19/95, upheld a sentence of seven (7) years imprisonment where the appellant, aged about 20 years defiled a victim below the age of 18 years. The victim was pulled by the appellant to a coffee plantation at about 7.00 p.m.; tore her pants, put her down and forcefully had sexual intercourse. The appellant was sentenced by the trial Court to 7 years imprisonment and ordered to receive corporal punishment of six strokes of the cane.**

The Supreme Court upheld the sentence of 7 years imprisonment, but set aside the corporal punishment of six strokes of the cane as being illegal.

In **Criminal Appeal No. 23/94 P. Akol vs. Uganda** the Supreme court upheld a sentence of 12 years for defilement.

**In another decision of Rugarwana Fred vs. Uganda, SCCA 39 of**

**95**, the Supreme Court upheld a sentence of 15 years as not being excessive where a 5 year old victim was defiled in a latrine by the appellant who was an adult. Again in that case the Supreme Court set aside the corporal punishment as being illegal.

In the **German Benjamin case** (Supra) the victim aged 5 years was sexually ravaged mercilessly by the appellant. The victim's mother found blood in her private parts soon after the defilement. She cried due to the pain. The appellant was 35 years, fit to be a father of the victim. Appellant had spent 4 ½ years on remand. He was a first offender. He showed signs of reform. This Court set aside the sentence of 20 years imprisonment and substituted the same with one of 15 years imprisonment.

This Court also confirmed a sentence of 15 years imprisonment for defilement in **Criminal Appeal No. 46 of 2009: Wanzala Simon vs Uganda**. The victim was aged 13 years and the appellant, a first offender, was aged 35 years. The defilement was done in a banana plantation during day time. The victim had blood in her private parts soon after being defiled. She walked lamely with pain.

Having subjected the sentencing carried out by the trial Judge to fresh scrutiny, and having considered the law and past Court precedents, we have come to the conclusion that the sentence of 45 years imprisonment was too harsh and excessive. We have not been able to access any past Court precedent supporting such a sentence. We accordingly set it aside as being too excessive and harsh to amount to a miscarriage of justice.

We have considered the mitigating and aggravating factors and taken into account the 3 ½ years the appellant spent on remand. We find that a sentence of seventeen (17) years imprisonment is most appropriate in this case. Accordingly we sentence the appellant to seventeen (17) years imprisonment and the appellant is to serve the same as from the date of his conviction, that is from 5<sup>th</sup> July, 2013.

In conclusion this appeal is allowed. The sentence of 45 years imprisonment is set aside. It is substituted by another sentence in the terms set out above.

It is so order.

Dated at Arua this 7<sup>th</sup> day of June 2016



JUSTICE OF APPEAL

Hon.Lady. Justice. Hellen Obura

JUSTICE OF APPEAL

Hon.Justice. Mr. Simon Byabakama Mugenyi

JUSTICE OF APPEAL

