THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

(Coram: Buteera, DCJ; Mulyagonja & Mugenyi, JJA)

CRIMINAL APPEAL NO. 239 OF 2021

NGANDA ANDREW KAGGWA ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

(Appeal from the High Court of Uganda at Mukono (Mutonyi, J) in Criminal Session Case No. 62 of 2019)

JUDGEMENT OF COURT

A. Introduction

1. Mr. Andrew Kaggwa Nganda ('the Appellant') was indicted for the offence of aggravated defilement contrary to section 129(3) and (4) (a) & (b) of the Penal Code Act, Cap. 120. He was convicted on his own plea of guilt and sentenced to a custodial sentence of twenty (20) years.

2. The uncontroverted facts as accepted by the trial court are that on 21st March 2018 at Kyesereka village, Goma Division in Mukono district, the Appellant whilst HIV + had carnal knowledge of a ten-year old girl, NS, and thereafter gave her Ushs. 4,000/=. On returning home, the victim narrated the incident to her mother, which led to the Appellant's arrest, conviction and sentencing.

3. Dissatisfied with the sentence handed down by the trial court, the Appellant initially challenged the sentence on the following grounds of appeal:

    I. *The Learned Trial Judge erred in law and fact when he/she failed to consider some mitigating factors in favour of the Appellant.*

    II. *The Learned Trial Judge erred in law and fact when he/she denied the Appellant a chance to mitigate for the sentence thus occasioned miscarriage of justice of the Appellant.*

    III. *The Learned Trial Judge erred in law when she/he imposed a sentence of 20 years imprisonment to the Appellant which is harsh and excessive in nature.*

4. He subsequently amended his memorandum of appeal to reflect the following singular ground of appeal:

    The Learned Trial Judge erred in law and fact when she imposed on the Appellant an illegal, harsh and excessive sentence of 20 years imprisonment thereby occasioning miscarriage of justice.

5. At the hearing, Mr. Richard Kumbuga represented the Appellant (on private brief) while Ms. Caroline Marion Acio, Chief State Attorney, appeared for the Respondent.

B. **Parties' Legal Arguments**

6. The trial judge is faulted for omitting to deduct the 1 year and 8 months that the Appellant had spent on remand from the sentence, as required by Article 23 (8) of the Constitution and **Tumwesigye Rauben vs Uganda, Criminal Appeal No 181 of 2013** (CA); thus yielding a harsh and excessive sentence that defies the need for consistency in sentencing. The case of **Kyotera Anthony vs Uganda, Criminal Appeal No. 71 of 2014** is cited for the proposition that term sentences in respect of aggravated defilement range between 12 – 15 years.

7. Although the parties purportedly negotiated a plea bargain agreement for a 20-year custodial sentence, it is argued that the trial judge abdicated her duty by handing the Appellant that harsh and excessive sentence. Citing rules 6(1)(a) and 8(2) of the *Judicature (Plea Bargain) Rules, 2016*, it is argued that the record does not indicate the steps taken by the trial judge to guide the parties prior to the execution of the plea bargain agreement, hence yielding a higher sentence after a plea of guilt than a convict would get after full trial.

8. This Court is therefore urged to invoke section 11 of the Judicature Act, Cap. 13 to substitute the contested sentence with a more appropriate one. Learned Counsel points to the Appellant having been found to be HIV negative and the 1 year and 8 months spent on remand, as well as his being a remorseful first offender who did not waste the trial court's time and is the sole breadwinner for his family, as the mitigating factors that justify a 10-year sentence.

9. Conversely, the Respondent contends that a 20-year sentence in respect of an offence for which the maximum penalty is death and the Sentencing Guidelines recommends a range of up to 35 years, is neither harsh nor excessive. The learned State Counsel argues that the plea bargain agreement took account of the remand period and the trial judge relied on the terms of the negotiation to arrive at the sentence. Contesting the wording of the Commitment Warrant for supposedly being at variance with the sentencing notes, Counsel urges the Court to be guided by the sentencing notes that indicate that the remand period was taken into account in arriving at the 20-year sentence.

10. State Counsel further contends that the sentence was agreed upon in a plea bargain agreement that followed due process, and the validity of which is not contested, urging that the Appellant be bound to the terms of the agreement, the recommended sentence in which is consistent with sentences passed in similar cases. Reference in that regard is made to the case of **Agaba Emmanuel & Others vs Uganda, Criminal Appeal No. 137 of 2017** (CA) where this Court held that plea bargaining creates an agreement between the prosecutor and the accused person with all the features of an agreement in the law of contract, and the court simply plays the role of a regulator of the agreement to ensure that it conforms to the justice needs of the case.

11. It is additionally argued that in **Lwere Bosco vs Uganda, Criminal Appeal No. 531 of 2016** (CA) this Court held that an appeal premised on the severity of a sentence cannot arise out of a plea bargain agreement where parties negotiate and voluntarily agree on the terms thereof. Accordingly, a convict cannot later change his mind and lodge an appeal faulting a trial judge whose discretion in the plea bargain proceedings is limited to confirming a sentence voluntarily initiated and agreed to by the parties. It is opined, therefore, that the Appellant in this case cannot turn around and argue that the sentence so approved was harsh and excessive for non-consideration of mitigating factors because these are part of the negotiation.

12. Further reference is made to the more recent case of **Arinaitwe Gerald vs Uganda, Criminal Appeal No. 191 of 2016** (CA), as well as **Aria Angelo vs Uganda, Criminal Appeal No 439 of 2015**. In **Arinaitwe Gerald vs Uganda** (supra), this Court reiterated the position in **Lwere Bosco vs Uganda** (supra) in upholding a sentence arrived at through plea bargaining. It was observed:

> If the plea bargain process is to meaningfully play its critical role in our criminal justice system, it is important for the Courts of law to hold the parties onto the terms freely negotiated and reduced into the plea bargain agreement unless of course, there is clear evidence of resultant miscarriage of justice or an illegality.

13. Similarly, in **Aria Angelo vs Uganda** (supra) it was held that since the sentence had been agreed upon by the parties in a valid plea bargain agreement and the Appellant was sentenced to the custodial term that he had agreed to that, in any case, was less than the maximum sentence for the offence committed; it was in the interest of justice that the sentence as agreed upon by the parties be maintained.

14. State Counsel maintains that the 20-year sentence is consistent with sentences passed in similar cases, citing the following decisions where higher sentences for aggravated defilement were upheld: in **Mugerwa Paul vs Uganda, Criminal Appeal No. 461 of 2015** (CA) a 26-year sentence was upheld for the aggravated defilement of an 8 year old child; in **Anguyo Siliva vs Uganda, Criminal Appeal No. 38 of 2014** a 21-year sentence was meted out to the Appellant; a 20-year sentence was handed down in **Magoro Hussein vs Uganda, Criminal Appeal No. 261 and 305 of 2016**, while in **Othieno John vs Uganda, Criminal Appeal No. 174 of 2010** (CA) this Court upheld a 29-year sentence for the defilement of a 14 year old girl. In her view, despite the 23-year age difference between the Appellant and the victim and his HIV + serro-status – which are supposedly aggravating factors, the Appellant was sentenced to only 20 years imprisonment, a very fair sentence in the circumstances.

C. **Determination**

15. The duty of this Court sitting as a first appellate court is to reconsider all material evidence that was before the trial Court and reach our own conclusions. See rule 30(1) of the *Judicature (Court of Appeal Rules) Directions*, **Kifamunte Henry vs Uganda Supreme Court Criminal Appeal No. 10 of 1997** and **Bogere Moses vs Uganda Supreme Court Criminal Appeal No 1 of 1997**. We do additionally recognise trial judges' discretion at sentencing as captured in **Kyalimpa Edward vs Uganda, Criminal Appeal No. 10 of 1995** as follows:

> An appropriate sentence is a matter for the discretion of the sentencing Judge. Each case presents its own facts upon which a Judge exercises his discretion. It is the practice that as an appellate Court, this Court will not normally interfere with the discretion of the Trial Judge unless the sentence is illegal or unless Court is satisfied that the sentence imposed by the Trial Judge was manifestly so excessive

as to amount to an injustice: **Ogalo s/o Owousa vs. R (1954) 21 EACA 270** and **R vs. Mohammed Jamal (1948) 15 EACA 126**.

16. The same principle has since been reiterated in **Kamya Johnson Wavamuno vs. Uganda Criminal Appeal No.16 of 2000** and in **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal N0.143 of 2001**.

17. Meanwhile, Article 23(8) of the Constitution and Clause 15 of the *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* (the Sentencing Guidelines), as elaborately elucidated in **Rwabugande vs Uganda (2017) UGSC 8**, enjoins courts to compute applicable sentences by arithmetically deducting the period that convicts have spent on remand.

18. In this case, the Appellant entered into a plea bargain agreement with the prosecution that included the following terms:

> *I hereby freely and voluntarily plead guilty to the charge(s) above and agree to be sentenced to within the range of 20 years.*
> *Prior to entering this plea, I have had full opportunity to discuss with my advocate the facts of my case, the elements of the charged offence(s), any defences I may have, my Constitutional rights and waiver of those rights, and the consequences of my plea.*
>
> *Note: 20 years include the period spent on remand.* **(Hand-written additional note signed by the Appellant and Counsel for both parties)**

19. Those terms of the plea bargain agreement were construed in the Commitment Warrant to mean that the Appellant had been '***sentenced to SERVE 20 (TWENTY) YEARS IMPRISONMENT. PERIOD SPENT ON REMAND INCLUSIVE***.'

20. The ambiguity of the above sentence undoubtedly defies the position advanced in **Rwabugande vs Uganda** (supra) for the period spent on remand to be credited to a convict by having it deducted from the custodial sentence contemplated by the sentencing court.

21. We do appreciate the need to give effect to the terms of plea bargain agreements that are freely and voluntarily agreed to by parties thereto as was stated in **Aria Angelo vs Uganda** (supra). However, in **Arinaitwe Gerald vs Uganda** (supra) it was emphasized that a sentence arrived at by plea bargaining ought to be maintained '**unless of course, there is clear evidence of resultant miscarriage of justice or an illegality**.' This is in tandem with rule 13(1) of the *Judicature (Plea Bargain) Rules, 2016* ('the Plea Bargain Rules'), which enjoins a sentencing court to reject a plea bargain agreement '**where it is satisfied that the agreement may occasion a miscarriage of justice**.'

22. Thus, in **Zoleka Christopher & Others vs Uganda, Criminal Appeal No. 226 & 227 of 2019**, this Court observed that '**the provision for deduction of the period spent on remand after all other factors have been taken into account would suggest that a plea bargain agreement that addresses all the requisite factors would nonetheless be subject to the requirement for the deduction or crediting to the convict of the period spent on remand**.' Such a deduction is duly catered for in rule 15(2) of the Plea Bargain Rules insofar as it restricts a sentencing court to the maximum sentence proposed in a plea bargain agreement, hence by implication leaving room for the deduction of the remand period as constitutionally required. Rule 15(2) reads:

> **The court shall not impose a sentence more severe than the maximum sentence recommended in the plea bargain agreement.**

23. In this case, although the plea bargain agreement reflected agreement by the parties to a sentence '*within the range of 20 years*', the learned trial judge construed the agreement to mean that a 20-year sentence had been agreed upon. She then discharged herself as follows:

> *Accused took plea under plea bargain, admitted the charge, admitted facts plea of Not Guilty was entered, conviction made, agreement explained and signed, sentenced to 20 years as agreed.*

24. Quite clearly, the period spent on remand was not taken into account or deducted from the sentence. This rendered the resultant sentence unconstitutional and hence illegal. Rule 12(g) of the Plea Bargain Rules recognises an illegal sentence

as a ground of appeal, the existence of a plea bargain agreement notwithstanding, insofar as it places a duty upon a sentencing court to satisfy itself that an accused person understands that by entering into a plea bargain agreement, s/ he waives their right of appeal '**except as to the legality or severity of sentence**.'

25. We are alive to this Court's decision in **Lwere Bosco vs Uganda** (supra), where rule 12(5) of the Plea Bargain Rules was construed to be binding upon the parties to a plea bargain agreement in the following terms:

> Severity of the sentence as a ground of appeal cannot arise out of plea bargain proceedings because parties negotiate and agree voluntarily. A convict cannot later change his mind on appeal faulting the Trial Judge whose discretion in the plea bargain proceedings is limited to confirming a sentence voluntarily initiated and agreed to by the parties in the agreement. Allowing convicts to appeal against sentences they freely and voluntarily agreed to in the first place without good reason would in our view undermine the relevancy and the objectives of Plea bargaining in our criminal justice system. Rule 12(5) of the same rules makes the plea bargain agreement binding on the parties.

26. It is respectfully observed, however, that the plea bargain agreement format outlined in the First Schedule to the Plea Bargain Rules does provide for a sentencing range as opposed to a specific sentence. It reads as follows:

> ***PLEA OF ACCUSED PERSON***
>
> *I hereby freely and voluntarily plead ..... to the charge(s) above and agree to be sentenced to within the range of ..... and that:*

27. The provision for that latitude in the format, as well as the recognition in rule 12(g) that the severity of a sentence is another exceptional circumstance that confers a right of appeal against a plea bargained sentence, would appear to run slightly contrary to the position advanced in **Lwere Bosco vs Uganda** (supra). We take the view that the import of the Plea Bargain Rules is to restrict parties to a plea bargain agreement to the sentencing range agreed to without necessarily holding them to the maximum sentence proposed. Indeed, the Appellant's plea in the plea bargain agreement before us followed the same format and made provision for a sentence '*within the range of 20 years*.' Therefore, the trial judge was not bound to abide the maximum limit of 20 years for as long as she remained within the

proposed sentencing range, and the Appellant is well within his remit to challenge the severity of the sentence.

28. Accordingly, as we undertake the resentencing of the Appellant, we are mindful of the provisions of clause 6(c) of the Sentencing Guidelines to '**take into account the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances**.'

29. Turning to the cases cited to us by learned State Counsel, in **Mugerwa Paul vs Uganda** (supra) a 26-year sentence was upheld for the aggravated defilement of an 8-year old child, while in **Othieno John vs Uganda** (supra) this Court upheld a 29-year sentence for the defilement of a 14-year old girl. On the other hand, we are aware that in **Candia Akim vs Uganda, Criminal Appeal No. 181 of 2019**, the Court upheld a 17- year sentence for the aggravated defilement of an 8-year old by her stepfather, while in **Kamugisha Asan vs Uganda, Criminal Appeal No. 212 of 2017**, the Court sentenced an Appellant who defiled a 3-year-old girl to 23 years' imprisonment.

30. We take due cognizance of the sentencing range in those cases of 17 – 29 years for an indictment of aggravated defilement that goes to full trial. This would negate the Appellant's proposition that the sentencing range for the offence of aggravated defilement is 12 – 15 years' imprisonment. We do not consider a plea of guilty to be relevant to an appeal against a sentence arrived at pursuant to plea bargaining because that would have been the foundational basis of the plea bargain agreement in the first instance, as would have all the other mitigating factors. We therefore find that the 20-year sentence that was handed down by the trial court is neither harsh nor excessive.

D. Disposition

31. In the result, the Appeal against sentence is only partially allowed. The sentence of 20-year custodial sentence is maintained, from which the 1 year and 8 months

spent on remand is deducted to yield a sentence of eighteen (18) years and four (4) months to run from the date of conviction.

It is so ordered.

Dated and delivered at Kampala this ...21st... day of ...Feb..., 2024.

Richard Buteera
Deputy Chief Justice

Irene Mulyagonja
Justice of Appeal

Monica K. Mugenyi
Justice of Appeal