THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: KATUREEBE;C.J;TUMWESIGYE;KISAAKYE; ARACH-AMOKO;TIBATEMWA-EKIRIKUBINZA; J.J.S.C.)

CRIMINAL APPEAL NO.34 OF 2014

BETWEEN

OKELLO GEOFFREY :::::::::::::::::::::::::::::: APPELLANT

AND

U GANDA.....**RESPONDENT** **……**

[Appeal from the decision of the Court of Appeal at Kampala (Kavuma, Mwangusya and Bossa, JJA) dated 18th March, 2014 in Criminal Appeal No. 329 of 2010]

JUDGMENT OF THE COURT

Okello Geoffrey, the appellant, was indicted for the offence of aggravated defilement contrary to Section 129(3), (4) (c) of the Penal Code Act. The particulars of the offence were that between December 2008 and January, 2009, the appellant being a person of authority at Latai Primary School performed a sexual act with Akwero Sarah, a girl below the age of 18 years. On 30th November,

2010 he was convicted by the High court (Kasule, J,) (as he then was) and sentenced to a term of 22 years imprisonment. He

appealed to the Court of Appeal which upheld his conviction and sentence, hence this appeal.

Background

Akwero Sarah (PW 1) was a primary school pupil at Latai Primary School where the appellant worked as a teacher. She resided with her mother Ayiko Margaret (PW2) near Latai Primary School in Acholi bur sub county in Pader District. The appellant resided at the school. He had met Akwero Sarah (PWl) five months before his arrest and in his words "I had love for her." He started a relationship with her which developed into a sexual relationship, and when her mother (PW2) got to know of it, she warned the appellant to keep off her daughter as she was still young. The appellantis said to have stopped having a sexual relationship with Akwero Sarah but that he later resumed the affair.

During the night of 20th March, 2009 while Akwero Sarah was at home, Okello Lameck, appellant's friend, came and told her that the appellant wanted to meet her at his house. She immediately disappeared from the house and went to meet the appellant who was waiting for her on the road nearby. When the two met, they proceeded to the school where they were met by the headmaster who asked them what they were doing in the school compound at that hour, and accused them of having a sexual relationship which they both denied.

The headmaster called people who gathered at his home and he told them what happened. The matter was reported to the police who arrested the appellant. The appellant and PWI were taken to Patongo Hospital for medical examination. The examination indicated that the girl (PWl) was aged 15 years and her hymen had been ruptured. The appellant was found to be aged 25 years.

The appellant was thereafter indicted for the offence of aggravated defilement, tried and convicted by the High Court sitting in Gulu and sentenced to 22 years imprisonment. After his conviction and sentence the appellant appealed to the Court of Appeal on two grounds namely:

1. That the learned judge erred in law and fact when he convicted the appellant on uncorroborated evidence thereby occasioning a miscarriage of justice.

2. That the learned trial judge erred in law and fact when he failed to properly evaluate the evidence, thus arriving at a wrong decision occasioning a miscarriage of justice.

The Court of Appeal heard the appeal and dismissed it. The appellant lodged his appeal to this court on the following grounds:

1. That the learned Justices of the Court of Appeal erred in law when they failed to adequately re- evaluate the evidence on record relating to the victim's credibility thereby coming to an erroneous decision.

2. That the learned Justices of the Court of Appeal erred in law when they upheld an illegal sentence imposed on the appellant by the trial judge.

At the hearing of the appeal the appellant was represented by Mr. Henry Kunya on state brief while the respondent was represented by Mr. Brian George Kalinaki, Principal State Attorney. Both counsel relied on their written submissions.

Counsel's submissions

On ground one, learned counsel for the appellant submitted that the Court of Appeal as a first appellate court failed to subject the evidence on record to fresh scrutiny before reaching its decision. He contended that the victim's credibility was questionable and that, therefore, her evidence that the appellant had sex with her could not be solely relied upon to support the appellant's conviction. He stated that whereas PW 1 told court that she did not reveal to anybody her sexual relationship with the appellant, the victim's brother later told court that she had disclosed to him the several sexual encounters she had had with the appellant.

In response, learned counsel for the respondent opposed the appeal and supported the Court of Appeal's decision. He submitted that the Court of Appeal properly re-appraised the evidence as a whole and reached the right conclusion. He further submitted that the girl's testimony did not require corroboration given her age and the trial judge believed her as a credible and truthful witness.

Consideration of the appeal.

We have held in a number of decisions that this court as a second appellate court will not re-evaluate the evidence in the manner of a first appellate court unless it is of the view that on approaching its task the first appellate court failed to properly review the evidence on record. See **Kifamunte Henry vs. Uganda,** SCCA No. 10 of 1997 and **Bogere Moses vs. Uganda,** SCCA No. 1 of 1997.

We are of the view that the Court of Appeal and the trial court not only correctly applied the principles to the case but also properly re-evaluated the evidence on record relating to whether the appellant had sexual intercourse with a minor aged 15 years and who was a pupil in his school over whom he exercised authority.

Akwero Sarah, PWl, testified in court that the appellant had sex with her between December 2008 and January 2009. This evidence is corroborated by that of Oyat Churchill (PW3) , a brother to PWl, who testified that PW 1 had told him that she had had sex with the appellant five times but that on the day of his arrest they did not engage in sexual intercourse.

PW2, the mother of PWl, testified that she had come to know that the appellant was having an affair with her daughter and that she called him and warned him to desist from it as her daughter was still young. Apparently the appellant stopped the affair but later resumed it.

There is evidence from PW 4, the headmaster of the primary school, that when he saw the appellant with PW1 in the compound of the school at about 10:00 p.m., he took them to his house where he called LC 1 Chairperson and LC 1 Deputy Chairperson and other people, and that both the appellant and PW1 admitted to have had a sexual relationship.

The appellant admitted that he was in love with PWI but denied that he had any sexual relationship with her. The trial judge who had opportunity to observe the demeanour of PW1 and that of the appellant did not believe him. He believed PW 1 instead. The Court of Appeal agreed with the trial court that there was sufficient evidence that PW 1 and the appellant had had a sexual relationship. We find no sound reason to fault their finding.

Counsel for the appellant questioned PW 1’s credibility because according to counsel during her cross examination PW 1 stated that she did not report her sexual encounters with the appellant yet she had also earlier testified that she had told her brother (PW3) that she had had sex with the appellant. We do not agree with counsel that PW 1 contradicted herself when she stated on one hand that she did not report her sexual encounters with the appellant and on the other that she told her brother about it. Her brother (PW3) had confronted her and demanded to know whether she had had sex with the appellant. She admitted it. This in our view was not "reporting" and should not be used as a basis for questioning her

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In conclusion, it is our view that the Court of Appeal properly re-evaluated the evidence before it confirmed the appellant's conviction of aggravated defilement. On that account, therefore, ground one of appeal fails.

Supplementary ground of appeal

Following the hearing of the appellant's appeal by the court, the appellant on 7th March, 2017 wrote a letter to the court complaining about his counsel's omission to raise a ground of appeal concerning the trial judge's alleged failure to administer Assessors oaths. In the letter aforementioned the appellant claimed that he gave firm instructions to counsel, to include this ground and he was upset that his counsel had not included that ground in the memorandum of appeal. The appellant framed "the supplementary ground of appeal" as follows:

> **"That the learned Justices of the Court of Appeal erred in law when they affirmed the conviction of the appellant by the trial court which omitted one of its core duties of administering Assessors' oaths, hence causing a travesty of justice."**

We must observe that filing a supplementary ground of appeal after closure of hearing is not catered for by the rules of this court. Rule 62 of the Judicature (Supreme Court Rules) Directions provides that **"The appellant shall, within 14 days after service on him**

or her of the record of appeal, lodge a memorandum of appeal with the registrar."

Rule 63(1) of the rules of this court provides that **"The appellant may at any time, with the leave of the court, lodge a supplementary memorandum of appeal"** and rule 63(3) provides that **"Any person lodging a supplementary memorandum under this rule shall cause a copy of it to be served on the respondent."** We do not think that the phrase **"at any time"** should be interpreted to mean that a supplementary memorandum of appeal can be lodged after the closure of the hearing of the appeal.

During the hearing of appeal, arguments by the appellant's counsel are based on the grounds specified in the memorandum of appeal or in the supplementary memorandum which might have been filed before the hearing with leave of court. (See rule 70 of the rules of the court). The arguments may be written or oral. The hearing is then closed and the court may deliver its judgment either immediately or reserve it for delivery on a future date.

Apart from the fact that the so-called supplementary memorandum was filed after 14 days following service of the record on the appellant which was beyond the time permitted, and also after the hearing of the appeal, the court did not give the appellant leave to file it as the rule requires. So it would be wrong to call it "a supplementary memorandum of appeal." Furthermore, a copy of it

was not served on the respondent. All these omissions constitute serious procedural irregularities that the court cannot condone.

Additionally, considering that this court is a second appellate court and the issue of the assessors not having been sworn by the trial judge was not raised in the Court of Appeal, we are inclined to think that the appellant raised this issue merely as an after-thought.

For the above reasons, we decline the appellant's request to consider his "supplementary memorandum of appeal".

Second Ground of Appeal

The appellant's second ground of appeal is that the learned Justices of Appeal erred in law when they upheld an illegal sentence.

Learned counsel for the appellant informed the court that this ground of appeal on sentence was not raised in the Court of Appeal and that, therefore, no submissions were made on it. He, however, pointed out that this was a mistake of the appellant's counsel (who was on State brief in the Court of Appeal) and that this mistake should not be visited on the appellant.

Counsel argued that a custodial sentence of 22 years imprisonment was illegal since the maximum custodial sentence was 20 years. He relied on the case of **Livingstone Kakooza vs. Uganda,** SCA No. 17 of 1993, where it was held that a sentence of life imprisonment meant 20 years under the Prisons Act. Counsel further argued that

by the time the appellant was sentenced the decision in **Tigo Stephen vs. Uganda,** SCCA No. 08 of 2009 had not been made.

Counsel prayed court to entertain the ground of appeal on sentence on the basis of **Euchu Micheal vs. Uganda,** SCCA No. 54 of 2000, where a ground of appeal which had not been raised in the Court of Appeal was allowed to be argued on the ground that it raised an important legal issue.

In response, learned counsel for the respondent argued that the maximum sentence provided for the offence of aggravated defilement is death and therefore a sentence of 22 years imprisonment cannot be said to be illegal.

Consideration of Second Ground

In the case of **Livingstone Kakooza vs. Uganda** (supra) where the appellant had been convicted of manslaughter it was held that section 49(7) of the Prisons Act (which is now section 86(3)) provides that imprisonment for life shall be deemed to be 20 years and that since the accused had been on remand for two years the sentence of 18 years imposed on him by court amounted to life imprisonment. The court reduced the sentence from 18 years to 10 years imprisonment.

In **Tigo Stephen vs. Uganda** (supra) this court held as follows:

> **"We hold that life imprisonment means imprisonment for the natural life [whole life] term of a convict, though the**

actual period of imprisonment may stand reduced on account of remission earned.

We note that in many cases in Uganda, courts have imposed specific terms of imprisonment beyond twenty years instead of imposing life imprisonment. It would be absurd if these terms of imprisonment were held to be more severe than life imprisonment."

In terms of severity of punishment in our penal laws a sentence of life imprisonment comes next to the death sentence which is still enforceable under our penal laws.

However, following the case of **Attorney General vs. Susan Kigula,** Constitutional Appeal No. 03 of 2005, which declared a mandatory death sentence to be unconstitutional though it remains the maximum sentence for capital offences, courts have not found it necessary to pass death sentences on convicts. Courts have instead opted to pass sentences of terms of imprisonment of well above 20 years in respect of offences which formerly attracted a mandatory death sentence.

Section 86 (3) of the Prisons Act deems a sentence of life imprisonment to be 20 years for purposes of remission. If life imprisonment is the highest sentence only next to a death sentence, where then do sentences of above 20 years imprisonment fall?

We are of the View that sentences of more than 20 years imprisonment for capital offences cannot be said to be illegal because they are less than the maximum sentence which is death. Courts have power to pass appropriate sentences as long as they do not exceed the maximum sentences provided by law. Article 28(8) of the Constitution provides that "no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum that could have been imposed for that offence at the time when it was committed". The maximum sentence for the offence of aggravated defilement is death.

If counsel for the appellant's argument was to be accepted, all custodial sentences would not exceed 20 years' imprisonment. And with remission for good behavior under the Prisons Act, convicts for capital offences who are not sentenced to death would serve a sentence of only 13 years imprisonment. This, in our view, would be inconsistent with the proper administration of justice under Article 126(1) of the Constitution which requires courts to administer judicial power in conformity with the law and with the values, norms and aspirations of the people.

This is not to say, however, that the irrational situation presented by section 86(3) of the Prisons Act which deems life imprisonment to be 20 years imprisonment should be left to remain on our statute books. We think Parliament should as a matter of urgency amend this law to bring it in conformity with the new trend of sentencing.

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We agree with learned counsel for the respondent that the sentence of 22 years imprisonment passed by the trial court on the appellant is not illegal since it is less than the death sentence which is the maximum sentence provided for the offence of aggravated defilement.

We have noted with concern failure by counsel for the appellant who was on state brief in the Court of Appeal to raise a ground of appeal on sentence in the memorandum of appeal he prepared and filed in that court. Counsel Henry Kunya who represented the appellant in this court attributed the omission to do so on the mistake of the appellant's counsel in the Court of Appeal. The Court of Appeal was unable to consider the appropriateness of the sentence of 22 years imprisonment passed by the trial judge against the appellant because no ground of appeal had been raised In connection with the sentence. We think this was dereliction of professional duty by the appellant's counsel. All counsel, even on state brief, must always take their professional duties seriously and not let down their clients.

Be that as it may, section 5(3) of the Judicature Act does not allow an appellant to appeal to this court on severity of sentence. It allows him or her to appeal against sentence only on a matter of law. And since we have held that a sentence of 22 years imprisonment is not illegal, we cannot interfere with it.

Accordingly this ground must fail.

In the result, this appeal is dismissed.

Dated at Kampala this 20t day of .. September 2017

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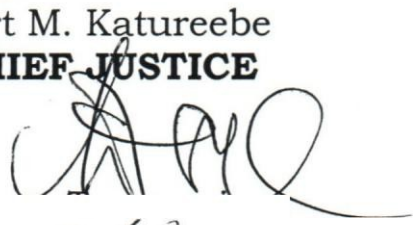
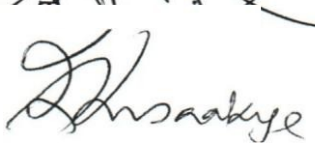
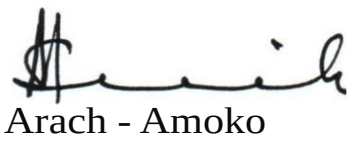
JOTHAM TUMWESIGYE
JUSTICE OF THE SUPREME COURT

Bart M. Katureebe
CHIEF JUSTICE





Dr. Esther Kisaakye
JUSTICE OF THE SUPREME COURT



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JUSTICE OF THE SUPREME COURT

Prof. Lillian Tibatemwa-Ekirikubinza
JUSTICE OF THE SUPREME COURT