THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 174 OF 2011

Coram: Cheborion Barishaki, Stephen Musota, Percy Night Tuhaise, JJA

Mawadrilee Richard .....Appellant

V

Uganda .....Respondent

(Appeal from the judgment of the High Court sitting at Jinja in HCT-03-CR-SC-0441-2010, delivered by His Lordship Hon. Mr. Justice Akiiki-Kiiza on 17th August 2011)

JUDGMENT OF COURT

The appellant was indicted for aggravated defilement contrary to section 129 (3) & (4)(a) of the Penal Code Act. He was convicted and sentenced to 18 years imprisonment.

The appellant was dissatisfied and appealed against the conviction and sentence on three grounds. However, with leave of this Court, under section 132(b) of the Trial on Indictments Act, he abandoned the appeal against conviction and appealed against sentence on one ground, that:-

1. The learned trial judge erred in law and fact when he passed a harsh and excessive sentence on the appellant.

The appellant prayed to this Court to quash the sentence, or, in the alternative, to substitute the same with a more lenient sentence.

Background

The brief background of the case is that on 9th March 2009, the appellant, at Soweto Zone Walukuba in Jinja district, performed a sexual act on Keriki Juliet (the victim), a girl aged 13 years. The victim was returning home from Jinja town when she met the appellant who requested her to accompany him to his house. The victim turned down the request, but the appellant followed her to her sister's home at around 1 pm. He undressed her and had sexual intercourse with her in her sister's bedroom. The appellant returned to the same residence at 8 pm, took the victim to his home, and had sexual intercourse with her again. The victim returned to her sister's home at around midnight. Her sister asked her where she had been, and the victim told her sister what the appellant had done to her. The matters were subsequently reported to the authorities and the appellant was arrested.

Representation

At the hearing of this appeal, Mr. David Ndamurani Ateenyi, Senior Assistant DPP, represented the respondent. Ms. Berna Mutamba, holding brief for Nasser Abed Mudiobe, represented the appellant on State brief. The appellant was in court when this appeal was heard.

Submissions for the Appellant.

Ms. Berna Mutamba submitted for the appellant that the trial judge did not consider the mitigating factors in the instant appeal when he sentenced the appellant. She referred this Court to page 31 of the record of appeal where the appellant pleaded for lenience, being a first time offender. She also submitted that the appellant was and is still remorseful. She contended that had the judge considered the appellant's remorsefulness, he would not have sentenced the appellant to 18 years imprisonment.

The appellant's counsel also submitted that the appellant was relatively a young man aged 25 years at the time of committing the offence. She argued that at that age, when a person is willing to reform, court ought to have

given him opportunity to do so by giving a lenient sentence. She relied on **Birungi Moses V Uganda, Criminal Appeal No. 177 of 2014** and **Oyo Peter V Uganda, Court of Appeal Criminal Appeal No. 671 of 2013** to support her submissions.

She prayed this Court to exercise its discretion and reduce the sentence from 18 years imprisonment to a more lenient sentence of 12 years imprisonment.

Submissions for the Respondent

Mr. David Ndamurani Ateenyi referred this Court to page 32 of the record and submitted that the trial judge was alive to the fact that the appellant being a first offender, and that he took it into account when sentencing him. He also referred this Court to page 31 of the record where the learned trial Judge took into account the fact alluded to by the appellant's counsel that the appellant was 25 years of age at the time of committing the offence.

Mr. Ndamurani contended that it was in the exercise of the lenience prayed for by the appellant that Court handed the appellant 18 years imprisonment instead of the death penalty which is the maximum penalty for aggravated defilement. He submitted that he had not asked Court to enhance the sentence because the lenience exercised by the trial Judge was within his exercise of judicial discretion, which he exercised on the side of mercy to which the appellant was entitled. He contended however that the trial Judge's sentence was certainly not manifestly harsh and excessive in the circumstances of the case. He cited **Livingstone Kakooza V Uganda Supreme Court Criminal Appeal No. 17 of 1993** and **Ogalo s/o Owoura V R [1954] 21 EACA 270** to support his submissions.

Counsel submitted that none of the factors alluded to by the appellant is obtaining in the circumstances of the instant case to merit intervention with the sentence imposed by the trial Judge. He prayed this Court to uphold the

sentence of 18 years imprisonment as passed by the trial judge, since the said Judge did not overlook any of the instances that would merit interference with the sentence of 18 years imprisonment imposed on the appellant.

Resolution of the appeal

We have addressed our minds to the adduced evidence, the submissions of counsel for both sides, the authorities cited, and the law applicable to the circumstances of this case.

This is a first appeal. This court, as a first appellate court, has a duty to re-evaluate the evidence and come to its own conclusion as required under rule 30 (1) of the Judicature (Court of Appeal Rules) Directions 2005. It will however be mindful of the fact that, unlike the trial court, it had no opportunity to observe the demeanour of the witnesses as they testified. See **Pandya V R [1957] EA 336; Henry Kifamunte V Uganda, Supreme Court Criminal Appeal No. 10/1997**; **Bogere Moses V Uganda, Supreme Court Criminal Appeal No. 1 of 1997**.

This appeal is against sentence only. The law is now well settled on when an appellate court can properly interfere with a sentence of a trial judge. In **Livingstone Kakooza V Uganda Supreme Court Criminal Appeal No. 17 of 1993**, which cited with approval the case of **Ogalo s/o Owoura V R [1954] 21 EACA 270**, the Supreme Court reiterated that the appellate court will only alter a sentence imposed by the trial court if it is evident that the trial court acted on a wrong principle, or overlooked some material factors, or if the sentence is manifestly excessive in view of the circumstances of that case.

In **Kiwalabye Bernard V Uganda SCCA No. 143 of 2001** the Supreme Court stated the principle that the appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on

sentence, unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive, or so low as to amount to a miscarriage of justice, or where a trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence, or where the sentence imposed is wrong in principle.

In this case, the record of appeal shows at page 32 that the learned trial Judge justified the sentence as follows:-

> *"Accused is allegedly a first offender. He has been on remand for about 2 years and 9 months. I take this period into account while considering the appropriate sentence to impose on him. He is said to be a young man of 26/5 years and that he has an infant to look after. He has prayed for leniency. However the accused has committed a serious offence. The maximum sentence upon conviction by this court is a possible death penalty. This means that the law treats convicted defilers harshly. The victim in this case was aged 13 years. She was fit in my view to be at least a sister to the accused. Society would expect the accused to take care and protect such a young girl from harm. But the accused took advantage of her and exploited her apparent consent and exploited her sexually. This cannot be supported by court. The girl child must be protected from predators like the accused person by imposing stiff and exemplary sentences with some belief that, other would be defilers, would think twice before exploiting young victims. Putting everything into consideration, I sentence the accused to 18 years imprisonment."*

In **Birungi Moses V Uganda, Court of Appeal Criminal Appeal No. 177 of 2014**, the accused was convicted of aggravated defilement on an 8 years old girl, and sentenced to 30 years imprisonment. The appellant was a first offender. He had spent 3 years on remand prior to his trial and conviction. He was 35 years old at the time of the commission of the offence. He was

remorseful. The court set aside the sentence of 18 years imprisonment and sentenced him to 12 years imprisonment.

In **Oyoo Peter V Uganda, Court of Appeal Criminal Appeal No. 671 of 2015**, the accused was convicted of aggravated defilement. The victim was 9 years old. The appellant was sentenced to 17 years imprisonment on his own plea of guilty. The appellant was 22 years old at the time of commission of the offence. The court set aside the sentence of 17 years imprisonment and sentenced him to 12 years imprisonment.

In the instant case, the record shows that the learned trial Judge considered all the mitigating factors, including that the appellant was a first offender and that he had spent 2 years and 9 months on remand. The appellant's counsel requested this Court to reduce the sentence from 18 years imprisonment to 12 years imprisonment. The respondent's counsel insisted on maintaining the 18 years imprisonment sentence issued by the trial Judge because it was lenient enough.

We have considered the authorities cited above where the same offence was committed in similar circumstances, including that the fact that the appellant was a first offender, he was a young man aged 25 years at the time of committing the offence and was remorseful, while the victim was aged 13 years of age. The need for uniformity was emphasized in **Kajungu Emmanuel V Uganda, Court of Appeal No 625 of 2014** where this Court emphasized the need for uniformity in sentencing if a decision is based on similar precedents.

In that connection, after considering the precedents with similar facts and the need to maintain uniformity of sentence for similar offences committed in similar circumstances, we find it appropriate to set aside the sentence of 18 years imprisonment. Having done that, we invoke our powers under section 11 of the Judicature Act and substitute the sentence with a sentence

of 15 years imprisonment, having taken into account the fact that the appellant spent 2 years and 9 months on remand.

We accordingly sentence the appellant to 15 (fifteen) years imprisonment which sentence shall run from the date of conviction, which is 17/08/2011.

We so order.

Dated at Jinja this ...30th.....day of .....Sept.....2019.

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Hon. Mr. Justice Cheborion Barishaki
Justice of Appeal

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Hon. Mr. Justice Stephen Musota
Justice of Appeal

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Hon. Lady Justice Percy Night Tuhaise
Justice of Appeal

30/9/19.

Appellant present.
D.P.P. Representative absent.
Charles: clerk.

Court: The ruling was delivered in the presence of the above.

30/9/19