

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA SITTING AT MBARARA**

**CRIMINAL APPEAL NO.355 OF 2014**

**MUGISHA FRANCIS ::: APPELLANT**

**VERSUS**

**UGANDA::: RESPONDENT**

*(Appeal arising from the decision of the High Court of Uganda at Mbarara before Hon. Justice Bashaija K. Andrew delivered on the 21<sup>st</sup> day of September, 2016 in Mbarara High Court Criminal Case No. 72 of 2012).*

**CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA**

**HON. JUSTICE STEPHEN MUSOTA, JA**

**HON. JUSTICE REMMY KASULE, AG. JA**

**JUDGMENT OF COURT**

The appellant was charged and convicted of Aggravated Defilement contrary to sections 129 (3), (4) (b) and (c) of the Penal Code Act and sentenced to 20 years imprisonment.

The appellant was dissatisfied with the sentence passed by the trial court and filed this appeal on one ground, namely;



1. That the trial Judge erred in fact and law by sentencing the appellant to imprisonment for 20 years for the offence of Aggravated Defilement which was harsh and excessive.

### **Background**

The background of this case is that the victim is a daughter of the appellant but grew up under the care of her grandmother. In July 2011, the appellant went to the home of the victim's grandmother from where he collected and took the victim to his home at Kashari trading center. On 29<sup>th</sup> July 2011, the appellant forced the victim into sexual intercourse with him. On 30<sup>th</sup> July 2011, the appellant again forced the victim into sexual intercourse with him at night and the victim cried out in pain but no one came to her rescue. On 31<sup>st</sup> July 2011, the appellant again had sexual intercourse with the victim and in all the incidents, the appellant warned the victim not to reveal to anyone what had happened. On 5<sup>th</sup> August 2011, the victim went for an overnight crusade at Kashaka Worship Centre and at around 4:00 am, the appellant came looking for her and she refused to go. She then informed one Kyomugisha whom she was with at the overnight crusade that she feared her father would have sexual intercourse with her. Kyomugisha advised that they report the matter to police which was done and the appellant was arrested and prosecuted. He was convicted and sentenced to 20 years imprisonment.

The hearing of the appeal was conducted through video conferencing because of the covid-19 pandemic. This enabled the appellant to follow the proceedings and be in touch with his advocate from prison.



## **Representation**

At the hearing of the appeal, Mr. Sam Dhabangi appeared for the appellant on state brief while Ms. Aleluya Glory, State Attorney appeared for the respondent. Both counsel proceeded by way of written submissions which were adopted by court.

## **Submissions of the appellant**

Counsel sought and was granted leave by court to appeal against sentence only under section 132 of the Trial on Indictments Act. Counsel submitted that the overriding principle in sentencing is the range of sentences in similar previous cases for consistency and uniformity of sentences for similar offences. Counsel relied on the case of **Kajjungu Michael Vs Uganda Court of Appeal Criminal Appeal No. 0095 of 2013** in which it was held that there is need to have uniformity in sentences for offences committed in similar circumstances.

Counsel argued that whereas the appellant is HIV positive, he was remorseful and was a first offender willing to reform. Counsel submitted that the 20 year sentence handed to the appellant was harsh and excessive in the circumstances of the case.

## **Submissions of the respondent**

Counsel for the respondent opposed the appeal and submitted that the sentence was neither harsh nor excessive. Under section 129 of the Penal Code Act, among the aggravating factors in the offence of aggravated defilement is the positive HIV status of the appellant. In



addition, the appellant defiled his own daughter and therefore, the sentence imposed was appropriate.

### **Resolution by court**

This being the first appellate court, the duty of this court is to review and re-evaluate the evidence adduced before the trial court, by subjecting that evidence to fresh scrutiny, draw inferences therefrom and reach our own conclusion as to the legality of the sentence passed upon the appellant. See: **Rule 30(1) of the Judicature (Court of Appeal Rules) Directions SI 13-10**

An 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 when passing the sentence, or where the sentence imposed is wrong in principle. (See **Kyalimpa Edward v. Uganda SC Cr. App. No. 10 of 1995 and Kyewalabye Bernard v. Uganda SC. Criminal Appeal No. 143 of 2001**)

We have borne the above principles in mind in resolving this appeal. We have also carefully looked at the submissions of the parties. While sentencing the appellant, the learned trial Judge stated as follows;

*“The convict committed a grave offence of incest and also defilement. As a father he should have protected his daughter.*

*This coupled with the fact that the convict had sexual intercourse with his daughter well knowing his HIV positive status, a disease that has no cure. He was a heartless father who acted in a beastly manner. Under ordinary circumstances, he should have deserved the maximum sentence. Since however, he's readily pleaded guilty and saved time, court considers it a mitigating factor. I have also taken into account the fact that he's spent time on remand since 25/8/11 and is presumed a first offender."*

We note that from the above excerpt, the learned trial Judge considered both the aggravating and mitigating factors of the case and sentenced the appellant to twenty (20) years imprisonment. The appellant is HIV positive and is the biological father to the victim who acted in a beastly manner. He had a duty to protect his daughter but did not. These are aggravating factors. As a mitigating factor, he pleaded guilty and only appealed against sentence.

In **Ouma Ben alias Ofwono Vs. Uganda Supreme Court Criminal Appeal No. 20 of 2016** a sentence of 26 years was imposed upon the appellant for defiling a toddler of 3 1/2 years who was also his daughter. The sentence was left unaltered by the Supreme Court.

Having subjected the evidence as to sentence imposed by the learned trial Judge to fresh scrutiny, and noting the fact that the learned trial Judge took into account the period the appellant spent on remand from 05. 08.2011 up to 21.09.2012 when he was convicted, we uphold the sentence of 20 years imprisonment for being appropriate



in the circumstances of the case. This appeal is dismissed accordingly.

Dated this 13<sup>th</sup> day of October 2020



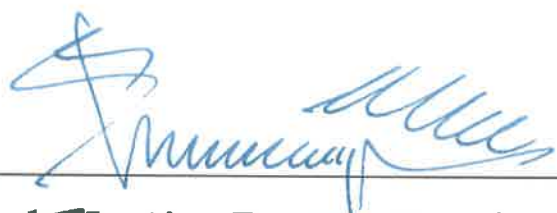
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**Hon. Justice Elizabeth Musoke, JA**



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**Hon. Justice Stephen Musota, JA**



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**Hon. Lady Justice Remmy Kasule, Ag. JA**