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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT ARUA

CRIMINAL APPEAL NO. 400 OF 2016

(Arising from High Court Criminal Case No.0205 of 2013)

BETWEEN

10 **MUTO ISMAIL.. APPELLANT**

AND

UGANDA .... RESPONDENT

(Appeal from the judgment of the High Court of Uganda Holden at Arua, before John. E. Keitirima. J delivered on the 24th November 2016)

15 **Coram: HON. MR. JUSTICE CHEBORION BARISHAKI, JA**

HON. LADY JUSTICE MONICA MUGENYI, JA

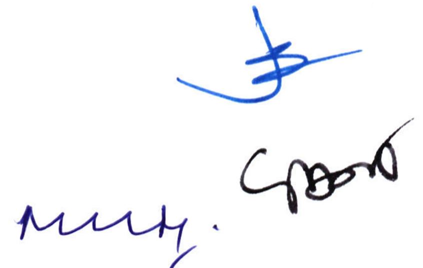
HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA

JUDGMENT OF THE COURT

20 **Introduction**

The Appellant/Accused person Muto Ismail was indicted with the offence of Aggravated Defilement contrary to Section 129 (3(4) (a) of the Penal Code Act. The particulars of the offence are that the Appellant/Accused person on the 28th day of May 2013, at Dranya village in Koboko District had unlawful sexual 25 intercourse with Aduna Kadijah a girl with disability and under the age of 14 years. The accused pleaded not guilty to the indictment. The prosecution called three witnesses to prove their case and the Appellant gave unsworn evidence. On 24th November 2013, he was sentenced to 35 years imprisonment. Dissatisfied with the decision of the trial Court the Appellant appealed on 30 ground that;

> The sentence of 35 years' imprisonment imposed by the learned trial Judge is manifestly harsh and excessive.



5 **Representation**

The Appellant was represented by Mr. Samuel Ondoma. The Respondent was represented by Mr. Patrick Omai.

Submissions of Counsel for Appellant

Counsel for the Appellant submitted that the sentence of 35 years imprisonment
10 imposed by the trial Judge on the Appellant was so harsh and excessive. Counsel submitted that the trial Judge failed to consider the fact that the Appellant was 23 years old, with a pregnant wife who needed his care and support. Counsel further submitted that the Appellant was young and was remorseful. He argued that the Appellant can reform and become a very useful
15 citizen of Uganda.

Additionally, counsel submitted that the Appellant had been on remand and detention before conviction for 3 years. Counsel argued that the trial judge did not mathematically deduct the years spent on remand while passing the sentence. Counsel therefore prayed that the sentence is reduced.

20 **Submissions of counsel for Respondent**

Counsel submitted that it is now settled law that an appellate court will interfere with the sentence imposed by a trial court in very limited circumstances. Counsel cited **Kyalimpa Edward vs. Uganda, SCCA No. 10 of 1995,** where the Supreme Court held that:

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> "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 /her discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice."

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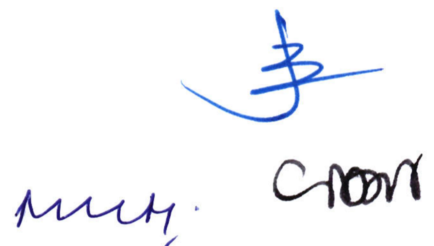
(See **Kamya Johnson Wavamuno vs. Uganda SCCA No.16 of 2000.**)



5 Counsel submitted that deducing from the submissions of counsel for the Appellant, they objected to the sentence on grounds that:

a) The sentence of 35 years is harsh and excessive;
b) The Appellants mitigating factors were not considered; and
c) The trial Judge did not practically consider and deduct the period spent on remand by each
10 Appellant.

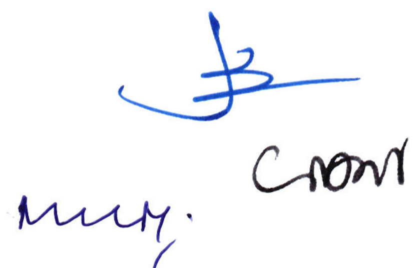
On harshness and excessive sentence counsel for the Respondent submitted that, a person convicted of the offence of aggravated defilement is liable to suffer death as the Maximum punishment under the Penal Code Act. Counsel cited **Tigo Stephen vs. Uganda SCCA NO.08 OF 2009**, where Supreme Court
15 observed that:

> "The most severe sentence known to the penal system includes the death penalty, imprisonment for life and imprisonment for a term of years."

Counsel further cited **Bacwa Benon vs. Uganda CACA No. 869 of 2014**, where this court upheld the conviction of life imprisonment imposed on the
20 Appellant who being a guardian to the ten year old victim had sexual intercourse with her and infected her with HIV. In **Kabazi Issa vs. Uganda, CACA No.286 of 2015**, where this court confirmed a sentence of 32 years imprisonment upon the Appellant who had been convicted of aggravated defilement of two minors who were each below the age of 14 years.

25 Counsel submitted that considering the facts of this case 35 years of imprisonment was not harsh.

On the mitigating factors, counsel for the Respondent submitted that while sentencing the Appellant, the trial Judge considered both aggravating and mitigating factors. The Judge considered the fact that the victim was a 9-year
30 disabled girl who sustained injuries during the act and was unable to walk outweighing the Appellant's mitigating factors and considered a 35-year sentence as being appropriate in the circumstances.



5 In his submission counsel for the Appellant submitted that trial Judge did not mathematically deduct the years spent on remand as required by law. In response counsel for the Respondent submitted that, in **Nashimolo Paul Kibolo vs. Uganda SSCA No. 46 of 2017**, the Supreme Court held that the requirement of arithmetic deduction of the time spent by a convict on remand was set as
10 precedent after the decision in *Rwabugande Moses vs. Uganda SCCA No. 25 of 2014,* which was decided on the 3rd March, 2017.

The sentence in this case was passed on the 24th of November 2016 several months before the decision in Rwabugande (supra). At page the trial judge stated that *'I have considered the period the convict has spent on remand...'*
15 Counsel argued that accordingly the trial Judge fully complied with the requirements as it was then.

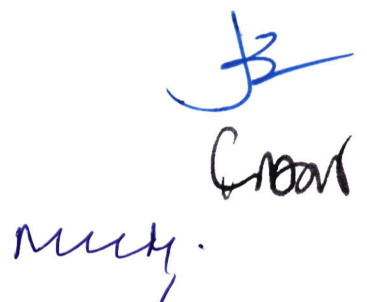
Counsel conclusively submitted that given the double aggravating factors in this case, the 35-year term of imprisonment imposed upon the Appellant is lawful and it is neither harsh nor excessive.

20 This sentence therefore meets the ends of justice. Counsel prayed that the sentence be upheld, and the appeal dismissed.

Consideration of court

In resolving the issues raised in this appeal, this court is mindful of its duty as the first appellate court to re-evaluate the evidence presented before the trial
25 court to reach its own conclusion. See **Pandya vs. R (1957) E.A and Kifamunte Henry vs. Uganda SCCA No.10 (1997)**

It is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court. This obligation to reappraise the evidence is founded in common law rather than rules of procedure. In so doing,
30 the first appellate court must consider the evidence on any issue in its totality and not any piece thereof in isolation. Although in case of conflicting evidence,



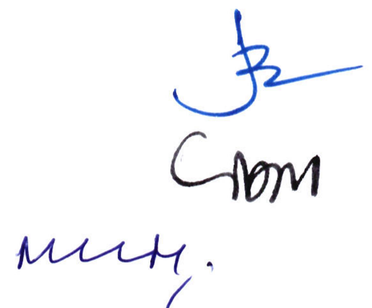
5 the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses. See **Fr. Narsensio Begumisa and 3 other vs. Eric Kibebaga SSCA No.17 of 2002.**

While sentencing, the Judge is guided by the sentencing guidelines. However it has to be noted that the guidelines neither provide the sentences nor do they take 10 away the judicial discretion. In every case the court has the duty to evaluate the evidence on record in order to arrive at a just and lawful sentence. Every sentencing judge is guided by both the mitigating and aggravating factors in passing sentence. This is provided for under Part 111 of the sentencing guidelines. In **State Vs Makwangane 1995 (3) SA 391, the South African** 15 **Constitutional Court** stated that:

> "Mitigating and aggravating circumstances must be identified by court, bearing in mind that the onus is on the state to prove beyond reasonable doubt the existence of aggravating factors, and to negate beyond reasonable doubt the presence of any mitigating factors relied on by the 20 accused. Due regard must be paid to the personal circumstances and subjective factors that might have influenced the accused person's conduct and these factors must then be weighed with the main objectives of punishment, which have been held to be; deterrence, prevention, reformation and rehabilitation. In this process any relevant 25 considerations should receive the most scrupulous care and reasoned attention......."

While sentencing, the trial judge stated that:

> "I have considered both the aggravating and mitigating factors. The convict took advantage of a vulnerable girl child who was only too 30 young at the age of 9 years but also disabled. He had no mercy on her and left her unable to walk. The likes of the convict do not deserve to stay in a civilized society and the girl child more so when disable needs maximum protection and care from society."



5 We have evaluated the evidence on record and it is our finding that the trial judge put into consideration both the aggravating and mitigating factors. We cannot therefore fault him on this.

On whether the trial Judge considered the period spent on remand, we agree with the submissions by the Respondent. By the time the judgment was passed 10 in 2016, it was not a requirement to arithmetically deduct the years spent on remand. In **Nashimolo Paul Kibolo** (*Supra),* Supreme Court held that the law cannot operate retrospectively. Court noted that the arithmetic deduction came into operation on 3rd of March, 2017 when the Supreme Court in *Rwabugande Moses vs. Uganda SCCA No. 25 of 2014,* set the precedent on the arithmetic 15 deduction.

It therefore suffices that the trial Judge took mental note and also made mention of the time spent on remand. In his own words the judge stated that:

> "I have considered the period the convict has spent on remand"

Lastly, in considering whether the sentence is harsh or excessive the court is 20 guided by the principle of consistency. To ensure this consistency the guidelines provide for ranges to guide the sentencing judge. **Guideline 19(1) of the Constitution (Sentencing Guideline)** provides for sentencing range for capital offences. It provides that:

> "The court shall be guided by the sentencing range specified
> 25 in Part I of the Third Schedule in determining the appropriate
> custodial sentence in a capital offence."

When imposing a custodial sentence on a person convicted of the offence of aggravated defilement, the third schedule of The **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, item 3 of** 30 **part 1** the sentencing range for aggravated defilement starts from 35 years to death sentence. This can be reduced or increased depending on the mitigating and aggravating factors.

5 Additionally, the sentencing court is guided by the principle of consistency and uniformity when sentencing. **Guideline No.6(c) of the Sentencing Guidelines** provides that;

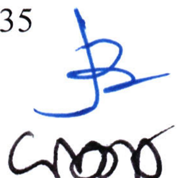
> "Every court shall when sentencing an offender take into account the need for consistency with appropriate sentencing levels and other
> 10 means of dealing with offenders in respect of similar offences committed in similar circumstances"

In **Ninsiima v. Uganda Crim. Appeal No. 180 of 2010**, Court of Appeal opined that the sentencing guidelines have to be applied taking into account past precedents of Court, decisions where the facts have a resemblance to the case
15 under trial. In that case, the Appellant defiled an 8 year old girl when the Appellant was 29 years old. Court set aside a sentence of 30 years imprisonment and substituted it with a sentence of 15 years' imprisonment.

In **Byera Denis vs. Uganda, Court of Appeal Criminal Appeal No. 99 of 2012,** this Court substituted a sentence of 30years imprisonment with one of 20
20 years imprisonment it considered appropriate in a case of aggravated defilement. The victim in that case was aged 3 years.

We have considered the decision of the Supreme Court in **Bashir Ssali v. Uganda, S.C. Crim. Appeal No 40 of 2003,** where the Supreme Court reduced the sentence of the trial court on account of the trial Court not having taken into
25 account the time the convict had spent on remand, reduced a sentence of 16 years' imprisonment to 14 years' imprisonment for a teacher who defiled an 8-year-old primary three school girl. The girl had sustained quite a big tear between the vagina and the anus.

Having considered the mitigating and aggravating factors, we find that the
30 sentence of 35 years was excessive. We therefore reduce the sentence from 35



5 years' imprisonment to 30 years imprisonment having considered the years spent on remand.

This appeal partially succeeds.

We so order.

Dated at Arua this ……29th…… day of ……March……2023

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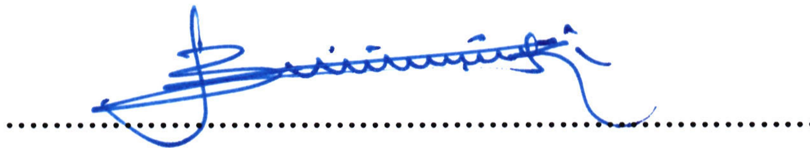

CHEBORION BARISHAKI

JUSTICE OF APPEAL

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MONICA MUGENYI

JUSTICE OF APPEAL

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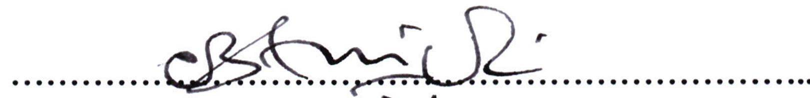

CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL