THE REPUBIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

[CORAM: Egonda-Ntende, Obura &Musota JJA]

CRIMINAL APPEAL NO. 126 OF 2013

(Arising from High Court Criminal Session Case No.127 of 2013 at Masaka)

BETWEEN

MUYITIRA SANDE .....APPELLANT

AND

UGANDA .....RESPONDENT

(*An appeal from the Judgment of the High Court of Uganda [Jane Kiggundu.J., delivered 11th September 2011.*)

JUDGEMENT OF THE COURT

Introduction

1. The appellant was indicted and convicted, on his own plea of guilty, of the offence of aggravated defilement contrary to Section 129 (3) (4) (a) and (c) of the Penal Code Act. The particulars of the offence were that on the 19th day of March 2013 at Bikira village in Rakai District performed a sexual act with Bagyenyi Anita aged ten (10) years, a girl under the age of 14 years. On the 12th day of September 2013, the learned trial judge sentenced him to serve a period of imprisonment for 17 years. He now appeals, with the permission of this court, against sentence only.

2. The appellant appeals on the following grounds;

> '(1)That the learned trial judge erred in law and in fact when she passed sentence without considering the period the appellant had been on remand.
> (2) That the learned trial judge erred in law and fact when she sentenced the appellant to a manifestly harsh and excessive sentence.'

3. The respondent opposed the appeal.

Submissions of Counsel

4. The appellant was represented by Mr. Kasadha David and the respondent was represented by Ms. Akasa Amina, Senior State Attorney in the Office of the Director, Public Prosecutions. Mr. Kasadha submitted that the learned trial judge did not take into consideration the period the appellant had spent in pre-trial custody. That it was not indicated whether the 17 years of imprisonment imposed on the appellant were inclusive of the 6 months period that the appellant had spent on remand as there was no calculation to that effect.
5. On the second ground, Mr. Kasadha submitted that the sentence was harsh because the appellant was only 18 years of age, he pleaded guilty and was a first time offender. He prayed that the sentence be reduced to 10 years of imprisonment.
6. Ms. Akasa in reply, submitted that the sentence passed against the appellant was not harsh and excessive considering the victim was only 10 years old, was living in the same house as the appellant and the maximum

penalty for the offence of aggravated defilement is death. She prayed that the court upholds the sentence and in the event court finds it excessive to reduce the sentence to a period not less than 15 years of imprisonment.

Analysis

7. The facts of the case are that on 19th March 2013, in the morning at about 7:00 am , Kabihogo Sylvia, the victim's aunt, with whom the appellant and the victim were staying in the same house, directed the victim (Bugenyi Anita) to go and dig in the garden. Around 8:00 am, the victim came back home crying claiming that the appellant had defiled her.

8. The victim disclosed that while she was digging, the accused came and grabbed her, threw her down, she was not putting on knickers, he pulled up her dress and defiled her. That the accused restrained her from alarming by holding her mouth. That after defiling her, he covered her with maize leaves. The victim's aunt noticed that victim's dress had water like fluids suspected to be sperms and reported the matter to the LC then to police.

9. This court as an appellate court can only interfere with the trial court's discretion in sentencing on limited grounds as has been set out in various decisions of the Supreme Court such as Bernard Kiwalabye V Uganda Criminal Appeal No. 143 of 2001. In this case, the Supreme Court stated,

> 'The appellate court is not to interfere with the sentence imposed by a trial court where that trial court has exercised its discretion on sentence, unless the exercise of that discretion is such that it results in the sentence imposed to be manifestly excessive or low as to amount to a miscarriage of justice or where the trial court ignores to consider an important matter or circumstance which ought

to be considered while passing sentence or where the sentence imposed is wrong in principle.'

10. The relevant part of the sentencing order of the trial court is as follows;

'I have listened to the submissions of counsel for the state and the accused and the accused's own statement in mitigation. The convict is a first offender and pleaded at the earliest opportunity and therefore saved court's time and resources. The accused is only 19 years and has been on remand for six months, so he has high chances to reform. He appeared remorseful, is repentant and promises not to commit such crimes again and prayed for a lenient sentence for him to go back and socialise with his peers. The offence with which he has committed carried a maximum sentence on conviction. The convict defiled a child who lived in the same home as him as she went about her chores. People like the convict, have made the home an insecure place for a girl child and should be kept away from society. This crime has become rampant in our society and the convict should be given a deterrent sentence that will send a message to other would be perpetrators. Consequently, court sentences the convict to (17) seventeen years imprisonment.'

11. The Supreme Court in the recent decision of Abelle Asuman v Uganda, SC Criminal Appeal No. 066 of 2016 while interpreting its decision in Rwabugande Moses v Uganda, SC Criminal Appeal No. 25 of 2014 stated:

'What is material in that decision is that the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according to the case of **Rwabugande** that remand period should be credited to a convict when he is sentenced to a term of imprisonment. **This Court used the words to deduct and in an arithmetical way**

as a guide for the sentencing Courts but those metaphors are not derived from the Constitution.

Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution.'

12. It appears to us that with the foregoing words the Supreme Court has in effect reversed itself in Rwabugande and accepted the position as previously understood prior to Rwabugande and in the cases the Supreme Court had said it was departing from in Rwabugande. A case in point is Kabwiso Issa v Uganda, S C Criminal Appeal No. 7 of 2002, (unreported). In that case the Supreme Court guided the courts in the following words,

'The sentence of 15 years imposed by the trial judge is set aside.

We think that the trial judge intended to sentence the appellant to imprisonment for ten (10) years. This period will run from 29/9/2000, the date the trial judge imposed the 15 years sentence. We understand that prison authorities experience difficulties in determining remission periods in cases where convicts are sentenced in terms similar to the words used by the trial judge in this case. We would therefore give the following guidelines to trial courts.

When sentencing a person to imprisonment a trial judge or magistrate should say-

"Taking into account the period of. years (months or weeks whichever is applicable) which the accused has already spent in remand, I now sentence the accused to a term of. , years (months or weeks, as the case may be)"

In such an event the sentence imposed shall be definite and be treated as excluding the period spent in custody on remand.

We direct that this judgment be circulated to all courts, prosecutors and prison authorities for guidance.'

13. Following its decision in Abelle the Supreme Court has considered the same scenario in the case of Oshurera Owen v Uganda S C Criminal Appeal No. 50 of 2015 (unreported) and stated as follows,

'We agree with counsel for the appellant regarding what ought to be done pursuant to Article 23(8) of the Constitution. The sentencing Judge when handing down the sentence stated as follows:

"I have taken into account the period the convicts have spent on remand in arriving at the sentence. All factors taken into account in light of the circumstances of this case, I sentence the convicts as follows:-
Convict (Al) is sentenced to 1WENTY- FIVE years' imprisonment.

Convict (A2) is sentenced to 1WENTY-FIVE years' imprisonment." Emphasis added.

The Court of Appeal in upholding the above sentences stated:

"The trial Judge took into account the period the applicants spent on remand as well as both the mitigating and aggravating factors. We find that the sentence imposed upon each appellant is legal and cannot be said to be harsh or manifestly excessive or based

on a wrong principle. Therefore we do not find a convincing reason to interfere with the sentence."

The trial Judge clearly stated that he had taken into account the period the appellants spent on remand prior to passing the respective sentences of 25 years. Like the Court of Appeal found, we too consider this sentence legal.....'

14. Given these 3 decisions of the Supreme Court (Rwabugande; Abelle and Osherura) it appears now the position is that a sentencing court can either take into account the period spent on remand (apply the non-mathematical formula as per Kabwiso Issa v Uganda (supra)); or it can deduct the period spent on remand from the appropriate sentence (apply the arithmetical formula as per Rwabugande v Uganda (supra)). Either option will be found to comply with the article 23(8) of the Constitution. Whatever the merits of this situation our duty is to comply with the Supreme Court decisions.

15. Looking at the sentencing order by the trial court it is clear that the trial court in arriving at its conclusion took into account the period spent on remand though it did not state that the period had been deducted. In light of the foregoing we find that the learned trial judge complied with provisions of Article 23(8) of the Constitution. Ground no.1 therefore fails.

16. Turning to ground no. 2 the appellant was convicted of a serious offence and the victim was only 10 years old. The appellant is a first time offender with no previous record of conviction. He was remorseful and pleaded for lenience. He pleaded guilty thus saving the court's time and resources.

17. The appellant had just made 19 years and had been on remand for 6 months. The medical Doctor who examined him on 25th March 2015 indicated on Police Form 24, that the appellant's approximate age was 18 years. Physical examination by the same doctor indicated on part B of the said form that the apparent age of the accused was 18 years. "Approximate age" and "Apparent age" are simply estimates which could mean more or less. The trial court should not have excluded the possibility that the appellant was below 18 years. The appellant was barely an adult. Had he committed the offence a few months earlier, he would have been sentenced as a child, to not more than a maximum of 3 years imprisonment.

18. In the case of Adoli Dickens v Uganda, CA Criminal Appeal No. 041 of 2010, (unreported) the appellant was indicted and convicted of the offence of aggravated defilement. The victim was 2½ years and the appellant was 19 years. The appellant was sentenced to 20 years of imprisonment. On appeal the sentence was reduced to 9 years 11 months I week upon taking into consideration the period spent on remand.

19. In Katende Ahamad v Uganda, SC Criminal Appeal No. 6 of 2004, (unreported) the appellant was convicted of defilement and sentenced to 10 years imprisonment. On appeal to the Court of Appeal it was confirmed. On further appeal to the Supreme Court the court upheld the sentence of 10 years imprisonment.

20. In the case of Ongwench Wilfred v Uganda, CA Criminal Appeal No. 142 of 2014 (unreported), the appellant was charged and convicted on his own plea of guilty of the offence of aggravated defilement. The victim was a 13

year old girl and the appellant was 20 years at the time of commission of the offence. He was sentenced to serve a period of imprisonment for 18 years. This court found that the trial court did not take into account the period spent on remand and reduced the sentence to 9 years and 3 months imprisonment.

21. In light of the above, we find reason to interfere with the sentence imposed by the learned trial judge on the ground that the sentence was manifestly harsh and excessive in the circumstances of this case. Ground no.2 succeeds.

22. We hereby interfere with the sentence imposed on the appellant and substitute it with a sentence of 9 years' imprisonment commencing from 11th September 2013, the date he was convicted.

Signed, dated and delivered at Masaka this 30th day of June 2018.

Fredrick Egonda-Ntende
Justice of Appeal

Hellen Obura
Justice of Appeal

Stephen Musota
Justice of Appeal