THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

CRIMINAL APPEAL NO.329 OF 2016

NDAULA MOSES::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mukono before Mutonyi Margret, J dated 21st October, 2016 in High Court Criminal Session No.073 of 2016)

CORAM: HON. MR. JUSTICE F.M.S EGONDA-NTENDE, JA

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA

JUDGMENT OF COURT

This is an appeal against sentence only. The appellant, Ndaula Moses was indicted with 3 counts, tried and convicted on his own plea of guilty of the offence of aggravated defilement contrary to sections 129(3) & (4) (a) of the Penal Code Act Cap 120 by Mutonyi Margaret, J in the High Court sitting at Mukono and sentenced to 30 years imprisonment on each count to run concurrently.

The facts giving rise to the appeal as found by the trial Judge are that the three victims NJ, NJ and NA aged 10, 9 and 9 years were at the time living at Upper

Kauga in Mukono district where the accused was a tenant to one Namaganda Victoria. On 12th February, 2011, at about midday, Victoria the landlady of the appellant while at her home heard NA a niece to the appellant crying. She asked her what the problem was and answered that the appellant forces them into sexual intercourse with him.

NJ is a biological daughter to the accused while NA and NJ were nieces to him. The victims revealed that since 2010, the accused would wake them up one by one in the night and have sexual intercourse with them and would tell them not to reveal to anyone or else they would be beaten up. Upon revealing the act, Namaganda Victoria took them to Mukono Police Station where she reported the case. The appellant was arrested, examined and found to be of sound mind and aged 35 years.

All the victims were examined and it was found that NJ had a freshly raptured hymen with inflammation but no bruises. The medical report revealed her age as 9 years. NJ was examined and found with a long standing raptured hymen which suggested that she had regular sexual intercourse and was approximately 10 years old. NA was examined and found with a long standing raptured hymen which suggested that she had regular sexual intercourse at an approximate age of 9 years. The appellant at trial pleaded guilty and was convicted on his own plea of guilty and sentenced to 30 years imprisonment on each count, all sentences were to run concurrently.

Being dissatisfied with the decision of the trial Judge, the appellant with leave of this Court appealed against sentence only on the ground that the learned trial Judge erred in law and fact when she passed a harsh and excessive sentence of 30 years imprisonment against him yet he had pleaded guilty.

At the hearing of this appeal, Mr. Kyabakaya Samson appeared for the appellant while the respondent was represented by Ms. Kwikiriza Joanita, State Attorney in the DPP's Office.

Counsel for the appellant submitted that in sentencing, many of the appellant's mitigating factors were not considered by the learned trial Judge, hence causing a miscarriage of justice for example the appellant was a 34 year old strong and healthy convict who changed his plea from not guilty to guilty hence saving Court's time, he was remorseful and a first offender.

Counsel further submitted that the appellant had been on remand since February 2011 and while on remand, he had acquired skills through different courses of training, namely: a certificate in peace making and conflict resolution from the province of church of Uganda, a course in HIV Preventive Care, Support and Counselling and a bible course in the Lord My Good Shepherd in 2013.

Counsel submitted that the sentence of 30 years imposed by the learned trial Judge was harsh and excessive considering the circumstances of the case. He prayed that the appeal be allowed and this honorable Court invokes its powers and reduces the sentence to 8 years considering that the appellant had been in prison for almost 10 years. He relied on ***Ntambala Fred V Uganda, Criminal***

Appeal No.0177 of 2009 wherein the appellant was convicted of defilement and sentenced to 14 years imprisonment and this Honorable Court maintained the sentence.

In reply, counsel for the respondent submitted that there was no error in law or fact when the trial Judge meted out the sentence of 30 years to the appellant because it was after prosecution had brought 6 witnesses that the appellant decided to change his plea to guilty. He added that the trial Judge had rightly considered the mitigating factors and there was no need for this honorable Court to interfere with the sentence.

Counsel invited this Court to consider the aggravating factors namely; the fact that the victims were the appellant's relatives, one being his daughter and the other two nieces. He prayed that this Court finds no reason to interfere with the discretion of the trial Judge and relied on ***Kiwalabye Bernard V Uganda, Criminal Appeal No. 143 of 2003*** for the proposition that the appellate Court is not to interfere with the sentence imposed by the trial Court unless the sentence is manifestly excessive or so low as to amount to a miscarriage of justice.

In rejoinder, counsel for the appellant submitted that despite the fact that the learned trial Judge appreciated the many certificates that the appellant had acquired while in prison, the only mitigating factor considered by her was the change of plea from not guilty to guilty. Counsel added that the learned trial

Judge considered the aggravating factors and ignored the mitigating factors. He reiterated his earlier prayers.

The duty of this Court as the first appellate Court was re-stated by the Supreme Court in ***Oryem Richard V Uganda, Criminal Appeal No.22 of 2014*** as follows;

> *"We should point out at this stage that Rule 30(1) of the Court of Appeal Rules places a duty on the Court of Appeal, as first appellate Court, to re-appraise the evidence on record and draw its own inference and conclusion on the case as a whole but making allowance for the fact that it has neither seen nor heard the witnesses. This gives the first appellate Court the duty to rehear the case."*

An appellate Court should not interfere with the discretion of a trial Court in imposing a sentence unless the trial Court acted on a wrong principle or overlooked a material factor or where the sentence is illegal or manifestly excessive or too low to amount to a miscarriage of justice. ***See Kyalimpa Edward V Uganda, Supreme Court Criminal Appeal No.10 of 1995.***

The learned trial Judge is faulted for passing a harsh and excessive sentence of 30 years imprisonment against the appellant who pleaded guilty thereby occasioning a miscarriage of justice. It was submitted for the appellant that several mitigating factors in his favor were not considered by the learned trial Judge which caused a miscarriage of justice.

While sentencing the appellant, the learned trial Judge stated that;

"The convict was a father to one of the victims and a guardian to two others. The victims were aged 9 and 10 years old. The defilement or sexual assault was repeatedly done. He abused the trust of the father of one of the victims who trusted him with his child. All the above aggravate the offence. The only mitigating fact is changing the plea after 5 8/12 years and after seeing his own daughter."

During allocutus, counsel for the appellant presented various mitigating factors including that; the accused was 34 years old, strong and healthy, he pleaded guilty hence saving Court's time, was remorseful, first offender with no previous criminal record and had been on remand since February 2011 that is 5 8/12 years.

We note that the trial Judge did not consider all the mitigating factors save for the fact that the appellant had changed his plea after 5 years and 8 months. She did not take into account the fact that he was a first offender, he was 34 years old and was remorseful. The learned trial Judge ought to have considered all these factors in the appellant's favor.

Counsel for the appellant submitted that the appellant had been on remand since February 2011.

In dealing with this issue, the learned trial Judge stated as follows;

"Since the children have moved on and are in safe hands, there is no need to let him out to plan for them. The convict deserves a sentence that will denounce the unlawful conduct of fathers defiling their own children,

guardians sexually abusing children under their care and custody and deterring the would be offenders. In the result, he is sentenced to 30 years imprisonment on each and every count with the period on remand inclusive and the sentence shall run concurrently."

Article 23(8) of the Constitution provides that where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.

The words used by the trial Judge that "the period on remand inclusive" were vague and did not clearly mean that the period spent on remand had been taken into account.

In ***Tatyama Fred V Uganda, Court of Appeal Criminal Appeal No.107 of 2012,*** the learned trial Judge while sentencing that appellant noted that she had considered all the circumstances of the case and the period spent on remand before sentencing the appellant to twenty years imprisonment. This Court found that the said sentence was vague as the trial Judge was silent on whether the period of 3 years that the appellant had spent on remand had been deducted from the final sentence. This Court reduced the sentence to 17 years and 4 months after taking into account the period that the appellant had spent on remand.

The trial Judge did not take into account the period the appellant had spent in lawful custody as required under **Article 23(8)** of the Constitution. Failure to do

so rendered the sentence illegal as was held by the Supreme Court in ***Rwabugande Moses V Uganda, Supreme Court Criminal Appeal No.25 of 2014*** where Court held that;

> *"A sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory Constitutional provision."*

We therefore, find that the sentence of 30 years imposed upon the appellant by the learned trial Judge was illegal and we set it aside.

Having found that the sentence was illegal for failure to meet the requirements the of Constitution and failure to take into consideration the mitigating factors as presented by counsel for the appellant, we invoke the provisions of ***section 11 of the Judicature Act*** which grant this Court the same powers as that of the trial Court to impose a sentence we consider appropriate. The section provides;

> *"For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."*

It is trite that Court has to try as much as possible to maintain uniformity of sentences for similar offences.

In ***Tatyama Fred V Uganda, Court of Appeal Criminal Appeal No.107 of 2012,*** the appellant was sentenced to 20 years imprisonment for defiling a 12 year old girl. On appeal, this Court reduced the sentence to 17 years and 4 months.

In ***German Benjamin V Uganda, Court of Appeal Criminal Appeal No.142 of 2010,*** the victim who was aged 5 years was sexually assaulted by a 35 year old appellant who was convicted and sentenced to 20 years imprisonment. On appeal, this Court set aside the sentence and substituted it with a sentence of 15 years imprisonment.

Having taken into account both mitigating and aggravating factors, we now sentence the appellant to 17 years imprisonment on each count. The said sentence shall run concurrently. We note that the appellant had spent 5 years and 8 months on remand which we deduct therefrom. He shall serve a sentence of 11 years and 4 months on each count to run concurrently starting from 21st October, 2016, the day the appellant was convicted.

We so order.

Dated at Mbale this.....15th.....day of.....September.....2020

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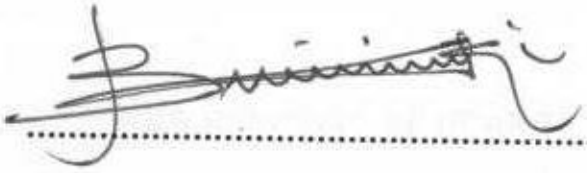
HON. MR. JUSTICE F.M.S EGONDA-NTENDE

JUSTICE OF APPEAL



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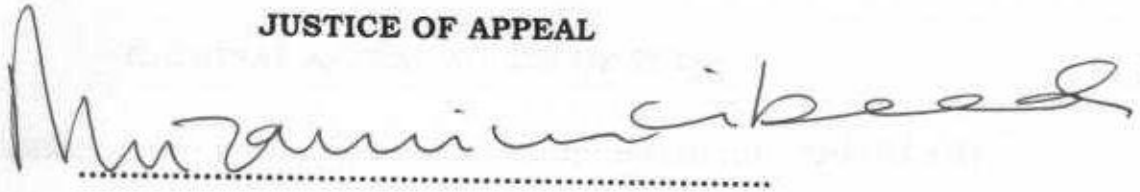
HON. JUSTICE CHEBORION BARISHAKI

JUSTICE OF APPEAL



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HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI

JUSTICE OF APPEAL