

**THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA  
CRIMINAL APPEAL No.0676 OF 2015  
[Coram: Egonda-Ntende, Bamugemereire & Mugenyi JJA]**

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**NDUNGI RAULENSIO ::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**UGANDA ::::::::::::::::::::::::::::::: RESPONDENT**

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*(Appeal from the decision of Simon Byabakama Mugenyi J in High  
Criminal Session No. 88 of 2009 dated 24<sup>th</sup> of September 2013)*

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*Criminal Law- Aggravated Defilement C/s 129 and 4(a) of the  
Penal Code Act- Own plea of guilt -Appeal against Sentence  
only - Harsh and excessive sentence.*

**JUDGMENT OF THE COURT**

**Introduction**

**Ndungu Raulensio**, the Appellant, was found guilty of the  
offence of Aggravated Defilement, contrary to sections 129  
20 and 4(a) of the Penal Code Act Cap 120. The court  
consequently sentenced him to 22 years of imprisonment.

**Background**

On September 18<sup>th</sup>, 2011, Katwesige Florence entrusted her  
25 3-year-old daughter, RK, to the care of her elder sister and  
grandmother while she went to Kabwoya market. Later that  
day, around 6:00 pm, RK's aunt dispatched her to retrieve a  
knife from their residence. While enroute, she crossed paths  
with the appellant who got her by the hand and took her to a  
30 bush and laid her down and performed a sexual act on her.  
The perpetrator was 38 years of age. Following the crime, the

victim's sister, mother, and aunt searched for her and discovered her crying in a nearby bush. When questioned, the victim disclosed that the appellant had sexually assaulted her. Upon examination, the victim's aunt observed that she  
5 was bleeding in her genital area. The authorities were alerted and despatched. The appellant was apprehended in the bush and taken into custody at Kabwoya Police Post. Medical examinations were conducted on both the victim and the perpetrator. The victim's examination revealed recent  
10 bruises in her private parts, while the perpetrator was found to be of sound mind. He tested positive for HIV. The offender was subsequently tried and convicted for Aggravated Defilement. He was sentenced to 22 years of imprisonment. Dissatisfied, he appealed on one ground only. That the trial  
15 Judge erred in Law and fact when he passed a manifestly harsh and excessive sentence of Twenty-Two (22) years imprisonment against the Appellant thereby occasioning gross miscarriage of Justice.

20 **Representation**

During the appeal hearing, Bahenzire Angella appeared for the Appellant, while the respondent was represented by Sam Oola Senior Assistant DPP. Counsel for the Appellant applied for and was granted leave to appeal solely against the  
25 sentence. Both counsel relied on written submissions that have been taken into account when writing this judgment.

### **Submissions for the Appellant**

Counsel for the appellant contended that the sentence of 22 years' imprisonment was harsh and manifestly excessive. Counsel faulted the learned trial Judge for failure to factor  
5 in the time spent on remand while passing sentence; for not taking into account status of the appellant as a first-time offender; not regarding that he was a widower with two dependents, and failing to recognise his declining health as a result of being HIV positive; and the fact that he pleaded  
10 guilty. In light of the above mitigating factors, counsel for the Appellant invited this court to re-evaluate the mitigating factors and reduce the sentence accordingly.

### **Submissions for the Respondent**

15 The learned Senior Assistant DPP contended that the Appellant's conviction and subsequent of 22 years' imprisonment was the outcome of a fair and free trial, not a guilty plea as suggested by the Appellant's counsel. Additionally, the Appellant, a 38-year-old HIV-positive man,  
20 engaged in sexual intercourse with a 3-year-old girl child, thereby exposing the child to the risk of HIV/AIDS infection. That such actions demonstrate an utter disregard for the life of a three-year-old female victim and her well-being. This juxtaposed against the Appellant's duty as a father to two  
25 children aged 5 years and 7 years makes him inconsiderate not just to the victim but to his own minor children as well. Counsel for the respondent submitted that the learned trial

Judge assessed both the aggravating and mitigating factors before passing a sentence of 22 years' imprisonment against the appellant, which in the view of counsel for the respondent, was neither excessive nor unjust. Counsel for the Respondent beseeched this court to dismiss the appeal and the uphold the sentence of 22 year' imprisonment.

### **Consideration of the Appeal**

As a first appellate court, the role of this court was outlined in the Supreme Court decision of **Oryem Richard v Uganda, SCCA No. 22 of 2014**, among others. It was established that,

“Rule 30(1) of the court of Appeal Rules, places a duty on the Court of Appeal, as the first Appellate Court to re-appraise 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 a witness. This gives the appellate court duty to rehear the case”.

This duty was further espoused in **Fr. Narcensio Begumisa & Ors v Eric Tibebaaga, SCCA No.17 of 2002, Kifamunte Henry v Uganda, SCCA No. 10 of 1997, The Executive Director of National Environmental Management Authority (NEMA) v Solid State Limited, SCCA No.15 of 2015 (unreported) and Pandya v R, [1957] EA 336**. We are cognisant of this duty and of the fact that we did not see the witnesses testify, first-hand.

It is a well-established legal principle that appellate courts will typically refrain from interfering with sentences passed by trial courts. The sentencing Judge exercises discretion when determining an appropriate sentence. An appellate court will only disturb such sentence if it is clear that the trial court's decision was based on erroneous principles or if it considered factors that should not have been taken into account or neglected to consider pertinent issues. Additionally, an appellate court may alter a sentence if it exceeds legal limits or is so low as to result in an injustice. **See Sekandi Hassan v Uganda, SCCA No.25 of 2019, Livingstone Kakooza v Uganda, SCCA No. 17 of 1993 [unreported] and Jackson Zita v Uganda, SCCA No. 19 of 1995.**

As previously stipulated, this appeal is against sentence only. Therefore, it's imperative that we extract the sentencing remarks made by the learned trial Judge while passing sentence. During the appellant's sentencing, the learned trial Judge remarked,

“The victim in this case was 3 years at the time and quite young, therefore. The convict, who was 38 years then, is fit to be her father given the disparity in age. He showed no regard or concern for her well-being by sexually ravishing her. On top of that, he was HIV positive at the time, thus greatly putting the victim's life at risk. Clearly the circumstances of this case call

for a deterrent sentence. Court takes cognizance of the fact that the convict is a first offender. He is now aged 40 years and is said to have children. He has been on remand for 2 years. Owing to the circumstances of this offence however, there is need to keep him out of the society for a while and away from underage girls in particular as he undergoes reform and rehabilitation. It is hoped by the time he rejoins his community he will be reformed and contribute meaningfully to the community. Taking into account all the foregoing factors, I sentence the convict to 22 years imprisonment taking into account the period spent on remand. You have a right of appeal against conviction and sentence.”

In her remarks during sentencing, the learned trial Judge considered both mitigating and aggravating factors, which is commendable. We note, however, that the time spent on remand was not deducted. A similar scenario occurred in **Umar Sebidde v Uganda SCCA No.23 of 2002** where the court propounded thus:

“It is the duty of the court to pass a **definite and clearly ascertainable sentence**. The learned Justices further noted that at the time the trial Judge sentenced the appellant, the latter had been in custody for almost three years.”

It is incumbent upon a learned trial Judge to pass definitive and unambiguous sentences which give clarity about how

long correctional facilities should keep a convict in confinement.

In as much as is possible, courts are obligated to hold fast the principle of uniformity in sentencing. Similarly placed offenders who commit comparable offences should not be given disparate treatment. Guideline No. 6l(c) of the (Judicature Sentencing Guidelines) (Practice Directions, 2013) provides that:

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

It is important that this court continues to set precedents that guide and direct on sentencing in order to realise parity in sentencing. Consistency is a fundamental tenet of any sentencing framework, and it is reflective of the rule of law, the dictates of the uniform application of laws and the prohibition against arbitrary and disparate treatment of similarly placed offenders. We shall now examine prior cases with similar circumstances.

In an appeal similar to the one before us, **Ederema Tomasi v Uganda CACA No.554 of 2014**, although the appellant was HIV positive, the victim did not contract the virus. The

appellant was a first-time offender, remorseful, had a dependant child and had spent 2 years on remand. The court reduced the appellant's sentence from 25 years to 18 years.

5 In **Moses Birungi v Uganda CACA No. 177 of 2014** this court while sentencing the appellant court held that,

“In the instant case the appellant was a first offender. He spent 3 years on remand prior to his trial and conviction. He was 35 years old at the time of the  
10 commission of offence. He was remorseful. Nevertheless, he committed a very serious offence whose maximum punishment was the death penalty. We are satisfied that a sentence of 12 years imprisonment from the date of conviction [11  
15 September 2013] will meet the ends of justice in this case. We so order.”

This court deemed a sentence of 30 years for the offence of aggravated defilement to be a severe and disproportionate one, and reduced it to 12 years.

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In **Olara John Peter v Uganda CACA No.30 of 2010** the appellant was found guilty of the offence of Aggravated Defilement c/s129 and 4(a) of the Penal Code Act The victim was aged 14 years. The appellant who was HIV+, pleaded  
25 guilty to the charges. He was convicted and handed a sentence of 16 years' imprisonment. The appellant appealed the sentence, stating that it was excessive given that he had



readily pleaded guilty and not wasted court's time and other resources. However, the court concluded that the victim was put at risk of contracting HIV. The sentence of 16 years' imprisonment was considered neither excessive nor harsh  
5 under the circumstances.

In the case before us, this court has taken into consideration the fact that the appellant was aged 40 years at the time of sentencing. He was known to suffer chronic illnesses; HIV+,  
10 TB and Hernia. He was a first-time offender who was remorseful and had 2 underage children aged 5 years and 7 years. After careful deliberation, this court is of the view that the seropositive status of the appellant; meaning that he has detectable antibodies to HIV; and the disparity in the age of  
15 the appellant; 38 years old at the time of committing the offence compared to the 3-year-old infant; are relevant facts to be considered in sentencing.

We have arrived at the conclusion that although the learned  
20 trial Judge handed down a sentence of 22 year' imprisonment, it remained ambiguous and in violation of Article 23(8) of the Constitution. For that reason, as obligated under section 11 of the Judicature Act, we now sentence the appellant to the sentence of 20 years imprisonment. We find  
25 this sentence sufficient in meeting the ends of justice. However, from the 20 years' imprisonment, we deduct the two years that the appellant spent in pre-trial custody. As a

result, the appellant is sentenced to 18 years in prison, running with effect from the 24<sup>th</sup> of October 2013, the date on which he was convicted.

5 Dated this 9<sup>th</sup> day of Nov 2023.

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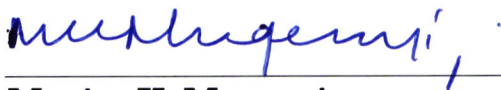
15 **Fredrick Egonda-Ntende**  
JUSTICE OF APPEAL



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**Catherine Bamugemereire**  
JUSTICE OF APPEAL

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**Monica K. Mugenyi**  
JUSTICE OF APPEAL

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