THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

[*Coram: Egonda-Ntende, Obura, Madrama, JJA*]

Criminal Appeal No. 59 of 2019

(Arising from High Court Criminal Session Case No.0280 0f 2013 at Fort Portal)

BETWEEN

Nzeimana Aaron ..... Appellant

AND

Uganda ..... Respondent

(An appeal from the judgement of the High Court of Uganda [Batema, J] delivered on 28th February 2014)

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted and convicted of the offence of aggravated defilement contrary to sections 129 (3) and (4) (a) of the Penal Code Act, Cap 120. The particulars of the offence were that the appellant, on the 26th day of December 2011, at Kasasa trading centre in Kamwenge district, performed a sexual act with Arinaitwe Annet, a girl aged six years. On 28th February 2014, the learned trial judge convicted and sentenced the appellant to 27 years' imprisonment.

[2] Being dissatisfied with that decision the appellant appealed against the sentence on the following grounds:

> '(1) The learned trial judge erred in law and in fact when he imposed on the Appellant a sentence of imprisonment for 27 years without complying with the Constitution of the Republic of Uganda and in the result rendering the sentence illegal.

(2) That in the alternative the sentence of imprisonment for 27 years imposed on the Appellant was unfair, harsh and excessive in the circumstances.'

[3] The respondent opposes the appeal.

Submissions of Counsel

[4] At the hearing of the appeal, the appellant was represented by Mr. Achellam Collins and the respondent was represented by Mr. Charles Bwiso, Senior State Attorney in the Office of the Director, Public Prosecutions. The appellant's counsel adopted his written submissions.

[5] Mr. Achellam submitted on the main ground that the learned trial judge did not take into account the period the appellant spent in lawful custody as required by article 23 (8) of the Constitution. He submitted that counsel for the appellant during the pre-sentence hearing informed the court that the appellant had spent 3 years on remand but this was not taken into consideration. He submitted that the failure to take into account the 2 years, 1 month and 12 days the appellant spent on remand renders the sentence illegal. He refered to guideline 15 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013 that require courts to take this period into account while sentencing and the case of Rwabugande Moses v Uganda [2017] UGSC 8 where the Supreme Court stated that failure to do so renders the sentence illegal.

[6] Counsel for the appellant concluded by praying that this court finds the sentence illegal and set it aside. He also prayed that this court should invoke its powers under section 11 of the Judicature Act and impose an appropriate sentence.

[7] With regard to the alternate ground, Counsel for the appellant argued that the sentence was not only illegal but also harsh. He submitted that although sentencing is within the discretion of the trial judge, one of the aims of punishment is reform of the offender, which cannot be achieved by a lengthy punishment. He contended that the trial court ought to have taken into consideration that the appellant was a first-time offender who was remorseful and a law abiding citizen with the likelihood of reforming. He was of the view that the learned trial judge ignored the appellant's mitigating factors and imposed a very severe sentence on the appellant.

[8] Mr. Achellam contended that this court has power under section 11 of the Judicature Act to set aside such sentences. He also relied on guidelines 34(a), (d) and 36(c), (f) of the Constitution (Sentencing Guidelines for Courts of

Judicature) (Practice) Directions 2013 that provide the considerations for determining a sentence for defilement. He submitted that courts have to take into consideration the ages of both the victim and the offender and the remorsefulness of the offender. He stated that the appellant was 65 years old, married with six children whom he takes care of as a bread winner and imprisoning him for such a lengthy period would amount to punishing the entire family. He prayed that this court be persuaded by its decision in Kia Erin v Uganda [2017] UGCA 70, where it took into consideration the advanced age of the appellant as a mitigating factor.

[9] Counsel for the appellant proposed a sentence of 12 years as appropriate in this case after taking into account the period the appellant spent on remand. She relied on German Benjamin v Uganda [2014] UGCA 63 and Rugarwana Fred v Uganda Supreme Court Civil Appeal No. 39 of 1995 (unreported).

[10] In reply Mr. Bwiso conceded to both the grounds of appeal. He proposed that 15 years' imprisonment after taking into account the period the appellant spent on remand would be appropriate in this case. He relied on German Benjamin v Uganda [2014] UGCA 63, where this court imposed a sentence of 15 years imprisonment under circumstances similar to this case.

Analysis

[11] The facts of this case are that on 26th December 2011, in the afternoon, the appellant found the 6 year old victim at her home. He enticed her with UGX 200 and took her to the banana plantation. He asked her to undress so that he could show her something. She did so and thereafter he put her on the ground, lay upon her and sexually ravished her. The victim's mother (PW2) found the appellant defiling the victim while the victim was screaming and she ran to find the victim's father (PW3) for help. PW3 caught the appellant in the act and apprehended him and handed him over to police. The victim was immediately taken for medical examination and the report revealed that there were signs of penetration of her vagina, her hymen had raptured and she had inflammation to the vagina that was still fresh. The appellant was examined and found to be 62 years of age and of sound mind.

[12] It is now a well-settled position in law that this Court will only interfere with a sentence imposed by a trial Court in a situation where the sentence is either illegal, or founded upon a wrong principle of the law. It will equally interfere with sentence, where the trial Court has not considered a material factor in the case; or has imposed a sentence which is harsh and manifestly excessive in the circumstance. See Bashir Ssali v Uganda [2005] UGSC 21, Ninsiima Gilbert v

Uganda [2014] UGCA 65, Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 143 of 2001 (unreported) and Livingstone Kakooza v Uganda [1994] UGSC 17.

Ground 1

[13] The appellant contends that the learned trial judge did not take into account the period spent in remand as required by Article 23(8) of the Constitution. Article 23(8) states:

> '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.'

[14] Guideline 15 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013 states:

> '15. **Remand period to be taken into account**.
> (1) The court shall take into account any period spent on remand in determining an appropriate sentence.
> (2) The court shall deduct the period spent on remand from the sentence considered appropriate after all factors have been taken into account.'

[15] In Rwabugande Moses v Uganda [2017] UGSC 8, the Supreme 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. Taking the remand period into account a mandatory requirement. The period to be taken into account is that period which an accused person spends in lawful custody before completion of the trial. This period should be taken into account applying the mathematical approach or taken into consideration specifically along with other relevant factors before the court pronounces the term to be served. It must be considered and that consideration must be noted in the judgment. See Abelle Asuman v Uganda [2018] UGSC 10.

[16] The relevant part of the sentence is set out as follows:

> **'SENTENCE**
> The law of defilement takes a seriously aggravated defilement. The maximum penalty is death. This old man is not remorseful. He only thinks of himself and does not care about young girls like **AR-NET**. He deserves no mercy at all. I sentence him to 27 years Imprisonment.'

[17] From the above excerpt it is evident that the pre-trial detention period was not taken into consideration. As such the sentence was determined in contravention of article 23 (8) of the Constitution. Counsel for the appellant informed court that the appellant had spent three years on remand and requested that this period be taken into account which was disregarded. From the record the appellant was arrested on 26th December 2011 and convicted on 28th February 2014. This means that he spent two years and two months on remand which ought to have been deducted from his sentence or taken into consideration after the appropriate sentence was determined.

[18] The sentence against the appellant was illegal and is set aside. There is no need to consider the alternative ground. We now invoke Section 11 of the Judicature Act which gives this court power as that of the trial court to impose a sentence of its own.

[19] In mitigation the appellant prayed for lenience. He was 65 years old with six children under his care. The appellant was a first-time offender and had spent three years on remand. We have put all these factors into consideration. The aggravating factors are that the victim was only 6 years old while the appellant at the time of sentencing 65 years old. His behaviour did not befit his advanced age.

[20] In Suuna Patrick v Uganda [2018] UGSC 35, the appellant was indicted and convicted of the offence of aggravated defilement. The victim was 7 years at the time the offence was committed, she was at a party with her step mother when the appellant lured her into a house with 1000= and defiled her. The appellant was sentenced to 19 years' imprisonment, the Supreme Court set aside the sentence and substituted it with a sentence of 15 years' imprisonment.

[21] In Candia v Uganda [2016] UGCA 27, this court upheld a sentence of 17 years imprisonment for the offence of aggravated defilement. The appellant was a step-father of the 8-year-old victim. While in Ngobya v Uganda [2018] UGCA 48, this court set aside a sentence of 37 years and substituted it with one of 15 years' imprisonment. The appellant was convicted of the offence of aggravated defilement. He defiled a 5-year-old girl.

[22] In German Benjamin v Uganda [2014] UGCA 63, the appellant was indicted and convicted of the offence of Defilement contrary to 129(1) of the Penal Code Act. He defiled a girl of 5 years. This court set aside the sentence of 20 years

and substituted with one of 15 years. In Ssenyomo Charles v Uganda [2018] UGCA 42, the appellant was convicted of the offence of aggravated defilement. The appellant confronted the 6-year-old victim and had sexual intercourse with her in a nearby plantation. The learned trial judge sentenced him to life imprisonment but on appeal to this court, the sentence was set aside and substituted with 16 years' imprisonment.

[23] In Ntambala v Uganda [2018] UGSC 1, the appellant, was indicted and convicted of aggravated defilement contrary to section 129(1) of the Penal Code Act and sentenced to 14 years' imprisonment. The appellant had been defiling his 14-year-old daughter with whom he lived. He appealed to this court which upheld his conviction and sentence and the Supreme Court confirmed it on appeal.

Decision

[24] Having taken into account both the aggravating and mitigating factors and the range of sentences for the offence of aggravated defilement in the above cited authorities, we find that a sentence of 15 years' imprisonment is appropriate in this case. From that sentence, we deduct the period of 2 years and 2 months as the period the appellant spent on remand. The appellant will therefore serve a sentence of 12 years and 10 months starting from 28th February 2014, the day he was convicted

[25] We so order.

Dated, signed and delivered at Fort Portal this 30th day of July 2019

Fredrick Egonda-Ntende
Justice of Appeal

Hellen Obura
Justice of Appeal

Christopher Madrama
Justice of Appeal