THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT ARUA

CORAM: CHEBORION; MUGENYI AND GASHIRABAKE, JJA

CRIMINAL APPEAL NO. 620 OF 2014

OCHENG MICHAEL ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

(Appeal from the High Court of Uganda at Arua (Nyanzi, J) in Criminal Case No. 67 of 2011)

JUDGMENT OF THE COURT

A. **Background**

1. Mr. Oceng Michael ('the Appellant') was convicted of the offence of aggravated defilement contrary to section 129(3) and (4) of the Penal Code Act, Cap. 120 and sentenced to twenty-five (25) years' imprisonment.

2. The Appellant appeals against the sentence on the singular ground that the learned trial judge erred in law and fact when he imposed a manifestly harsh and excessive sentence of 25 years' imprisonment. It is the contention that had the trial judge considered the mitigating factors and court decisions arising from cases of a similar nature, he would not have imposed a 25-year sentence upon the Appellant. A more appropriate sentence of fifteen (15) years is proposed which, after factoring in the two and half year-period the Appellant had spent on remand would purportedly reduce to twelve (12) years.

3. Conversely, the Respondent supports the 25-year sentence on the premise that it was arrived at after due consideration of the period spent on remand, as well as all the mitigating circumstances of the case. In the alternative, it is proposed that should Court be inclined to reduce the sentence, an eighteen (18) year sentence would be appropriate.

4. At the hearing, Ms. Daisy Bandaru of M/s Bandaru & Co Advocates appeared for the Appellant while the Respondent was represented by Mr. Richard Okello, an Assistant Director of Public Prosecutions.

B. **Determination**

5. The circumstances under which an appellate court may interfere with a sentence meted out by a trial court are well articulated in **Kyalimpa Edward vs. Uganda, Criminal Appeal No.10 of 1995** (Supreme Court) as follows:

> 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 discretion. It is the practice that as an appellate Court, this Court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless Court is satisfied that the sentence imposed by the trial judge was so manifestly excessive as

to amount to an injustice: Ogalo s/o Owoura vs. R (1954) 21 E.A.C.A 126 and R vs. Mohamedali Jamal (1948) 15 E.A.C.A 126.

6. That position was re-echoed in the latter case of **Kiwalabye vs. Uganda, Criminal Appeal No.143 of 2001** (Supreme Court) in the following terms:

> The appellate Court is not to interfere with sentence imposed by a trial Court which has exercised its discretion on sentences unless the exercise of the discretion is such that the trial Court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence.

7. From the foregoing authorities, it becomes apparent that in so far as the sentencing of convicts is an exercise of judicial discretion, no two sentences (even in cases of similar facts) would necessarily attract similar sentences. Rather, the circumstances of each case would be considered on their merits and the aggravating and mitigating factors engrained therein may yield a different sentence from that imposed in a case arising from a similar offence. I am therefore disinclined to abide the views of learned Counsel for the Appellant in that regard. Consequently, aside from an illegal sentence or one that is so manifestly excessive as to amount to an injustice, this Court would defer to the discretion of the trial court and sustain the sentence imposed by it.

8. Turning to the matter before the Court presently, considering that the Third Schedule to the Sentencing Guidelines does prescribe a sentencing range of 30 years' imprisonment to the death penalty for the offence of aggravated defilement, it can scarcely be proposed that a 25-year sentence is either harsh or excessive, let alone manifestly so. We would therefore decline to interfere with that sentence.

9. In deciding as he did the trial judge considered the prevalence of the offence aggravated defilement in Arua as an aggravating factor that warranted a sufficiently deterrent sentence to protect the society from like-minded persons. He further considered the fact of the Appellant himself being a father of seven infant children as an aggravating factor to the extent that being a parent, he would have been expected to protect not harm a nine-year old child, such as was the victim. This would speak to the gravity of the offence. Both the prevalence and gravity of the

offence are valid considerations in the determination of appropriate sentence as propounded in clauses (b) and (i) of the Second Schedule to the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 ('the Sentencing Guidelines'). To that extent, the trial judge did exercise his discretion quite judiciously.

10. We are alive to the decision in **Rwabugande Moses vs. Uganda, Criminal Appeal No. 25 of 2014** (Supreme Court) that defers to an arithmetic approach to the provisions of Article 23(8) of the Constitution and Guideline 15 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 ('the Sentencing Guidelines'). That case enjoins courts to compute sentences by arithmetically deducting the period that convicts have spent on remand.

11. However, the Supreme has since clarified its position in that case by its decision in the latter case of **Asuman Abelle vs. Uganda (2018) UGSC 10**, where it was held:

> We find that this appeal was premised on a misunderstanding of the decision of this Court in **Rwabugande Moses versus Uganda** (supra) .... 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. (Emphasis ours)

12. We note that the trial court in **Asuman Abelle vs. Uganda** (supra) had made no mention whatsoever of the period the convict had spent on remand. In that respect, the Supreme Court further observed:

> It appears to us that whether a court adopts the arithmetical approach or the non-arithmetical approach to complying with the aforesaid constitutional provision it is incumbent on the court to ascertain first the exact period the convict has spent in lawful custody and then choose whether to apply Rwabugande Moses v Uganda (the arithmetical formula) or Asuman Abelle v Uganda (the non- arithmetical approach). When this period is not ascertained it cannot be possible to correctly take it into account. (Emphasis ours)

13. We respectfully agree with the foregoing proposition. Given the constitutional requirement for the period spent on remand to be taken into account, it is only by such ascertainment that a sentencing court can demonstrate that it has indeed taken the said period into account.

14. In the instant case, the trial court discharged itself as follows:

> *I have heard all the prayers both aggravating factors and mitigating factors have been considered. The accused is a parent of 7 infants who go to school. I do believe as a parent he would have taken a lot of interest in the victim's school and health. It was terrible to defile her. The victim aged 9 years had nothing of sexual appeal to any normal person. He chose a style of life for which he is to pay.* ***I have considered the fact that the accused has been on remand for 2 ½ years****. .... The accused had no control over his late trial. Having considered all relevant factors in order to protect society by deterrence and for a wrong he did, the accused person is sentenced to 25 years imprisonment.*

15. We are satisfied, therefore, that the trial court did in fact consider the two and a half-year period the Appellant had spent on remand, in arriving at the 25-year sentence handed down.

C. **Conclusion**

16. In the result, the Appeal against sentence is disallowed, and the 25-year sentence imposed upon the Appellant by the trial court is hereby upheld.

It is so ordered.

Dated and delivered at Kampala this 29th **day of** March **, 2022.**

Barishaki Cheborion
Justice of Appeal

Monica K. Mugenyi
Justice of Appeal

Christopher Gashirabake
Justice of Appeal