THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT ARUA

CORAM: CHEBORION; MUGENYI AND GASHIRABAKYE, JJA

CRIMINAL APPEAL NO. 294 OF 2017

OKELLO BASIL MUGENYI .... APPELLANT

VERSUS

UGANDA .... RESPONDENT

(Appeal from the High Court of Uganda at Lira (Rugadya Atwoki, J) in Criminal Case No. 55 of 2014)

JUDGMENT OF THE COURT

A. **Background**

1. Mr. Basil Okello ('the Appellant') was convicted of the offence of aggravated defilement contrary to section 129(3) and (4)(a), (b) and (c) of the Penal Code Act, Cap. 120 and sentenced to thirty-two (32) years' imprisonment. The victim of the offence was a minor of twelve (12) years, a niece to the Appellant's wife that lived with his family while her accoster was a 39 year old, HIV positive man.

2. The Appellant appeals against the sentence only on the singular ground that it is harsh and excessive. Invoking the principle of uniformity and proportionality, it was argued for the Appellant that a 32-year sentence was harsh and excessive in light of **Aharikundira Yusitina vs Uganda, Criminal Appeal No. 27 of 2015** (Supreme Court) which recommends consistency in sentencing. The following decisions of this Court were cited in support of a sentencing range for the offence of aggravated defilement of between eleven (11) – fifteen (15) years: **Tiboruhanga Emmanuel vs Uganda, Criminal Appeal No. 655 of2014, Birungi Moses vs Uganda, Criminal Appeal No. 177 of 2014, Kizito Senkula vs Uganda, Criminal Appeal No. 24 of 2001** and **Ninsiima Gilbert vs Uganda, Criminal Appeal No. 180 of 2010**.

3. Conversely, learned State Counsel the Respondent was emphatic about the discretion of judicial officers at sentencing, arguing that the consistency or uniformity sought by the Appellant was only possible in cases with similar offences but no such similarity had been demonstrated in relation to the cases cited. On the contrary, it is opined that the 32-year sentence imposed on the Appellant is on the lower side given that the maximum sentence is death. Nonetheless, the aggravating factors having outweighed the mitigating circumstances of the case, the 32-year sentence fell within the range of sentences available to the trial court.

4. To illustrate her point, Counsel cited the case of **Bachwa Benon vs Uganda, Criminal Appeal No. 869 of 2014** where a life imprisonment sentence was upheld in respect of an Appellant that was HIV positive and convicted for the aggravated defilement of a 10-year old. Furthermore, in **Bonyo Abdul vs Uganda, Criminal**

Appeal No. 7 of 2011, the Supreme Court similarly upheld a sentence of life imprisonment for a 27-year old HIV positive convict that had defiled a 14-year old girl. In the same vein, in **Othieno John vs Uganda, Criminal Appeal No. 174 of 2010**, this Court (Court of Appeal) upheld a 29-year sentence meted on an HIV positive man who had defiled a 14-year old. The Court was thus urged to find that the Appeal had no merit.

5. At the hearing, Mr. Paul Abiti of the Legal Aid Project of the Uganda Law Society – Arua Branch appeared for the Appellant while the Respondent was represented by Ms. Doreen Adello Olwo, a State Attorney.

B. Determination

6. 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.

7. 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.

8. The discretionary duty upon a judicial officer at sentencing was further emphatically restated in **Sekitoleko Yudah & Ors vs Uganda, Criminal Appeal, No.33 of 2014**, where the Supreme Court observed that '**an appropriate sentence is a**

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matter for the discretion of the sentencing judge (and) **each case presents its own facts upon which a judge exercises his discretion**.'

9. From the foregoing authorities, it becomes apparent that in so far as the sentencing of convicts is an exercise of judicial discretion, no two cases (even those with fairly 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 an otherwise similar offence. This indeed is the gist of the position that was adopted by the Supreme Court in **Kaddu Kavulu Lawrence vs. Uganda, Criminal Appeal 72 of 2018**, as well as this Court in **Muwonge Fulgensio vs Uganda Court of Appeal, Criminal Appeal No. 586 of 2014**.

10. Whereas, therefore, consistency in sentencing is the ideal where all parameters are identical, it would not negate judicial discretion in sentencing. Such discretion, to the extent that it holistically canvasses all the mitigating and aggravating set of circumstances that are specific to a case, would in my view engender functional justice the import of which to criminal justice cannot be overstated.

11. In any event, the *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* ('the Sentencing Guidelines') represent a tangible step taken to rationalize sentencing and, as far as possible, ensure a degree uniformity in the exercise of judicial discretion at sentencing. Under the Third Schedule to the said Guidelines, the offence of aggravated defilement would attract a minimum sentence of 30 years' imprisonment and maximum sentence of the death penalty. Clearly, the 32-year sentence meted out by the trial court in this case falls within that threshold and is therefore neither illegal nor excessive.

12. In arriving at the now contested sentence, the trial judge did consider the fact of the Appellant being a first offender, his family responsibility as a father of seven (7) children and his sickly condition as mitigating factors. She nonetheless considered the aggravating factors to outweigh the mitigating factors. These include the fact that aware of his serro-status and despite his having been a father figure to the victim, the Appellant traumatised her with his wanton, deliberate actions. The trial

judge thus considered the need to protect young girls in the society by rendering a deterrent sentence. She did also consider the three (3) years already spent on remand, deducting them from a possible 35-year sentence to arrive at the sentence of 32 years' imprisonment.

13. Guideline 35(d), (e) and (i) of the Sentencing Guidelines highlight an offender's knowledge of his HIV/ AIDS status; the victim being of tender age and knowledge of that fact by the offender as aggravating factors for the offence of defilement. The evidence on record is that the Appellant was aware of the victim's young age, as well as his HIV status, but had no qualms about defiling her at the risk of infecting her with a terminal illness at such a tender age. Consequently, we cannot fault the trial judge for her judicious exercise of the discretion available to her.

C. **Conclusion**

14. Having found nothing illegal or excessive about the sentence in the circumstances of this case, we would respectfully abide the decision in in **Kyalimpa Edward vs. Uganda** (supra) and **Kiwalabye vs. Uganda** (supra), and refrain from interfering with the discretion of the sentencing judge. The 32-year sentence is hereby upheld.

15. In the result, we find no merit in the Appeal and do hereby dismiss it.

It is so ordered.

Dated and delivered at Kampala this ...30th... day of ...March..., 2022

Barishaki Cheborion

<u>**Justice of Appeal**</u>

Monica K. Mugenyi

<u>**Justice of Appeal**</u>

Christopher Gashirabake

<u>**Justice of Appeal**</u>