THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO 30 OF 2010

(ARISING FROM MASAKA CRIMINAL SESSION CASE NO. 21 OF 2009)

OLARA JOHN PETER ………………………………………… APPELLANT

VERSUS

UGANDA ……………………………………………………… RESPONDENT

Coram: Augustine Nshimye JA

Mwangusya Eldad JA

Buteera Richard JA

(*APPEAL AGAINST THE CONVICTION OF OLARA JOHN PETER BY THE HIGH COURT OF UGANDA SEATED AT MASAKA BEFORE HON. LADY JUSTICE KIGGUNDU JANE F. B. DATED 26/3/2010)*

JUDGMENT OF THE COURT

The Appellant OLARA JOHN PETER was indicted for the offence AGGRAVATED DEFILEMENT C/S 129 (3) and 4 (a) and (b) the Penal Code Act. The particulars were that on the 25th day of November 2008 at

Lwanabatya Fishing Village in the Kalangala District he had sexual intercourse with AJENGO MADINA WINFRED a girl under the age of 14 years.

He was arraigned before the High Court at Masaka where he pleaded guilty to the indictment. He was convicted on his own plea of guilty and sentenced to a term of imprisonment of sixteen year against which he now appeals to this court. He raises the following ground in his memorandum of appeal.

> "The Learned trial Judge grossly erred in Law and fact when she sentenced the appellant to 16 years imprisonment a sentence that is manifestly excessive in the circumstances"

Before this court delves into the merits of the appeal against the sentence we wish to observe that the procedure for taking the plea of the appellant was not followed. This procedure is clearly set out in the case of **ADAN Vs REPUBLIC (1973) EA. 445** where the court stated as follows:-

> "when a person is charged with an offence, the charge and the particulars thereof should be read out to him, so far as possible in his own language, but if that is not possible in the language

which he can speak and understand. Thereafter the Court should explain to him the essential ingredients of the charge and he should be asked if he admits them. **If he does admit his answer should be recorded as nearly as possible in his own words and then plea of guilty formally entered.** The prosecutor should then be asked to state the facts of the case and the accused be given an opportunity to dispute or explain the facts or to add any relevant facts he may wish the court to know. If the accused does not agree with the facts as stated by the prosecutor or introduces new facts which, if true might raise a question as to his guilt, a change of plea to one of not guilty should be recorded and the trial should proceed. It the accused does not dispute the alleged facts in any material respect, a conviction should be recorded and further facts relating to the question of sentence should be given before sentence is passed" (*emphasis added*)

In the present case the accused, instead of answering the indictment went into a lengthy narrative of the circumstance under which he had had sexual intercourse with the victim and of his arrest. This set of facts from the

accused was not necessary. According to the elaborate procedure of taking plea of guilty set down in the case of **ADAN Vs REPUBLIC** (Supra) the role of narrating the facts from which an alleged offence arises is the role of the prosecution. The accused person is only required to confirm, dispute or vary the facts without narration of his/her own facts which was done in this case. We wish to observe that the appellant was not prejudiced because both at the trial and during the hearing of this appeal he maintained his guilt.

On the appeal against sentence Mr. Andrew Sebugwawo Counsel for the Appellant submitted that the trial judge did not take into account all the mitigating factors before meting out the sentence of 16 years imprisonment. These mitigating factors were that the appellant had spent one and half years on remand, had family responsibilities and was the sole breadwinner for his family. Counsel emphasized that during the period the appellant had spent on remand he had repented his sins and readily pleaded guilty when arraigned in court. He cited the case of **SEMBATYA ROBERT VERSUS UGANDA** Criminal Appeal No. 61 of 1996 where this court set aside a sentence of 18 years imprisonment and substituted it with a sentence of 10 years. This court made a finding that the trial Judge had not

taken into account the factors that the appellant was a young man aged 29 years who was a first offender and who had been on remand for three years.

On behalf of the respondent Ms Somalie Wakholi Senior State Attorney supported the sentence of 16 years imprisonment which according to her was not excessive. She submitted that the Appellant was convicted for the offence of Aggravated Defilement where the maximum sentence provided by the law is death. She also submitted that while in the case of Sembatya the trial Judge did not take into account the factors pointed out by this Court the trial judge in this case did take into account all the factors including aggravating factors before passing the sentence. The aggravating factors included the fact that the appellant was H.I.V. positive and there was a big age difference between the girl who was only eight years and the appellant who was thirty one.

We have considered the Law governing interference with Sentence by an Appellate Court. The criteria is set down in the case **KIWALABYE BERNARD VS UGANDA** Supreme Court Criminal Appeal No. 143 of 2001 where the court set down the following principle:-

> "The Appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence, unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial Court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."

In our view the trial judge exercised her discretion correctly and took into consideration both the mitigating factors and the aggravating factors before arriving at the sentence. The sentence of 16 years was neither manifestly excessive nor so low as to amount to miscarriage of justice to warrant interference by this court. It should be noted that an eight year girl was exposed to the dangers of HIV by an adult and on this consideration alone the sentence could have been even higher. It should also be observed that the case of **SEMBATYA ROBERTS Vs UGANDA** is not applicable because that was decided before the amendments to the Penal Code Act where under section 129 (3) and (4) an element of Aggravation in the offence of Defilement is introduced and one of the circumstances of

aggravation is “where an offender is infected with Human Immunodeficiency Virus (HIV) ….”

In the result this appeal is dismissed and the sentence of 16 years imprisonment is upheld.

Dated at Kampala this …19th …… day of December…2013

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Augustine Nshimye

JUSTICE OF APPEAL

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Mwangusya Eldad

JUSTICE OF APPEAL

……………………………………………………..

Buteera Richard

JUSTICE OF APPEAL