

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT GULU
CRIMINAL APPEAL NO. 0158 OF 2014**

OMARA CHARLESAPPELLANT

VERSUS

10 **UGANDA.....RESPONDENT**

*(An appeal from the decision of the High Court at Gulu before His Lordship
Hon. Justice Alfonse C. Owiny-Dollo dated 5th day August, 2013 in Criminal
Case No. 0212 of 2012)*

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

15 **HON. MR. JUSTICE F.M.S EGONDA- NTENDE, JA**

HON. LADY JUSTICE HELLEN OBURA, JA

JUDGMENT OF THE COURT

20 This appeal arises from the decision of His Lordship Alfonse C. Owiny-Dollo J,
(as he then was) in High Court *Criminal Case No. 0212 of 2012* delivered on
21st June, 2013 and 5th August, 2013.

25 The appellant was on his own plea of guilt, convicted of two counts of the
offence of aggravated defilement contrary to *Section 129 (3) and (4)* of the
Penal Code Act (Cap 120) and sentenced to 28 years imprisonment on the first
count and 40 years imprisonment in respect of the second count. At the time
of the commission of the offence, the appellant was 33 years old and the
victims were aged 10 years and 12 years respectively.

30 Being dissatisfied with the sentence he now appeals to this Court on the
following grounds.

1) *The trial Judge erred in law when he passed a very harsh and illegal
sentence in the circumstances and imposed 28 years imprisonment
without taking into consideration the period the appellant spent on
remand thereby occasioning a miscarriage of justice.*

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2) *The trial Judge erred in law when he passed a very harsh and illegal
sentence in the circumstances and imposed 40 years imprisonment*

5 without taking into consideration the period the appellant spent on
remand thereby occasioning a miscarriage of justice.

10 3) The trial Judge erred in law and fact by imposing the two sentences of 28
years and 40 years imprisonment in respect of counts 1 and 2 respectively,
which were manifestly excessive and without specifying how the appellant
would serve them thereby occasioning a miscarriage of justice.

15 At the hearing of this appeal, learned Counsel Mr. Walter Okidi Ladwar
appeared for the appellant on state brief while Mr. Patrick Omia learned
Senior State Attorney appeared for the respondent. The appellant was present
in Court.

Appellant's case.

 Mr. Walter Ladwar first sought and was granted leave extending the time
within which to file the Notice of Appeal. He was also granted leave to appeal
against sentence only.

20 Counsel argued all the three grounds together. On grounds one and two, he
submitted that, the appellant was convicted on his own plea of guilt on the
first count and plea of not guilty on the second count. He contended that,
while passing sentence in respect of the two counts, the learned trial Judge did
not take into account the period the appellant had spent on remand as
25 required under *Article 23 (8)* of the Constitution. This, Counsel contended,
rendered the sentences a nullity. He asked this Court to find that the sentences
are illegal and set them aside. For the above proposition he relied on *Kasaijia
Daudi Vs Uganda, Court of Appeal Criminal Appeal No. 128 of 2008.*

30 On ground three, Counsel submitted that, both sentences were very harsh and
manifestly excessive.

 He contended that, there was no indication as to whether they were to be
served concurrently or consecutively. Counsel relied on *Ninsima Gilbert Vs*

5 *Uganda, Court of Appeal Criminal Appeal No. 0180 of 2010, Obed Moses Vs Uganda, Court of Appeal Criminal Appeal No. 091 of 2014 and Birungi Moses Vs Uganda, Court of Appeal Criminal Appeal No. 177 of 2014*, in which this Court commuted the sentences for the offence of aggravated defilement.

He asked this Court to find that the sentences are illegal, set them aside,
10 invoke *Section 11* of the Judicature Act and impose sentences that range between 12 to 18 years imprisonment which are to be served concurrently.

Respondent's reply

Counsel conceded that, the trial Judge did not comply with the provisions of *Article 23 (8)* of the Constitution, thus rendering the sentence a nullity. He
15 asked this Court to invoke *Section 11* of the Judicature Act and come up with a sentence that meets the ends of justice after taking into account both the aggravating and mitigating factors of this case. He asked Court to reduce the sentence to 10 years imprisonment.

Resolution of issues

20 We have carefully listened to the submissions of both Counsel and we have also perused the Court record and the authorities cited to us. This Court, as a first appellate Court, has a duty to re-appraise the evidence and make its own inferences in all issues of law and fact. See: *Rule 30(1)* of the Rules of this Court, *Kifamunte Henry Vs Uganda, Supreme Court Criminal Appeal No. 10 of*
25 *1997 and Bogere Moses Vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997.*

Grounds one and two

Both Counsel agree that, the sentences of 28 years and 40 years imprisonment imposed by the trial Judge ought to be set aside, as he did not take into
30 account the pre-trial detention period the appellant had spent on remand.

5 This omission, both Counsel agreed warrants Court sentencing aside the sentence.

In this case while passing sentence on the 1st count, the trial Judge stated as follows;-

10 *"He has pleaded guilty and for this reason I will greatly bring down the punishment which ordinarily would have had the matter been proved in a full blown trial. I sentence him to 28 (twenty eight) years in prison. This I believe will act as a deterrence to society to honour and protect the innocence and vulnerability of our children."*

And in respect of the 2nd count, the learned trial Judge stated as follows;-

15 *"There is no such way a person can be unleashed onto society to perpetuate his most evil occupation and pre occupation. He deserves a serious punitive sentence. I accordingly sentence him to 40 (forty) years in jail from the date of this sentence."*

20 Clearly the trial Judge, with all due respect, erred in law when he did not comply with the provisions of *Article 23 (8)* of the Constitution which stipulates as follow;-

25 *"23 (8) 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 a term of imprisonment."*

Failure to comply with *Article 23 (8)* of the Constitution renders the decision of the trial Judge a nullity. For this reason we do not have to delve into the merits of ground 3.

5 We now invoke the provisions of Section 11 of the Judicature Act (Cap 13) which empowers this Court in such circumstances to exercise the powers of the trial Court, to impose a sentence of our own.

There are aggravating factors in this case. The victims were aged 10 and 12 years old respectively. They were attacked by their step-father who should
10 have been protecting them. The appellant was HIV positive. He infected the first victim with HIV.

However, there are also mitigating factors in favour of the appellant. He was remorseful, pleaded guilty in respect of count one and saved Court's time. He was 33 years old at the time of the commission of the offence. He had spent 1
15 (one) year and 2 (two) months in pre trial detention prior to his conviction.

In *Katende Ahamad Vs Uganda, Supreme Court Criminal Appeal No. 6 of 2004*, the Supreme Court upheld a sentence of 10 years for aggravated defilement. The appellant in this case was the father of the 9 year old victim.

In *Dratia Saviour Vs Uganda, Court of Appeal Criminal Appeal No. 154 of 2011*,
20 the appellant was convicted of the offence of aggravated defilement and sentenced to 20 years imprisonment. The appellant was 33 years old, he was HIV positive and a guardian of the victim. This Court taking into account the period of 2 years the appellant had spent on remand reduced the sentence to 18 years imprisonment.

25 In *Kabwiso Issa Vs Uganda, Supreme Court Criminal Appeal no. 7 of 2002*, the Supreme Court, reduced a 15 year sentence for aggravated defilement to 10 years imprisonment.

In *Candia Akim Vs Uganda, Court of Appeal Criminal Appeal No. 0181 of 2009*, this Court upheld a sentence of 17 years imprisonment for the offence of


5 aggravated defilement. The appellant in this case was a step-father of the 8
year old victim.


Taking into account all the aggravating and mitigating factors in this case and
considering the range of sentences for the offence of aggravated defilement in
the above cited cases of this Court and those of the Supreme Court, we find
10 that, a sentence of 17 (seventeen) years imprisonment on count one and
11(eleven) years imprisonment on count two would meet the ends of justice.

In line with *Article 23 (8)* of the Constitution, we deduct 1 year the appellant
had spent on pre-trial detention from each of the counts. The appellant will
therefore serve a sentence of 16 (sixteen) years in respect of count one
15 commencing on 21st June, 2013 the date he was convicted on that count and
10 (ten) years and 10 (ten) months in respect of count two commencing on 5th
August, 2013 the date when he was convicted on that count. Both sentences
to run concurrently.

We so order.

20 Dated at Gulu this.....7th.....day of November.....2017.


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HON. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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HON. JUSTICE F.M.S EGONDA -NTENDE
JUSTICE OF APPEAL

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HON. JUSTICE HELLEN OBURA
JUSTICE OF APPEAL

