

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT GULU
CRIMINAL APPEAL No. 151 of 2014

ONEKA SIMON PETER..... APPELLANT
VS
UGANDA.....RESPONDENT

*[Appeal from the decision of the High Court at Gulu before His Lordship Justice
Alfonse C. Owiny-Dollo dated 21st day of June 2013 in Criminal case No. 29 of 2013]*

CORAM: HON.MR. JUSTICE KENNETH KAKURU, JA
HON. MR. JUSTICE F.M.S EGONDA-NTENDE, JA
HON. LADY JUSTICE HELLEN OBURA, JA

JUDGMENT OF THE COURT

This appeal arises from the decision of His Lordship Alfonse C. Owiny-Dollo J, (as he then was) in High Court Criminal Case No. 0029 of 2013 at Gulu, delivered on 21st of June, 2013.

The appellant was convicted on his own plea of guilt, of the offence of aggravated defilement contrary to Section 129 (3) and (4) of the Penal Code Act (CAP 120) and sentenced to 15 years imprisonment. At the time of commission of the offence on 10th December, 2012 the appellant was 28 years old and the victim was aged 11 years.

The appellant being dissatisfied with this decision of the High Court now appeals against sentence only.

At the hearing of this appeal, learned Counsel *Mr. Opar Donge* 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.

The Appellant's Case

Mr. Donge first sought and was granted leave to appeal against sentence alone. He thereafter submitted that the sentence of 15 years imposed upon the appellant was too harsh and manifestly excessive in the circumstances of this case. He pointed out that there were a number of mitigating factors the trial Judge did not seriously take into account before passing the sentence. He contended that had he taken all of them into account, he would have sentenced the appellant to a lesser term of imprisonment.

He enumerated the mitigating factors as follows:-

The appellant was very remorseful. He had already pleaded guilty to the offence thus saving Court's time. He was a first offender and a young man of only 28 years. He had spent time on remand before conviction. Counsel submitted that taking into account the above factors, the sentence of 15 years was unjustified.

He cited the decision of this Court in *Komakech Samuel vs Uganda, Court of Appeal Criminal Appeal No. 440 of 2014* in which a sentence of 16 years for defilement was confirmed by this Court.

He asked this Court to reduce the sentence to 13 years imprisonment and upon deducting the period he had spent on remand a sentence of 15 years imprisonment be substituted with that of 12 years.

The Respondent's reply

Mr. Omia opposed the appeal and supported the sentence. He contended that the sentence of 15 years imprisonment was legal and within the range established by authorities of this Court and the Supreme Court.

He argued that while passing the sentence, the trial Judge took into account all the mitigating and aggravating factors before arriving at his decision. Further that, he

also complied with the provision of *Article 23 (8)* of the Constitution as he took into consideration the period the appellant had spent on remand prior to his conviction.

He asked this court to dismiss the appeal.

Resolution of issues

We have carefully listened to both Counsel. We have also perused the Court record and the authorities cited to us and those that were not cited.

We are alive to the duty of this Court as a first appellate Court which requires us to re-appraise all the evidence adduced at the trial and to come up with our inferences on all issues of law and fact. *See:-* Rule 30 (1) of the Rules of this Court and *Bogere Moses and Another Vs Uganda, Supreme Court Criminal Appeal No.1 of 1997.*

It is now established law that this Court may interfere with the trial Judge's discretion on sentence only in limited circumstances, which were re-echoed by the Supreme Court in *Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001* as follows;-

"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 its 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 circumstances which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."

In this case, while passing sentence, the learned trial Judge stated as follows;-

"This was aggravated defilement. At 28 years of age the convict ought to have been the protector of the 11 year old victim he savaged. There can never be any justification for subjecting such a kid to sexual encounter. If indeed it was alcohol that enhanced the convict's libido, he should have looked for a woman

fit for such encounter , and won her heart. The convict has however from the beginning admitted his guilt. He has saved Court's time and resources. He is truly repentant. Nevertheless he has to be punished sufficiently to act as deterrence to all that an 11 year old girl is way below the age of sexual activity. The Convict is therefore sentenced to 15 (fifteen) years in prison. Right of appeal explained."

Clearly the learned trial Judge with all due respect erred in law when he did not comply with the provision Article 23(8) of the Constitution which stipulates as follows;-

"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 the term of imprisonment."

The Supreme Court recently in *Rwabugande Moses vs Uganda Supreme Court Criminal Appeal No. 25 of 2014 (unreported)* at page 16 of the Judgment in regard to the above provision of the Constitution, held as follows;-

"It is our view that the taking into account of the period spent on remand by a Court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused."

Failure to comply with Article 23(8) renders the decision of the trial Judge a nullity, and we hold so.

We now invoke the provisions of Section 11 of the Judicature Act 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 victim was a young innocent girl who was at the time only 11 years old. She was attacked by this young man the appellant who should have been protecting her. Going by the number of cases coming to Courts, defilement appears to be rampant in almost all parts of this country.

However, there are also a number of mitigating factors in favour of the appellant. He was remorseful, pleaded guilty readily and saved Court's time and resources. He was not related to the victim, nor was he in any position of influence over her. He was not found to have been H.I.V positive.

The injuries sustained by the victim appear from the medical evidence to have been minor. He is a young man of 28 years at the material time who is capable of reform and therefore deserves a lenient sentence.

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

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.

In *Birungi Moses vs Uganda, Court of Appeal Criminal Appeal No. 177 of 2014 at Fort Portal*, the appellant was convicted of the offence of aggravated defilement and sentenced to 30 years imprisonment. The victim was 8 years old at the time she was defiled. The appellant was 35 years and had spent 3 years on remand. This Court after taking into account the period of 3 years the appellant had spent on remand reduced the sentence to 12 years.

We find that the sentences imposed or confirmed by this Court for aggravated defilement range from 9 years to 17 years. *See;- Kobusheshe Karaveri Vs Uganda, Court of Appeal Criminal Appeal No. 110 of 2008.*

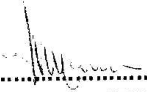
In *Obedi Moses vs Uganda, Court of Appeal Criminal Appeal No. 091 of 2014*, the Court of Appeal reduced a 23 year sentence for aggravated defilement to 15 years.


In *Ninsiima Gilbert vs Uganda Court of Appeal Criminal Appeal No. 0180 of 2010*, Court of appeal reduced a 30 year sentence for aggravated defilement to 15 years.

Taking into account all the aggravating and mitigating factors in this case, we find that a sentence of 10 years imprisonment would be appropriate. In line with Article 23(8) of the Constitution, we deduct 6 months the appellant had spent on pre-trial detention. He will therefore serve a sentence of 9 years and 6 months from 21st June, 2013 when he was convicted.

We so order.

Dated at Gulu this ^{22th} day of ^{September} 2017.


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HON. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL


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HON. JUSTICE FM EGONDA- NTENDE
JUSTICE OF APPEAL


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HON. LADY JUSTICE HELLEN OBURA
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