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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 240 OF 2011

ONGOM ALI:.....APPELLANT

VERSUS

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

(Appeal from the decision of Hon. Lady Justice Margaret C. Oguli Oumo in the High Court of Soroti holden at Moroto in Criminal Session Case No. 0013 of 2010)

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

15 **HON. MR. JUSTICE STEPHEN MUSOTA, JA**

HON. LADY JUSTICE PERCY NIGHT TUHAISE, JA

JUDGMENT

The appellant was convicted of defilement contrary to Section 129 (3) and (4) (a) of the Penal Code Act and sentenced to 25 years imprisonment by Lady
20 Justice Margret C. Oguli Oumo, J on 29th August, 2011. He is dissatisfied with the sentence and appeals to this court against it.

Prosecution alleged that the victim, Adru Rafa aged 14 years and a resident of Dodoth College Ward, Kotido Town Council was on the night of 2nd May 2008 keeping her sisters' house when her sister's husband, Ongom Ali, the
25 appellant returned from Lira and when he reached at home, he knocked on

5 the door and the victim Adiru Rafa opened the door for him and then went back to sleep. The accused entered the same room where the victim was sleeping and lay on the bed while the victim was sleeping on a mattress placed on the floor. The appellant then joined the victim where she was sleeping and started showing her blue movies on his mobile phone.

10 As they watched the movies, the appellant asked the victim to choose a style they could use but the victim refused. The appellant then grabbed the victim and told her he wanted to have sex with her but the victim refused. She attempted to shout for help but the appellant closed her mouth with his hand and had sexual intercourse with her. The next morning the victim with the
15 help of PW1, Abdul Majid Agondoka reported the matter to police. The victim was medically examined and her hymen was found to have been ruptured. Subsequently, the appellant was indicted, convicted and sentenced to 25 years imprisonment.

The appellant with leave of this Court appealed against sentence only having
20 obtained leave to do so under Section 132(1) (b) of the TIA. He faulted the learned trial Judge for imposing on him a harsh sentence of 25 years imprisonment.

At the hearing of this appeal, Mr. Osilo Jacob appeared for the appellant while the respondent was represented by Mr. Ndamulani David Ateenyi, Senior
25 Assistant DPP.

Counsel for the appellant submitted that during allocutus, the Court was informed that the appellant was a first offender and ought to have been given an opportunity to reform. He added that the appellant was 40 years at the

5 time of his sentence and the sentence of 25 years imposed on him was
manifestly harsh in the circumstances of this case. Counsel relied on ***Birungi***
Moses V Uganda, Court of Appeal Criminal Appeal No. 177 of 2014 where
the victim of defilement was 8 years old and this Court confirmed a sentence
of 12 years imprisonment. He invited Court to reduce the sentence to 12
10 years.

In reply, counsel for the respondent submitted that the offence for which the
appellant was convicted carries a maximum sentence of death. He added that
part 3 of the sentencing guidelines prescribes the range for these kind of
offences as 30 years up to death with the starting point being 35 years.

15 Counsel further submitted that if this Court were to follow the sentencing
guidelines, then the sentence of 25 years would not be harsh given that it is
below the minimum which is 30 years. He submitted that going by the
doctrine of precedent which was in existence before the sentencing guidelines,
the sentence of 25 years imposed on the appellant was manifestly harsh and
20 excessive. Counsel conceded to the proposed sentence of 12 years
imprisonment as appropriate in the circumstances.

We have studied the Court record and considered the submissions of both
counsel. It is our duty as the first appellate Court to review the evidence of
the case and to reconsider the materials before the trial judge. We must then
25 make up our own mind not disregarding the judgment appealed from but
carefully weighing and considering it. ***See Rule 30(1) of the Rules of this***
Court, Kifamunte Henry V Uganda, Supreme Court Criminal Appeal
No.10 of 1997.

This is an appeal against sentence only and it is settled law that an appellate Court cannot interfere with the sentence imposed by the trial Court in the exercise of its discretion unless such exercise of discretion results into a sentence which is manifestly excessive or so low as to amount to a miscarriage of justice or the sentence imposed is wrong in principle. **See *Kiwalabye Bernard V Uganda, Supreme Court Criminal Appeal No. 143 of 2001.***

While sentencing the appellant, the learned trial Judge stated as follows;

“Ongom Ali was the guardian of Adiru Rafa whose sister had left her in his charge. Instead of protecting her, he went ahead to defile her after showing her pornographic materials. Such behaviour is not acceptable in a civilized society. However the accused has been on remand for 3 years and has a large family to look after.

Consequently it is Court’s view that, a period of 25 years imprisonment is deterrent enough for him and others who want to do such.”

We have perused the record of appeal and find that the appellant was a first offender, he had been on remand for 3 years and 3 months and he is a family man with 9 children.

It is trite that sentences are just and fair not only to victims and offenders but to society as a whole. In order to achieve this, the Courts should apply the same approach while sentencing so that the sentences are consistent. This in the end will reflect fairness. **See *Bigirwa Robert V Uganda, Court of Appeal Criminal Appeal No.201 of 2015.***

5 In *Nkurunziza Julius V Uganda, Court of Appeal Criminal Appeal No.12 of 2009*, the appellant was convicted on his own plea of guilt of the offence of defilement of a 7 months old baby and sentenced to 17 years imprisonment. On appeal, this Court confirmed the sentence.

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

15 We find that the sentence of 23 years imprisonment for defilement imposed upon the appellant was harsh and excessive considering the fact that the appellant was a first offender, a family man with 9 children and had been on remand for 3 years and 3 months. We set it aside. We shall proceed to sentence the appellant afresh under Section 11 of the Judicature Act.

20 In sentencing the appellant, we shall take into consideration the fact that the victim was a niece to the appellant who owed her a duty of care. We therefore consider a sentence of 18 years and 3 months to be appropriate. We shall deduct the period of 3 years and 3 months the appellant spent on remand. He shall serve a sentence of 15 years. The said sentence shall run from 29th August 2011, the date of conviction.

25 **We so order**

Dated at Jinja this17th.....day ofJuly.....2019

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HON. MR. JUSTICE BARISHAKI CHEBORION

JUSTICE OF APPEAL

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HON. MR. JUSTICE STEPHEN MUSOTA

JUSTICE OF APPEAL

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HON. LADY JUSTICE PERCY NIGHT TUHAISE

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