

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT GULU

[CORAM: Kakuru, Egonda-Ntende & Obura, JJA]

Criminal Appeal No.142 of 2014

(Arising from High Court Criminal HCT-02-CO-SC-160-2012 at Gulu)

Between

ONGWECH WILFRED=====Appellant

And

Uganda=====Respondent

(On Appeal from the Judgment of the High Court of Uganda [Alfonse Owiny-Dollo, J.,] in Criminal Session Case No. 160 of 2012 sitting at Gulu and delivered on the 17 June 2013)

JUGDEMENT OF THE COURT

Introduction

1. This appeal is against sentence only. The appellant was charged and convicted, on his own plea of guilty, of the offence of aggravated defilement contrary to section 129 (3) and (4) (a) of the Penal Code Act on the 17 June 2013 by the High Court of Uganda sitting at Gulu. The facts of the case were that the appellant on the 21st day of September 2012 at Kal-Okura village in Nwoya district performed a sexual act with Ayoo Concy, a girl that was 13 years old. On the 21st June 2013 the learned trial judge sentenced the appellant to serve a period of imprisonment for 18 years.
2. The appellant contends in the single ground of appeal that the learned trial judge failed to comply with the provisions of Article 23 (8) of the Constitution while passing sentence which rendered the sentence a nullity.
3. At the hearing of the appeal the appellant was represented by Mr Patrick Abore and the respondent was represented by Ms Rose Tumuheise,

Principal State Attorney. Mr Abore submitted that the learned trial Judge had erred in law when he failed to take into account and deduct from the sentence to be imposed on the appellant the 9 months that he had spent in pre-trial custody. This violated Article 23 (8) of the Constitution and this failure rendered the sentence passed by the trial judge a nullity. He submitted that this court should now impose a new sentence on the accused taking into account the mitigating factors on record and deduct therefrom the period spent in pre-trial custody.

4. Ms Rose Tumuheise for the respondent conceded that the learned trial judge had not complied with the provisions of Article 23 (8) of the Constitution which are mandatory. She submitted that this court should now exercise its powers under section 11 of the Judicature Act and impose upon the appellant an adequate sentence, taking into account the aggravating factors on record.

Analysis

5. The sentencing order of the learned trial judge is brief. We shall set it out in full.

'This is a case of aggravated defilement where the convict had on several occasions subjected the victim of 13 years, repeatedly to sexual intercourse. Thus traumatizing her, and yet the victim is sister to his wife, and was living under his care. He was fully aware of the culpability of the deeds. He threatened her with death if she reported the deeds. Aggravated defilement of this category is liable to fetch the perpetrator death sentence. However, despite the gravity of the offence, I shall spare the convict the ultimate punishment since he has pleaded remorse. Nonetheless he has to suffer a prison term that will serve as a deterrence to him and other members of society to show decency and care in dealing with the vulnerable members of our society. I therefore sentence him to serve 18 years in prison for the multiple acts of defilement he subjected the victim to. Right of appeal against sentence explained.'

6. It is clear that the learned trial judge did not make any reference at all to the period the appellant had spent in pre-trial custody.
7. Article 23 (8) of the Constitution provides,

'(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.'

8. This provision is mandatory. Courts must comply with it while sentencing a convicted person to a term of imprisonment. The Supreme Court decided in Rwabugande Moses v Uganda, SC Criminal Appeal No. 25 of 2014 (unreported) that a sentence of imprisonment that runs afoul of Article 23(8) of the Constitution is illegal and that the period spent on remand must be subtracted from the appropriate sentence assessed by court after taking into account all relevant factors.
9. It is evident that the learned trial judge did not comply with Article 23 (8) of the Constitution and this renders the sentence he passed a nullity. We shall proceed to impose a new sentence.
10. The appellant was a first offender who pleaded guilty saving the court time and resources. He was remorseful. The accused was 20 years of age at the time of the commission of the offence. Nevertheless he committed a serious offence. The victim was only 13 years old. Taking into account all the above factors we would consider a sentence of 10 years appropriate from which we deduct the period of 9 months spent in pre-trial custody and sentence him to serve a period of 9 years and 3 months imprisonment from the 17th June 2013, the date of conviction.

Dated, signed and delivered at Gulu this 7th day of November 2017


Kenneth Kakuru
Justice of Appeal


Fredrick Egonda-Ntende
Justice of Appeal


Hellen Obura
Justice of Appeal