

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

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

Criminal Appeal No.187 of 2014

(Arising from High Court Criminal Session Case No. 170 of 2010 at Kitgum)

Between

OPIYO KENNETH=====Appellant

And

Uganda=====Respondent

*(On Appeal from the Judgment of the High Court of Uganda [Akiiki-Kiiza, J.]
sitting at Kitgum and delivered on the 12th June 2012)*

JUGDEMENT OF THE COURT

Introduction

1. The appellant was indicted of the offence of aggravated defilement contrary to section 129 (3) and (4) (a) & (b) of the Penal Code Act. The particulars of the offence were that the appellant had on the 4th day of December 2010 at Forest Sub-ward in Gulu district being a person infected with the Human Immuno Deficiency Virus (HIV), performed a sexual act with Ayikoru Ritah, a girl below the age of 14 years. The appellant was convicted of the said offence on the 12th June 2012 and sentenced to 28 years imprisonment. He now appeals against sentence only.
2. There are 2 grounds of appeal. Firstly, that the learned trial judge erred in law and fact when he failed to deduct from the sentence of imprisonment the period that the appellant had spent on remand contrary to Article 23 (8) of the Constitution, rendering the said sentence a nullity. Secondly and in the alternative to the first ground, that the learned trial judge erred in law and fact when he sentenced the appellant to 28 years imprisonment, a sentence that was harsh and manifestly excessive.

3. The respondent opposed the appeal.

Submissions of Counsel

4. At the hearing of this appeal the appellant was represented by Mr Ochorobiya Lloyd and the respondent was represented by Mr Rukundo Martin, Principal State Attorney in the Office of the Director of Public Prosecutions.
5. Mr Ochorobiya submitted that in light of the provisions of Article 23 (8) of the Constitution and the decision of the Supreme Court in Rwabugande Moses v Uganda, SC Criminal Appeal No. 25 of 2014 (unreported) a sentence of imprisonment from which the trial court had not deducted the period spent in pre-trial custody was a nullity. In the instant case the learned trial judge had sentenced the appellant to 28 years imprisonment but had not deducted from such sentence the period that the appellant had spent on remand. The sentence is therefore a nullity and this court should sentence the appellant afresh.
6. In the alternative he submitted that the sentence of the trial court was harsh and manifestly excessive as it is out of range of the sentences that the Supreme Court and this Court had confirmed or imposed for the crime of aggravated defilement. He referred to the case of Rubanga v Uganda, CA Criminal Appeal No. 124 of 2009 (unreported) in which a sentence of 15 years was confirmed on appeal. The appellant, 31 years old, in that case had been convicted of defiling a 1 year old child.
7. Mr Ochorobiya further referred to the cases of Komakech Samuel v Uganda, CA Criminal Appeal No. 440 of 2014 (unreported); Birungi Moses v Uganda, CA Criminal Appeal No.177 of 2014 (unreported); and Ninsima Gilbert v Uganda, CA Criminal Appeal No. 180 of 2010 (unreported).
8. Mr Ochorobiya prayed that the appellant be sentenced to 16 years imprisonment after the remand period had been deducted.
9. Mr Martin Rukundo in reply conceded that the sentence of the trial court was out of range with sentences imposed for similar offences. He referred this court to the decisions of this Court in Kobusheshe Karaveri v Uganda, CA Criminal Appeal No.110 of 2008 (unreported) in which this court confirmed a sentence of 17 years imprisonment. He also referred to Komakech Samuel v Uganda (supra) where a sentence of 16 years was upheld on appeal and German Benjamin v Uganda, CA Criminal Appeal


No. 144 of 2019 (unreported) in which this court reduced a sentence of 20 years to 15 years. He submitted that the range established by the cases was between 15 to 17 years.

10. Mr Rukundo proposed that this court imposes on the appellant a sentence of 17 years imprisonment after deducting off the period spent on remand.

Analysis

11. The sentence order of the learned ^{Judge} trial stated that it had taken into consideration the 18 months the appellant had spent on remand while sentencing him. This was the formulae that complied with the earlier decisions of the Supreme Court like Kabwiso Issa v Uganda, SC Criminal Appeal No. 7 of 2002 (unreported). However, the Supreme Court has now held in Rwabugande Moses v Uganda, SC Criminal Appeal No. 25 of 2014 (unreported) that it has departed from such construction. It has devised a 2 stage process. A sentencing court must first of all determine what the appropriate sentence would be taking into account all mitigating and aggravating factors. And then the sentencing court must subtract the period spent on remand from such sentence and the result will be the sentence imposed upon a convict.
12. It is clear that in the instant case this 2 stage process was not followed. The Supreme Court has stated in Rwabugande Moses v Uganda (supra) that a sentence from which the period spent on remand was not deducted is illegal. It follows that it must be set aside. We therefore set aside the sentence imposed on the appellant by the trial court.
13. Exercising the powers conferred on this court by section 11 of the Judicature Act we shall proceed to sentence the appellant. The appellant was a first offender. He was 31 years old at the time of the commission of the offence. He is remorseful and repentant. However, it is to be noted that he ravished a child only 3 years old. As an HIV infected person there was the risk of passing on infection to the victim much as no tests were carried out to determine the status of the victim. This was a very serious offence for which retributive punishment is called for to express the revulsion of this court and society at large to this offence. A sentence of 18 years imprisonment would be appropriate in the circumstances of this case. As the appellant had spent 18 months on remand prior to his conviction we sentence him to a term of imprisonment of 16 years and 6 months to run from the 12th June 2012, the date of conviction.

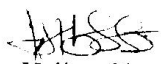
Dated, signed and delivered at Gulu this 7th day of November 2017



Kenneth Kakuru
Justice of Appeal



Fredrick Egonda-Ntende
Justice of Appeal



Hellen Obura
Justice of Appeal