THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

(Coram; Cheborion Barishaki, Hellen Obura, Eva K. Luswata, JJA)

CRIMINAL APPEAL NO. 0097 OF 2020

BETWEEN

OTHIENO MICHAEL:: APPELLANT

AND

UGANDA :: RESPONDENT

[*Appeal from the Judgment of the High Court of Uganda sitting at Kampala in Criminal Session Case No.392 of 2018, by Hon. Justice Jane Frances Abodo, delivered on 21st day of October 2019]*

JUDGMENT OF THE COURT

Introduction

1] The appellant was charged with the offence of aggravated defilement contrary to Section 129 (3) (4) (a) of the Penal Code Act. The particulars of the indictment were that on the 23rd day of April, 2017 at about 1700 hours in the Faith in Action International Ministries Church at Kalule Zone Kawempe Division in the Kampala District, the appellant performed a sexual intercourse with AT, a girl aged 9 years old. The appellant pleaded guilty to the offence on 21/01/2019 and entered into a plea bargaining

agreement, whereby he was convicted and sentenced to 20 years' imprisonment from which his remand period of 2 years, 5 months and 9 days was deducted. He was ordered to serve a sentence of 17 years, 6 months and 21 days' imprisonment.

Brief Facts

2] The brief facts of the case were recorded in paragraph 3.0 of the plea bargaining agreement (hereinafter PBA). Those facts were at the trial read out and admitted by the appellant. It was specifically stated by the prosecutor that on the 23/4/2017, the victim Afeyorwoth Trinity who was aged 9 (nine) years was walking to the shop at Kalule zone Kawempe Division and the accused Othieno Michael intercepted her took her to a Church removed her knicker and had sexual intercourse with her. The mother to the victim, Claire Stella found the accused on top of the victim (inflgrante delicto). The accused ran way only to be arrested after one week.

3] The appellant being dissatisfied with the decision of the learned Trial Judge, lodged an appealed to this Honorable Court on the following grounds:

i. That the learned Judge erred in law when he failed to adequately evaluate and scrutinize the plea-bargaining agreement thereby wrongly convicted the appellant based on illegally obtained agreement.

ii. That the learned trial Judge erred in law when he conducted the appellant's criminal trial without sworn assessors.

iii. That the learned trial Judge erred in law when he failed to consider the ingredients of the offence of aggravated defilement which are legal essential forming a basis upon which the plea of guilty should be entered before convicting the appellant occasioning miscarriage of justice.

iv. The learned Judge erred in law when he failed to consider sentencing mitigation and without deducting a remand period imposed upon the appellant harsh and excessive custodial imprisonment of 17 years 6months and 21 days.

v. That the learned trial Judge erred in law when he failed to consider that as at the time of the alleged offence, the appellant was a child and that the appellant's trial should have been at the time of the alleged offence thereby handled as a child.

Representation

4] At the hearing of the appeal, the appellant was represented by Mr. Seth Rukundo on State brief. The respondent was represented by Ms. Immaculate Angutoko who held the brief of Ms. Ann Kabajungu, a Chief State Attorney. The appellant followed proceedings by video link from the Luzira Upper prison. During the proceedings, Mr. Rukondo sought leave of Court to adopt an amended memorandum of appeal filed on 16/8/2022. Ms. Angutoko

objected to the prayer arguing that a new ground (five) had been added to the amendment and that she had had no opportunity to respond to it. After hearing both counsel, the Court allowed Mr. Rukondo's prayer with an order that the respondent responds to the new ground of appeal.

5] Therefore, this appeal has been decided on the basis of the amended memorandum of appeal, as well as written submissions and authorities filed by both counsel.

Submissions of the appellant

6] As a precursor to his submissions, Mr. Rukundo, counsel for the appellant affirmed the duty and powers of this Court under section 11 of the Judicature Act of Uganda, as well as the powers of this Court under Rule 2(2) of the Rules of Court which empower this Court to set aside judgments which have been found to be null and void. He considered grounds 1,2,3 and 5 as similarly addressing the legality of the trial and submitted on them together. He contested the findings on the Judge on three points.

i. That the Judge failed to adequately evaluate and scrutinize the PBA
ii. That the Judge conducted the criminal trial without sworn assessors, and
iii. She did not consider the ingredients of the offence of aggravated defilement which are legal essential steps upon which the plea of guilty is entered.

7] Counsel drew out attention to the PBA form, in particular pages 15, 16 and 17. He then submitted that on 21/10/2019, Ms. Awelo Sarah and Mr. Kyomuhendo Joseph the prosecutor organized an impromptu meeting with the appellant in prison where the form was filled and signed. He attacked the manner in which it was signed, and further complained that names of those who signed as the advocates or interpreter were unclear or missing. He also complained that the Judge only scribbled her signature but did not indicate her full name.

8] Further Mr. Rukundu submitted that during the hearing of 23/9/2019, since a Japadhola interpreter was missing to translate the proceedings from English into Japadhola language known to the appellant, the matter was adjourned to 21/10/2019. He then recounted the proceedings of 21/10/2019, at which the appellant took plea and admitted the contents of the PBA as true. He argued then that the PBA was drafted in English instead of Japadhola yet an interpreter was missing in the agreement. In his view, the PBA was actually made between Ms. Awelo Sarah and Joseph Kyomuhendo, and the appellant was made to sign it without understanding its contents

9] Mr. Rukundo submitted further that the Judge did not follow the correct procedure when recording the plea of guilty, in particular that the charge was never read to the appellant in his language. Further that the essential ingredients of the offence were not explained to the appellant in Japadhola, the language which he

understands contrary to section 129(3), (4)(a) of the Penal Code Act. To buttress his submissions, counsel referred the Court to the jurisprudence in the cases of **Adan versus R, 1973 EA 445, Adukule Natal versus Uganda, CA Criminal Appeal No.10 of 2000** reported in **2000 KALR 105** and **Mataka versus Republic, 1971 EA 512** and section 63 of the Trial on Indictments Act. He considered the entire plea taking proceedings as being irregular and occasioned a miscarriage of justice. Further that the PBA was not an admission of all the ingredients of the offence, to justify the conviction based on a plea of guilty. Further that the appellant's plea of guilty was not clear or specific; and therefore, had the trial Judge properly considered the PBA, she would have entered a plea of not guilty.

10] Mr. Rukundo also found fault against the PBA for being conducted while the appellant was in prison, a place where his free will was eroded. He referred the court to sections 2 and 10 of the Contract Act, No. 7 of 2010 which require that a contract is an agreement made with free consent of parties with capacity to contract for any lawful object, with intention to be legally bound. In his view, an accused person in incarceration has no freedom to contract.

11] Mr Rukondo further submitted that the trial was conducted in the absence of assessors contrary to Section 67 of the Trial On Indictments Act (TIA) which is mandatory. He argued then the trial proceedings which are a nullity cannot be cured by a re trial for it would amount to permitting the prosecution to fill gaps left out in

the trial. He cited the decision of **Fatehali Manji versus R, (1966) EA 344** on that point. Counsel concluded by drawing our attention to the decision in **Younghusband versus Luftig (1949) 2 ALLER 72** where it was held that an act itself does not make a man guilty, unless the man does the act with guilty intention.

12] With regard to the 5th ground, counsel submitted that the trial Judge failed to find that appellant was a child at the time he committed the offence contrary to Sections 2, 93 and 94 of the Children's Act (as amended). That it is only the Family & Children Court that had jurisdiction to sentence the appellant and it was an error by the Judge not to have referred him there for sentencing. Counsel cited the decision of **Kiiza Samuel versus Uganda, CA Criminal Appeal No. 102 of 2008** where this Court quashed the conviction of a minor offender and ordered his immediate release because he had been tried as an adult. Counsel faulted the trial Judge for not conducting an inquiry into the appellant's age as required under sections 104 and 107 of the Children Act, and also cited the decisions of **Franscis Omuroni versus Uganda, CA Criminal Appeal No.2 of 2002, Ssendyose Joseph versus Uganda, CA Criminal Appeal No. 15 of 2010** and **Serubega versus Uganda, CA Criminal Appeal No. 147 of 2008 UGCA 93 (16th October 2015)** that discussed the rights of minors wrongly sentenced or held in custody beyond the mandatory three years' imprisonment term.

13] With regard to the 4th ground, counsel cited the Supreme Court decisions of **Susan Kigula versus Uganda, Constitutional Appeal No. 3 of 2006** and **Akbar Hussein Godi versus Uganda, Criminal Appeal No. 3 of 2013,** to argue that the trial Judge did not consider the mitigating factors and also omitted to deduct the remand period off the sentence of 17 years 6 months 21 days that she imposed. That those omissions resulted into a sentence that was harsh and excessive.

Submissions for the Respondent

14] Ms. Kabajungu opposed the appeal, and in her submissions argued grounds 1 and 3 together, before addressing grounds 2 and 4 separately. She in addition filed additional submissions in response to the 5th ground. In response to the contest against the proceeding during which the PBA was admitted, she reproduced the relevant part of the record then argued that the Judge did inquire of the appellant (who was represented) his willingness to enter into the PBA including waiving his constitutional rights. Counsel pointed out in addition that an interpreter fluent in Japadhola was earlier sworn in on 21/10/2019, and it was that same interpreter who read the charges and explained them to the appellant in the Japadhola language to which he responded by pleading guilty. The appellant specifically indicated his willingness to engage in the plea bargain process.

15] In addition, Ms. Kabajungu brought it to our attention that the summary of facts was contained in the PBA, the same facts which

were read out to the appellant, who confirmed that they were true and correct. Ms. Kabajungu considered that those facts spelt out the ingredients of the offence of aggravated defilement with which the appellant was charged. That in addition, those facts elaborated on the other circumstances of the case i.e. when and where it was committed, some of those who witnessed the offence, the appellant's arrest, and the fact that he was convicted on his own plea of guilty. Ms. Kabajungu then cited excerpts from the Court of Appeal decision in the case of **Sebuliba Siraji versus Uganda, Criminal Appeal No. 319 of 2019** which cited **Inshair Hassan Adan versus R, (1973) EA 445,** then argued that the Judge followed the correct procedure when recording the plea of guilty.

16] In reference to ground two, Ms. Kabajungu, referred the Court to Sections 63, 65, 66 and 67 of the TIA that provide for the specific steps to follow when an accused person choses to plead guilty, or the converse. Her interpretation of the law is that where the accused pleads guilty, as was the case here, the appointment of assessors is not necessary.

17] In reply to ground four, Ms. Kabajungu submitted that the appellant was charged with an offence that carries a death sentence. However, that he willingly opted to enter into a PBA whereby he waived his constitutional rights and signed for a sentence of 20 years' imprisonment. That in addition to his admission, both the mitigating and aggravating factors were outlined in the PBA. That at page 18 of the record of appeal, the

Judge indicated that he took into account the period of 2 years, 5 months and 9 days that the appellant had spent on remand before sentencing him to 17 years, 6 months and 21 days in prison, with effect from the date of conviction and sentencing. Counsel concluded her submission here by drawing our attention to the Supreme Court decision of **Kiwalabye Bernard versus Uganda, SC Criminal Appeal No. 143 of 2001** where appellate courts are cautioned to interfere with sentences only where certain conditions are apparent.

18] Ms. Kabajungu in addition contested the facts raised in ground five. She submitted in particular that when filling the PBA, the appellant indicated his age to be 21 years. That since he had by then been on remand for a period of 2 years and 6 months, he should have been 18 and a half years old at the time of the offence. Ms Kabujungu found it strange for the appellant not to have raised the issue of his age at the time he entered into the PBA at a time when he was communicating with the trial Judge. In her view, the burden rested on the appellant to inform the Court of his age when the issue of him being a juvenile offender was raised.

19] In conclusion, counsel for the respondent submitted that the learned Trial Judge exercised her discretion judiciously and correctly based her decision on a PBA voluntarily entered into by the appellant, his counsel and the prosecutor. According to counsel, the learned trial Judge inquired of the appellant as to the contents of the PBA which included the sentence, and he confirmed his

willingness to be bound by its terms. Counsel did not consider the sentence as harsh or excessive, or even illegal. She therefore, prayed this Court not to interfere with the sentence, and find no merit in all the grounds raised, and thereby dismiss the appeal.

Decision of Court

20] We have carefully studied the Court record, considered the submissions for either counsel, and the law and authorities cited, and those sourced by the Court. Perhaps before embarking on our mandate, we need to point out that the appellant's counsel presented very poorly drafted pleadings and submissions. Certain parts were incoherent and were ridden with contradictions. It is also clear that counsel did not proof read the final work. The result is that the Court wasted valuable time in trying to comprehend the submissions, which is a delay of justice. We encourage counsel to consider his instructions from the State as serious and worthy of commensurate attention. We also call upon the Registrar of the Court to execute her oversight duty to supervise state briefs more studiously, and consider instructing only those Advocates that exhibit professionalism. We shall now turn to considering the appeal.

21] The appeal is governed by the provisions of **Rule 30(1) (a)** Rules of this Court under which we are mandated to critically review the record of the High Court and re-appraise the evidence in order to make inferences of fact, but without disregarding the decision of the

High Court. For reference see: **Kifamunte Henry versus Uganda, (Supra)**.

22] We agree with both counsel on their submission that the settled legal position is that an appellate court's powers to intervene and set aside a sentence is limited. The decisions provided by appellant's counsel are instructive on this point. This Court in the decision of **Olar Joseph Peter versus Uganda, CA Criminal Appeal No. 30 of 2010** that cited with approval the earlier decision of **Kiwalabye Bernard versus Uganda, SC Criminal Appeal No. 143 of 2001** held as follows:

> *"The appellate court is not to interfere with sentence imposed by the trial court where the trial court exercised its discretion on sentence, unless the exercise of that discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice, or where the trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."*

Also see: **Livingstone Kakooza versus Uganda, SC Criminal Appeal No. 17 of 1993**. Alive to the above-stated duty and limitations, we shall proceed to resolve the grounds of appeal.

Ground One and three

23] In ground one, it is contended that the trial Judge did not adequately evaluate or scrutinize the plea bargain agreement and also omitted to mention or explain the ingredients of the offence before recording the appellant's plea. In summary the points of contention are as follows:

i. That the PBA was erratically filled and lacked clear signatures in some parts

ii. That no interpreter was involved in the recording of the PBA which was also never interpreted into Japhadola language which the appellant understood

iii. The Judge did not follow the correct procedure when recording the plea of guilty

iv. The Judge did not consider or explain the ingredients of the offence before recording the plea of guilty

v. That the PBA was negotiated and signed while the appellant was in prison, which eroded his free consent.

24] Objective 3(b) of the Judicature (Plea Bargain) Rules 2016 (Plea Bargaining Rules) is to enable the accused and the prosecution in consultation with the victim, to reach an amicable settlement on an appropriate punishment for the offence for which the accused is charged. Therefore, the prosecution and the court should endevour to ensure that accused person enters the bargain with full knowledge of his rights, and a full comprehension of the terms that he is prepared to sign for. He can only do so if the PBA is explained

to him in a language he understands before it is translated into English, which is the language of the Court. Rule 10 of the PB Rules requires that the agreement is explained to the appellant in a language that he understands before he signs. Space is allocated for the interpreter to sign the agreement as confirmation that the provision was complied with.

25] We have perused the record. When the case was called for the first hearing of 23/9/2019, the Judge allowed an adjournment during which a Japhadola speaking interpreter would be procured. Our assumption then is that the appellant was confortable with that language. At the next hearing on 21/10/2009 an interpreter, one **Mr. Odong Fred** had been located and was sworn in on that same day. The record indicates at page 16, that the indictment was read out to the appellant in accordance with section 60 of the TIA and then interpreted in the Japhadola language. The trial judge recorded as follows:

> *"Charge read and explained in Japadhola."*
> The appellant responded in an unequivocal manner that:
>
> *"I have heard the charges, I accept the crime and I want a plea bargain"*
>
> The trial judge then recorded that:
> *"Plea of Guilty entered."*

26] It is evident that although the plea was related in the Japhadhola language, there was no evidence that during the hearing, the PBA

was explained to the appellant in the same manner. That could not be a fatal omission because the Plea Bargain Rules do not necessarily require such a procedure. Rule 12 PB Rules, provides in part in part, as follows:

> *(2) The charge shall be read and explained to the accused in a language that he or she understands and the accused shall be invited to take plea.*
>
> *(3) The prosecution shall lay before the court the factual basis contained in the plea bargain agreement and the court shall determine whether there exists a basis for the agreement.*
>
> *(4) The accused person shall freely and voluntarily, without threat or use of force, execute the agreement with full understanding of all matters.* ***{Emphasis supplied}***

27] It is clear that the duty to introduce the contents of the PBA to the Court lays on the prosecution. The record indicates at page 16 and 17 as follows:

> *"Prosecution: we have entered into a Plea Bargain and we have signed an agreement' we have talked to the victim and the mother as well.*
>
> *Court: inquiring into the Constitutional rights and plea bargain agreement.*
>
> *Accused: I am willing enter into a plea bargain agreement and waive my constitutional rights.*
>
> *Court: Charge read and explained in Japadhola*

Accused: It is true

Court: Plea of guilty entered

Court: Facts read as contained in paragraph 3.0 of the Plea Bargain Agreement.

Accused: The facts are true and correct'

28] Under Rule 12 Plea Bargain Rules, the assumption is that by the time the prosecution lays the agreement before the Court, the negotiations have ended and what is related to Court is the agreed position of both sides. The appellant who was present in court and represented raised no objection to any of the terms of the PBA. It is true that whoever interpreted the contents of the agreements to the appellant did not append his signature to the PBA. However, it is evident from the PBA that the appellant was represented in the negotiations, and Ms. Awelo Sarah signed the agreement as his lawyer, at page 26 of the record. It is therefore to be inferred from the document itself that before the appellant signed it, his counsel or another competent person explained the contents thereof. We also take note of the implied fact that had the appellant not received an adequate interpretation of the contents of the agreement, he would not have pleaded guilty to the offence, as he unequivocally did before the Court. It is also clear at page 28 of the record that the trial Judge appended her signature at the foot of the PBA. Thus raising all the aforesaid matters on appeal, appears to be an afterthought, one made to avoid an agreement that the appellant fully understood and signed.

29] We also find no fault in the manner in which the plea of guilty was recorded. Respondent's counsel provided the leading decision of **Adan Inshair Hassan versus R,** (supra) in which the Court of Appeal of East Africa laid down the correct procedure to be followed in cases of plea of guilty. It was held that:

> *"When a person is charged with an offence, the charge and the particulars thereof should be read out to him, so far as possible in his own language, but if that is not possible in the language which he can speak and understand. Thereafter the court should explain to him the essential ingredients of the charge and he should be asked if he admits them. If he does admit his answer should be recorded as nearly as possible in his own words and then plea of guilty formally entered. The prosecutor should then be asked to state the facts of the case and the accused be given an opportunity to dispute or explain the facts or to add any relevant facts he may wish the court to know. If the accused does not agree with the facts stated as stated by the prosecutor or introduces new facts which, if true might raise a question as to his guilt, a change of plea is one of not guilty should be recorded and the trial should proceed. If the accused does not dispute the alleged facts in any material respect, a conviction should be recorded and further facts relating to the question of sentence should be given before sentence is passed."*

30] The record indicates that before recording his plea, the charge was read and explained to the appellant in the Japhadola language. The Judge did not record in detail how she explained the details of the

ingredients of the offence, but this court is prepared to take judicial notice that the charge and its particulars is always read out in court. The appellant indicated that he understood what was read out to him, stating that it was true. Neither the appellant nor his advocate raised any objection at that point or after the facts of the offence were related by the prosecutor. It is not even explained here what exactly the appellant did not understand.

31] It is inconceivable that after going through negotiations in the presence of, and assistance of his lawyer, the appellant did not understand any aspect of the charge, or the ingredients of the offence for which he was facing trial. As stated by respondent's counsel, even without an explanation by the Judge, the facts contained in the PBA and related by the prosecutor in Court, contained sufficient facts to lay out the ingredients of the offence. It was related that the appellant way laid a nine year old girl, removed her knickers and had sexual intercourse with her. He was found in the act of sexual intercourse with the child. Those facts together with the charge and its particulars would be sufficient to enumerate the ingredients of the offence of aggravated defilement.

32] Although not a ground of appeal, appellant's counsel submitted further that the PBA having been negotiated and signed inside prison, his client's will to contract freely, was eroded. After perusing the record, we have confirmed that the appellant was represented by legal counsel throughout his trial. It is clear that on 21/10/2019,

when the case was called up for hearing, Ms. Awelo his counsel, addressed Court that his client was offering to plea bargain his sentence. That offer was made without any prompting from the prosecution, the latter who only indicated that he too had made an offer which the appellant and his counsel were free to consider. We take judicial notice that during the plea bargaining process, the prosecution and defence is given time and space outside Court to enter into and conclude negotiations before addressing the Court on the agreed terms of the plea bargain, including the sentence. Before making plea, the appellant did not raise any evidence of duress or unfair bargaining and readily pleaded guilty. Therefore, there is no merit in the submission that he did not enter the PBA with his free will.

33] Accordingly, ground one and three of the appeal, must fail.

Ground Two

34] In ground two of the appeal, the appellant found fault with the trial Judge for conducting the trial in the absence of sworn assessors, which in view resulted into proceedings that are illegal. We have confirmed from the record that indeed on 21/10/2019 when the appellant took plea, no assessors had been identified or sworn in by the Court.

35] Section 3 TIA underscores the importance of assessors by providing for a mandatory requirement that all criminal trials in the High Court be conducted with at least two assessors. It therefore follows

that assessors' participation and role in a criminal trial is vital. Their role goes to the legality of the trial and both counsel provided ample authority to support this argument. The purpose and duties of assessors were to an extent explained in Section 67 TIA which provides in part that:

> *"At the commencement of the trial where the provisions of section **66** are applicable, after the preliminary hearing has been concluded, each assessor shall take an oath impartially to advise the court to the best of his or her knowledge, skill and ability, on the issues pending before the court."*

36] It is clear from the above law that an assessor is required only if a case proceeds to full trial. It is clear as submitted for the respondent that under Section 63 TIA, where an accused pleads guilty, the Court should proceed to record the plea followed with a conviction. Assessors are mentioned only in Sections 65, 66 and 67 TIA after a plea of not guilty is entered, and a preliminary hearing is held during which assessors are identified, appointed, and then sworn in by the Court. Counsel did not explain why assessors would be required in a case in which the appellant had chosen to plead guilty and agreed to negotiate his sentence or that their absence resulted into a miscarriage of justice. Even if we were to believe that the omission was an error, it would be the type considered under section 139 TIA or section 34 of the Criminal Procedure Code as not being fatal to the sentence imposed against the appellant. There is abundant authority that failure to swear assessors or even their

partial absence during a trial, should not always result into a sentence being overturned. See for example; **Agaba Lilian & Amutuheire Patrick versus Uganda, CA Criminal Appeal No. 239 & 242 of 2017** and **Ndaula vs Uganda [2002] 1 EA 214.**

37] Therefore we do not agree that the absence of assessors during the appellant's trial resulted into illegal proceedings or that the resultant sentence occasioned him any injustice. Accordingly ground two of this appeal must fail.

Ground Four

38] The settled position is that the Court should meticulously consider the mitigating factors before deciding on an appropriate sentence. See **Aharikurinda Yustina versus Uganda, SC Criminal Appeal No. 27 of 2015,** in this case, the appellant voluntarily participated in a plea bargaining exercise during which he pleaded guilty. Our assumption is that the mitigating factors were pivotal in those negotiations and the resultant sentence agreed upon. Indeed, two mitigating factors were recorded in the PBA that the appellant had been on remand for a period of two years and six months, and had easily pleaded guilty to save court's time. Those are the terms the Judge considered when she sanctioned the sentence that was agreed upon by the prosecution and defence.

39] In addition, the Judge strictly applied the legal requirement of deducting the remand period from the agreed sentence. It is provided in Article 23 (8) of the Constitution that:

"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 completion of his or her trial shall be taken into account in imposing the term of imprisonment."

There is evidence that the Judge took the remand period into account. We shall for clarity reproduce the part of the sentencing Ruling as below:

'Court: You are hereby convicted on your own plea of guilty and sentenced to 20 years as per the Plea Bargain Agreement. Having been in custody for 2 years, 5 months and 9 days, I take that into account and deduct. You are now going to serve a period of 17 years, 6 months and 21 days starting today. You can appeal within a period of 14 days.

Sign: Jane Frances Abodo

Judge...21/10/19"

40] When interpreting the above law, the Supreme Court in **Rwabagande Mosese versus Uganda, Criminal Appeal No. 25 of 2015** advised that deduction of the remand period must be clear and discernable. It was held that;

"taking into account the period spent on remand by a court is necessarily arithmetical and that this is due to the fact that the period is known with certainty and precision; consideration of the remand period should mean reducing or subtracting that period from the final sentence"

The Judge strictly applied that principle while imposing the final sentence because she deducted the remand period from the 20 years prison sentence agreed upon by the two parties. The final sentence imposed and to be served is 17 years 6 months and 9 days' imprisonment. The appellant should not have expected any further deductions beyond what is provided in the law.

42] In addition, we do not agree that the final sentence was either harsh or excessive. The **Sentencing Guidelines for Courts of Judicature (Practice) Directions, 2013, (Sentencing Guidelines),** indicate a sentencing range for aggravated defilement from 30 years' imprisonment up to death. The aggravating factors stated in the PBA were grave. The appellant defiled a nine-year-old child who sustained injuries in her private parts. The offence is rampart and the appellant failed in his duty to protect the child. Those factors far outweighed the mitigating factors presented. The appellant negotiated and then agreed to serve a custodial sentence of 20 years, from which the remand period was deducted. Therefore, there is virtually no merit in the submissions that it was a harsh sentence.

43] Accordingly, ground four fails as well.

Ground Five

44] In ground five, the appellant's counsel faulted the trial Judge for not considering the appellant as a child offender and trying him as such. However, the submission that the appellant was aged below

18 years at the time that he offended is not backed by any evidence on record. In Police Form 53, the charge sheet dated 11/5/2017, he was described as a 21 year old Japhadola. Since the offence was committed on 23/4/2017, only 19 days before his examination, it is not possible that he was at the material time he offended, a minor.

45] In the PBA, the appellant recorded his age as 21 years. In view of what had earlier been recorded closer to the date of the offence, this Court would consider the age given during the plea bargain as an error, or a ploy by the appellant to induce the Court to consider him a minor.

46] Even then, the calculations provided by the respondent in their submissions would still categorize him as an adult offender. Further, the appellant who was represented at the trial should have alerted his advocate about the discrepancy in his age, and never agreed to a term of 20 years' imprisonment which is barred by law for minors. Without alerting the court of that important fact, the Judge could not be blamed for not having considered it at all when handing out the final sentence. It is true that a trial Judge should in certain circumstances make an inquiry into the age of a convict, but in this case, the appellant had agreed to enter into a PBA, and his age should have been raised during the negotiations and then brought to the attention of the Court.

47] Accordingly, ground five also fails.

48] In conclusion, we have found no merit in all the grounds of the appeal and have no reason to interfere with the conviction and sentence given by the trial Judge.

49] The appeal is accordingly dismissed.

Dated at **Kampala** this ..... day of.....2023.

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HON. CHEBORION BARISHAKI
JUSTICE OF THE COURT OF APPEAL

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HON. HELLEN OBURA
JUSTICE OF THE COURT OF APPEAL

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HON. EVA K. LUSWATA
JUSTICE OF THE COURT OF APPEAL