THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT ARUA

CRIMINAL APPEAL NO. 0373 OF 2014

(Arising from High Court Criminal Case No.048 of 2010)

BETWEEN

OYOKU COSMAS..... APPELLANT

AND

UGANDA ..... RESPONDENT

(Appeal from the judgment of the High Court of Uganda Holden at Arua, before Hon. Justice Yasin Nyanzi delivered on the 4th March 2013)

Coram: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. LADY JUSTICE MONICA MUGENYI, JA

HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA

JUDGMENT OF THE COURT

Introduction

This appeal is from the decision of the High Court of Uganda sitting at Arua in High Court Criminal Case No. 048 of 2010, in which Yasin Nyanzi, J convicted the Appellant of the offence of aggravated defilement contrary to section 129(3) and (4) of the Penal Code Act Cap 120 and sentenced him to 25 years imprisonment.

The brief facts of the case as admitted by the trial court were that on the 25th of September, 2020 at about 2:00pm at Lindoa Village, Terego county in Arua district, the Appellant had unlawful sexual intercourse with Flavia Inzikuru, a girl then aged 9 years. The incident was reported to police whereupon, investigations

led to the arrest and charging of the Appellant with offence of aggravated defilement contrary to Section 129(3) and (4) (a) of the Penal Code Act. The Appellant was subsequently arraigned before court, he denied the charge and underwent full trial. To prove its case, prosecution led evidence of six witnesses and documentary medical reports as well. The Appellant gave unsworn testimony denying culpability but without any specific defence. Upon evaluating both prosecution and defence cases, court believed prosecution and found the Appellant guilty of the offence. He was convicted and sentenced to 25 years imprisonment. The Appellant was aggrieved by the sentence only hence this appeal on grounds that;

1. The learned trial Judge erred in law and fact when he failed to consider some mitigating factors that were available and in favour of the Appellant.
2. The sentence of 2 years imprisonment without remission is deemed harsh and excessive given the obtaining circumstances.
3. The learned trial Judge erred in law and facts when he sentenced the Appellant to serve 25 years imprisonment without taking into account the period the Appellant spent on remand in lawful custody.

Representation

The Appellant was represented by Mr. Madira Jimmy. The Respondent was represented by Ms. Nabasa Caroline.

Both parties sought, and were granted leave to proceed by way of written submissions.

Submissions of counsel for the Appellant.

Counsel for the Appellant abandoned the other grounds and resolved only ground three as it appeared in the Memorandum of Appeal. Counsel submitted that the mitigating factors are provided for under **Rule 36 (c), (d) and (g) of the Constitutional Sentencing Guidelines for Courts of Judicature (Practice) Directions, 2013.**

Counsel submitted that the trial judge ignored these guidelines. He further submitted that the guidelines provide that the court shall take into account the remorsefulness of the offender, whether the offender is a first time offender with no previous conviction or no relevant or recent conviction and any other factor that court may consider relevant.

Counsel submitted that the intention of sentencing an offender is to promote respect for the law in order to maintain a just, peaceful and safe society and to promote initiatives to prevent crime. He argued that the sentence of 25 years imprisonment was excessive taking into account the circumstances under which the sentence was passed by the court.

Counsel cited **Ederema Tomasi vs. Uganda Criminal Appeal No. 554 of 2014**, where the Appellant was initially convicted and sentenced to 25 years, after having spent 2 and half years on remand for aggravated defilement but on appeal the Appellate court overturned the sentence and reduced the same to 18 years imprisonment.

Counsel noted that similarly in **Omara Charles vs. Uganda Criminal Appeal No. 158 of 2014**, the Appellant was convicted on two counts of aggravated defilement of two girls, aged 10 and 12 years. The Appellant was sentenced to 40 and 28 years

imprisonment respectively by the trial court. On appeal before this court, the sentences were reduced to 11 and 17 years respectively to run concurrently.

Counsel for the Appellant submitted that the Courts ought to observe consistency and uniformity in sentencing , as was observed in **Aharikundira Yusitina vs. Uganda , Supreme Court Criminal Appeal No. 27 of 2015,** which cited **Senyonjo Paul vs. Uganda Criminal Appeal No, 115 of 2014** , where court cited **Guideline No. 6 (c) of the Constitutional (Sentencing Guidelines)** (*Supra*) that every court shall when sentencing an offender take into account the needs for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances.

Counsel submitted that this court should put into consideration the fact that the Appellant was a first time offender. He further submitted that the trial judge made mention of the time spent by the Appellant on remand but did not put it into consideration while sentencing the Appellant which occasioned a miscarriage of justice. He cited Article **23(8) of the Constitution of the Republic of Uganda 1995, as amended** which stipulates 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 the completion of his or her trial shall be taken into account in imposing the term of imprisonment."

He cited **Byamukama Herbert vs. Uganda, Criminal Appeal No. 21 of 2017,** which cited with approval **Abele Asuman vs. Uganda, Criminal Appeal No. 66 of 2016,** where court held that

> " this court has previously guided that sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision"

Counsel further cited **Jagenda John vs. Uganda, Criminal Appeal No. 001 of 2011** where court stated that by merely stating that 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 in account does not with certainty show that she took the period into consideration.

Counsel argued that basing on the authorities above and the evidence on record the trial judge fell short of the demands of **Article 23(8) of the Constitution**. He prayed that this court finds merit in the appeal.

Submissions of Counsel for the Respondent.

Counsel for the Respondent raised a preliminary objection in her submissions but this was addressed by court during the hearing and it was disposed off.

Counsel submitted that the learned trial judge detailed sentencing proceedings clearly noting all the mitigating and aggravating factors advanced by both prosecution and defence. She argued that while passing the sentence, the learned trial judge underscored thus:

> ".... I have considered the fact that the accused had been on remand for close to 3 years "

Counsel further submitted that the Appellant was sentenced on the 4th March 2013 way before all the decisions relied on by counsel for the Appellant including **Jagenda John vs. Ug** *(Supra)*. She submitted that the legal regime at the time was to the effect that, the words "*to take into account*" did not require a trial court to apply a mathematical formula by deducting the exact number of years spent by an accused person on remand from the sentence to be awarded by the trial court.

Counsel concluded her submissions by arguing that the sentence of 25 years met the ends of justice even if the 2 years spent of remand were to be arithmetically accounted for. She additionally submitted that the judge clearly demonstrated that he had taken into account the period spent on remand by the Appellant. Counsel submitted that the trial court cannot be faulted when in fact it complied with the Constitutional obligation in **Article 23(8) of the Constitution.**

Rejoinder

During the hearing it was agreed by court that the Appellant's submissions filed on the 4th July 2022 be considered as the rejoinder to the Respondent's submissions.

Consideration of Court.

This is a first appellate court and as such this court is required under **Rule 30 (1)(a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10** to re-appraise the evidence and make its inferences on issues of law and fact while making allowance for the fact that they did not see the witnesses in order to observe their demeanor. See **Kifamunte vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 and Pandy vs. R [1957] E.A 336.**

This is an appeal against the sentence passed by the trial court. It is now settled law that for an appellate court to interfere with the discretion of the trial court while passing sentence, it must be shown that the sentence is illegal or founded upon a wrong principle of the law, or where the trial court failed to take into account an important matter or circumstance, or made an error in principle, or imposed a sentence which is harsh and manifestly excessive in the circumstances. See: **Kiwalabye Bernard vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001.**

Bearing in mind the above principles of the law, I shall proceed to consider the ground before this court.

While sentencing the Appellant, court at page 32 of the Record of Appeal, stated thus:

> "I have heard all the witnesses during the proceeding. I have considered the fact that the accused had been on remand for close to 3 years and was not a habitual offender.
>
> He was a relative and a family person. I believe those are matters that would have made him avoid the offence.
>
> I agree with the statement that aggravated defilement is very rampant. The communities do it just for the sake of it without any regard to the consequences. The accused person who was a married man who would have avoided this crime. I do believe there is lack of respect towards the victim for being the reason to defile infants.
>
> It is the circumstantial duty of this court to protect society of crimes especially those crime that can be avoided. If the state is being divered in criminal trials from defilement instead it be applied to safe motherhood, T.B or HIV.
>
> If strong sentences are pronounced I still believe I will save others. I sentence the accused person to 25 years of imprisonment."

Counsel submitted that it was unclear whether the trial Judge considered the time spent on remand by the Appellant. I agree with the submissions of counsel for the Respondent that cases relied on by the Appellant counsel were decided after the matter before court. According to the record of appeal the trial Judge took cognizance of the fact that the Appellant was a first time offender and that he had spent close to three years on remand.

It seems from the submissions of Counsel for the Appellant he expected the trial Court to arithmetically calculate the sentence in deducting the years spent on remand. I agree with the submissions of counsel for the Respondent that that was not the legal regime in 2013. The trial court cannot be faulted for not arithmetically articulating the deduction because he demonstrated during sentence that he was aware of the fact that the Appellant had spent close to three years on remand. In **Abelle Asuman vs. Ug, SC. Criminal Appeal No. 66 of 2016**, Court held that;

> "Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution."

From the above it is clear that the trial Judge took into consideration the provisions of **Article 23(8) of the Constitution**. It suffices that the trial court bore it in mind and actually made mention of it during sentencing. The trial court gave reasons for the sentence after considering both the mitigating and aggravating factors.

According to **Section 129 (3) of the Penal Code Act Cap 120**, the maximum penalty for the offence of Aggravated Defilement is death. However this maximum sentence is reserved for the most severe circumstances of perpetration of such an offence.

It is now an established position of the law that a sentencing court is bound by the principle of consistency. This principle is to the effect that the sentences passed by the trial Court must as much as circumstances may permit, be similar to those passed in previously decided cases having a resemblance of facts. See:

Aharikundira Yustina vs. Uganda, Supreme Court Criminal Appeal No. 27 of 2015.

Guideline No. 6(c) of the (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 provides that:

> "Every court shall when sentencing an offender take into account the need for consistency sentencing an offender take into the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances"

We agree with the above position of the law. In order to enhance uniformity in sentencing consistency is very key. It also in a way upholds the principle of equity that justice should not only be done but must be seen to be done.

We are alive to the fact that the offence with which the Appellant was convicted carries a maximum penalty of death and it is rampant as noted by the trial court. However, taking into the principle of uniformity and consistency, we find that the sentence was harsh and excessive. In **Apiku Ensi vs. Uganda C.A Criminal Appeal No.751 of 2015,** this court was guided by the previous authorities and found that the sentence of 25 years imprisonment was out of range of the sentences in similar offences. In ***Ninsiima vs. Uganda, CACA No. 1080 of 2010,*** this Court found that the range of sentences for similar offences of aggravated defilement is 15-18 years. In that case, this Court reduced a sentence of 30 years to 20 years imprisonment for the offence of aggravated defilement.

Guided by mitigating factors and the principle of uniformity and consistency we find that the sentence of 25 years was harsh and we reduce the sentence to 20 years.

We accordingly allow this appeal. We set aside the sentence of 25 years imprisonment imposed upon the Appellant. We substitute the same with the sentence of 20 years imprisonment to be served by the Appellant as from the date of his conviction that is 04 March 2013.

We so order

Dated at Arua this ..... day of 2023

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CHEBORION BARISHAKI

JUSTICE OF APPEAL

.....

MONICA MUGENYI

JUSTICE OF APPEAL

.....

CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL