THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NUMBER 0243 OF 2009

SSALI IBRAHIM ::APPELLANT

VS

UGANDA::RESPONDENT

CORAM:

HON. MR JUSTICE S.B.K KAVUMA, JA

HON. MR JUSTICE ELDAD MWANGUSYA, JA

HON. JUSTICE PROF. LILLIAN EKIRIKUBINZA TIBATEMWA, JA

(Arising from the conviction and sentence of the Learned Judge of the High Court of Uganda at Masaka, the Hon Justice Jane Kiggundu in Criminal Session Case No.194/2008)

THE JUDGMENT OF COURT:

This is an appeal against sentence only which was imposed by her Lordship Hon. Justice Jane Kiggundu of the High Court of Uganda sitting at Masaka on 17/02/2009.

At the appeal, the appellant was represented by Mr Henry Kunya and the appellant was in court. The State was represented by Principal State Attorney, Fred Kakooza.

According to the Memorandum of Appeal filed by Counsel for the Appellant, the appeal was only on one ground, sentencing.

Counsel for the appellant prayed that he be allowed to proceed with this one ground under the provisions of ***Section 132 1(b) of the Trial on Indictments Act*** and ***Rule 43 (3) (a) of the Rules of this Honorable Court*** which enjoin an appellant to seek leave of court to appeal against sentence only. Leave was accordingly granted by Court.

The brief facts of the case as found by the trial court were that on the 7th of September 2008 at Lwani village Bumunga sub county Masaka District, the appellant went to the home of Nyiramugisha where he found the victim, a 7 year old Akumpurira Rhoda. The appellant persuaded the child to escort him to a nearby place where they could pick firewood. Once there, he sexually assaulted her. After the incident and on the way home, the victim met her mother who had been looking for her and she narrated the ordeal she had suffered at the hands of the appellant. The mother of the child

raised an alarm and a search for the appellant commenced. The appellant was found in a nearby bush, was arrested and charged with defilement. The victim was taken for medical examination and it was established that she had been subjected to sexual intercourse.

At the trial, the appellant pleaded guilty. The offence and its ingredients were duly explained to him and he confirmed his plea. He was subsequently convicted on his own plea of guilty. He was sentenced to 10 years imprisonment. Hence this appeal.

Counsel for the appellant submitted that in full consideration of the mitigating factors adduced at trial, the ten years imprisonment sentence was excessive. He prayed that this Court be pleased to reduce that sentence.

In support of his submission, appellant's Counsel contended that the learned trial Judge never took heed of the fact that the appellant was repentant and remorseful as demonstrated in his own words which were on record wherein the appellant categorically stated that he was repentant and promised he would not commit any other offence.

Counsel argued that the case for lenience was also strengthened by the fact that at trial, the appellant prayed for forgiveness and readily admitted the offence as already borne out on the record in his own plea. The appellant had clearly stated the reason for telling the truth was because he did not wish to waste court's time.

Counsel further contended that although the State Attorney who prosecuted the case at the Trial brought out factors in favor of the appellant to wit being a first offender, being of advanced age (65 years), and the fact that by the time of the trial, he had spent some five months on remand, the learned trial judge who was thus alive to the said mitigating factors, especially the age of the appellant and the fact that he was a first offender, was swayed by other considerations to mete out the sentence of 10 years imprisonment. Counsel referred this Court to the observations of the Trial Judge as indicated on the record where she stated in sentencing that: "the appellant would live a shameful legacy; had brought shame to his family and his wife and had shown no mercy to the victim." The Trial Judge had gone on to state that the victim stands a chance of never having children as a result of this misfortune that befell her. The Trial Judge had then concluded that "This act offence calls for a severe sentence."

Counsel argued that the Judge's "observations" that the victim stood a chance of never having children as a result of the defilement was not premised on any scientific consideration since there is no proof at all that people who befall such unfortunate ordeal never go on to produce children. Counsel argued that if this was the basis of the judge's decision to arrive at the 10 years prison sentence, it was misguided.

In support of his submission, appellant's counsel relied on the authority of this Court; **Opio Alfred vs Uganda Criminal Appeal No.29 of 2003**.

In that case, the convict of defilement was a 57 year old man and during the appeal his counsel submitted he was remorseful and repentant. Court reduced the sentence of 10 years and substituted it with one of 6 years imprisonment.

Counsel argued that the appellant in the case before Court was even more deserving of lenience because whereas Opio was 57 years of age, the present appellant was 65 years at the time he committed the offence.

Counsel further referred Court to the sentencing guiding principles enumerated in the **Opio Alfred** wherein Court quoted the Supreme Court case of **Kamya Johnson Wavamuno vs Uganda, Criminal Appeal No. 16/2000** to the effect that it is well settled law that an appellate court will not interfere with the sentence of a trial court unless there has been a failure to exercise discretion or failure to take into account a material consideration or where an error in principle was made by the trial court.

Counsel contended that in the case before us, there had been failure on the part of the trial Judge to take into account material considerations, which very considerations this Court had been guided by in reducing the sentence of 10 years to 6 years imprisonment in the Opio case.

Counsel further sought to support his prayer for reduction of sentence arguments by submitting a letter from the Luzira Prison authorities, where the appellant was serving his sentence, vouching the good conduct of the appellant for the 5 years he had been in prison and that he was reformed, disciplined and a man of good character worthy to be integrated into society.

Counsel also stated that the appellant had memory lapse and was of poor hearing, all attributed to his advanced age.

Counsel prayed that the Court be pleased to allow the appeal and vary the sentence as would be judiciously determined.

On the other hand, Counsel for the State Respondent opposed the appeal. He argued that as correctly submitted by the appellant's counsel, the principle in the case of **Kamya Johnson Wavamunno,** (supra) was that an appellate court will not interfere in a sentence passed by a lower court except where it is illegal or where the lower court proceeded on a wrong principle or where a material consideration was not considered. Counsel submitted that guided by the said principles, this Court should not interfere with the sentence handed down by the Trial Court.

The respondent's counsel observed that it was on record that at the trial, the Prosecuting Counsel had correctly submitted that defilement was a very serious offence. He had nevertheless further called upon court to consider the period the appellant spent on remand before trial. It was also on record that the appellant had

himself applied for a lenient sentence and proceeded to say that he was repentant and prayed for forgiveness. Counsel for the Respondent further submitted that as contained in the record, the Judge had stated that she considered the mitigating factors presented to court. The judge had noted the age of the appellant and that he was a first offender. The trial Judge is on record as having stated that she had considered all the mitigating factors. This, counsel for the Respondent argued, meant that the fact of being repentant was considered by the Judge.

Counsel submitted that the sentence imposed was not illegal and prayed that Court confirms the sentence and accordingly dismisses the appeal.

Court Resolution.

The appeal is in respect of sentence. We have to consider whether as an appellate Court we should interfere with the sentence imposed by the learned trial judge.

The principles upon which an appellate Court should interfere with a sentence were considered by the Supreme Court in the case of **Kyalimpa Edward versus Uganda, Criminal Appeal No. 10 of 1995** .The Supreme Court referred **to Rvs Haviland (1983) 5 Cr. App. R(s) 109** and held as follows:

> *"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the*

> *practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice*: **Ogalo s/o Owoura Vs R. (1954) 21 E.A.C.A 126." 21 EAC.A.270 And R.V Mohamedali Jamal (1948) 15 E.A.C.A 126."**

We are also guided by another Supreme Court case, referred to by both Counsel in their submissions: **Kamya Johnson Wavamuno vs Uganda (supra)** in which court said:

> *It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a material consideration, or an error in principle was made. It is not sufficient that the members of the Court would have exercised their discretion differently.*

The maximum sentence to which the appellant in this case was liable after conviction is death. We note that before the sentencing by the trial Court, counsel for the accused then submitted on matters in favor of the appellant. Furthermore, in his allocutus, the accused also cited factors in mitigation. The matters were repeated by counsel for the appellant before this Court. The Trial judge specifically stated that she had considered the mitigating factors

presented to court. She also made specific mention of the factors that were aggravating the case against the appellant. The Trial judge gave convincing justification for the sentence imposed on the appellant. There is nothing to show that based on both the aggravating and mitigating factors, the sentence imposed by the trial judge was manifestly excessive, harsh or illegal so as to call for our interference.

We also must distinguish the case of **Opio Alfred** (supra) which the appellant's Counsel sought to rely on in his argument that due to the appellant's age, the sentence should be reduced as happened in that case. In the **Opio** case, the victim was 15 years old and the appellant in that case had thus committed the offence of defilement as defined by **Section 129 (1) of the Penal Code Act** thus:

> *Any person who performs a sexual act with another person who is below the age of eighteen years, commits a felony known as defilement and is on conviction liable to life imprisonment.*

In the appeal before us, the victim was aged 7 years. Consequently, the offence committed by the present appellant was of **aggravated defilement** as defined by Section 129 (3) and (4) (a) as follows:

> *Any person who performs a sexual act with another person who is below the age of fourteen years commits a felony called aggravated defilement and is on conviction by the High Court liable to suffer death.*

We therefore find no merit in the appeal.

Order of Court

Having found no merit in the appeal, this appeal stands dismissed. The sentence of 10 years imprisonment passed by the Trial Judge upon the appellant is hereby upheld. The appellant is to continue serving the sentence from the date of sentence (17/02/2009) up to completion.

Dated at Kampala, this 16 Day of JULY 2014

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HON. MR JUSTICE S.B.K KAVUMA, JA

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HON. MR JUSTICE ELDAD MWANGUSYA, JA

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HON. JUSTICE PROF. LILLIAN EKIRIKUBINZA TIBATEMWA, JA

16 July 2014