

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA SITTING AT MBARARA

CRIMINAL APPEAL NO.73 AND 111 OF 2016

SSENTONGO LATIBU ::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA::: RESPONDENT

(Appeal arising from the decision of the High Court of Uganda at Mbarara before Hon. Justice David Matovu delivered on the 14th day of April, 2016 in Mbarara Criminal Session Case No. 0261 of 2012 0261 of 2012).

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE REMMY KASULE, AG. JA

JUDGMENT OF COURT

The appellant filed two notices of appeal which were given two different numbers *to wit* 73 and 111 both of 2016 but for the same appeal. In order not to leave one pending, the two were consolidated to make one appeal.

The appellant was charged and convicted of Aggravated Defilement contrary to sections 129 (1), (3) and (4) (a) of the Penal Code Act and sentenced to 48 years imprisonment.



The appellant was dissatisfied with the sentence passed by the trial court and filed this appeal on one ground that;

1. The trial Judge erred in law and fact when he sentenced the appellant to 48 years' imprisonment, a manifestly harsh and excessive sentence which did not take into account all the mitigating factors given the circumstances of the case.

Learned counsel for the appellant applied for leave for the appellant to appeal against sentence only pursuant to **S. 132(1) (b) of the Trial On Indictments Act and Rule 43 (3) (a) of the Court of Appeal Rules**. Counsel for the respondent did not object to the application. Leave to appeal against sentence only was accordingly granted to the appellant.

Background

The background of this case is that the victim was residing at the home of her parents at Kilembe cell, Nyamityobora, in Mbarara district and the appellant was their neighbor. The victim used to go to the enclosure of the appellant's to fetch water at the tap. On 31st August 2011, the victim went to the enclosure to fetch water and found the appellant standing at his door way. The appellant called the victim to where he was standing. The victim refused to go there. This prompted the appellant to go where the victim was and pulled her to his bedroom, removed her knickers, pulled her on the bed and had sexual intercourse with her. On 1st September 2011, the accused sent one Kyarisiima to call the victim and she refused. One Filimon, a young brother to the victim, pulled the victim to the home of the appellant and he, Filimon was given 200 shillings. The appellant again took the victim, to his bed and had sexual intercourse with her and gave her 200 shillings.

One mama Kyali met the victim fearing to go to the shop where her mother had sent her to buy airtime and she disclosed that she was fed up of the appellant having sexual intercourse with her. The

parents were informed of what had happened which led to the arrest of the appellant. He was charged with aggravated defilement.

Representation

At the hearing of the appeal, Mr. Tumwebaze Emmanuel appeared for the appellant while Ms. Aleluya Glory State Attorney, appeared for the respondent. The hearing of the appeal was through video conferencing to prevent the spread of Covid-19 and the appellant was able to fully participate and was in constant communication with his counsel and court throughout the hearing.

Submissions of the appellant

Counsel relied on the case of **Suuna Frank Vs Uganda Criminal Appeal No. 265 of 2014** in which a sentence of 19 years was set aside and substituted with a 15 year sentence for aggravated defilement of a 7 year old girl. Counsel argued that there is need for courts to maintain consistency in sentencing as was held in **Twikirike Alice Vs Uganda Criminal Appeal No. 764 of 2014**. He prayed that the 48 year sentence be set aside for being harsh and excessive in the circumstances of this case.

Submissions of the respondent

In reply, counsel for the respondent argued that the learned trial Judge took into account the mitigating and aggravating factors of the case and properly sentenced the appellant to 48 years imprisonment. Counsel prayed that this court uphold the sentence imposed by the trial Judge as appropriate.

Resolution by Court

It has been consistently held in numerous cases by both the Supreme Court and the Court of Appeal for East Africa, and more specifically in the case of **Livingstone Kakooza v Uganda SC Criminal Appeal No. 17 of 1993 [unreported]** that:



*'An appellate court will only alter a sentence imposed by the trial court if it is evident that it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration: See **Ogalo S/O Owoura v R (1954) 21 E.A.C.A. 270.**'*

The foregoing principles are equally applicable in the instant case. The sentencing order of the trial Judge states;

The convict in this case is a first offender with a family, but the act of performing a sexual act on a girl aged (5) years is so grave that the accused should be put away for a long time to protect girl child. I would have sentenced him to fifty (50) years imprisonment but after deducting the two years he was on remand, I hereby sentence him to serve a prison term of forty eight (48) years.

The maximum sentence for the offence of aggravated defilement is death. The learned trial Judge sentenced the appellant to 48 years imprisonment after deducting the period of two years spent on remand. This, in our view, was harsh considering that the appellant was a first time offender in his youthful age with a chance to reform.

In consideration of the principle of uniformity and consistency, in sentencing, we have carefully reviewed court precedents set out in various cases having relevancy to the facts and circumstances of the appellant's case as follows:

In **Tushabe John Bosco Vs. Uganda, Court of Appeal Criminal Appeal No. 045 of 2014** the appellant was sentenced to 22 years for defiling a girl of 3 ½ years. He had spent 3 years on remand which period was deducted from 22 years with the result that the appellant had to serve 19 years imprisonment.

In **German Benjamin Vs, Uganda Court of Appeal Criminal Appeal No. 142 of 2010**, the appellant was convicted of defiling a girl of 5

years and was sentenced to 20 years imprisonment. On appeal, this court reduced the sentence to 15 years imprisonment mainly on ground that the appellant had spent 4 ½ years on remand.

We have also noted that the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 paragraph 19, part 1, 3rd schedule**, the sentencing range for Aggravated Defilement has a sentencing range from 35 years imprisonment to maximum sentence of death. These guidelines however have to be taken into account in consideration of the decisions by courts of law of competent Jurisdiction.

Accordingly, we hold that a sentence of 48 years imprisonment imposed on the appellant is too harsh and excessive and has to be set aside by reason thereof. The appeal on sentence is accordingly allowed.

This court has the same powers as the trial High Court, under Section 11 of the Judicature Act. It states,

'11. Court of Appeal to have powers of the court of original jurisdiction.

For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated'

We shall accordingly invoke the said powers and re-sentence the appellant.

In the instant case, the appellant was a first offender who was 23 years old at the time the offence was committed and had spent 2 years on remand. On the aggravating factors, the appellant defiled a girl of 5 years more than once and needs to be put away from society for a considerable period of time.

We are satisfied that a sentence of 25 years imprisonment from the date of conviction meets the ends of justice in this case. We shall

deduct the 2 years the appellant spent on remand and the appellant shall serve a sentence of 23 years imprisonment for the serial defilement of the victim from the date of conviction of 14th of April, 2016. The appeal is therefore allowed.

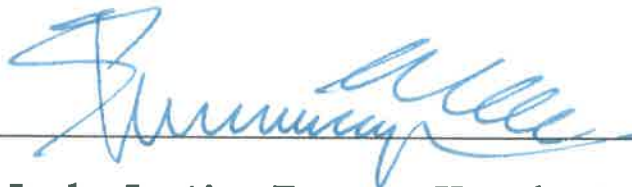
Dated this 13th day of October 2020



Hon. Justice Elizabeth Musoke, JA



Hon. Justice Stephen Musota, JA



Hon. Lady Justice Remmy Kasule, Ag. JA