THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Elizabeth Musoke, Hellen Obura & Ezekiel Muhanguzi JJA)

CRIMINAL APPEAL NO. 100 OF 2015

TUGUMISIRIZE GODRFEY::APPELLANT

VERSUS

UGANDA::RESPONDENT

(An appeal from the decision of the High Court at Nakawa before His Lordship Hon. Justice Wilson Masalu Musene dated 19th March, 2015 in Criminal Session Case No. 70 of 2013)

JUDGMENT OF THE COURT

This appeal arises from the decision of the High Court at Nakawa (Masalu Musene, J) delivered on 19th March, 2015 in which the appellant was convicted on his own plea of guilty of the offence of aggravated defilement contrary to Sections 129 (3) & (4) of the Penal Code Act subsequent to a plea bargaining session and he was sentenced to 15 years imprisonment.

We note from the court record that the case came up for hearing on 19/03/2015 in the presence of the appellant, his counsel and the prosecutor. The court then recorded that; *"Plea Bargain Agreement received in court, charge read and explained."* The appellant is recorded to have responded; *"It is true I played sexual intercourse with Kyengereye Florence."* A plea of guilty was then entered and the brief facts were read to the effect that the victim was aged 12 years and was residing with her mother while the appellant resided in the neighborhood. On 9/9/2013, the appellant pulled the victim to the kitchen and forcefully had sexual intercourse with her. She reported the matter to her parents and the police. The victim was

examined and found to be with injuries in her vagina. The appellant was also examined and found to be above 18 years and of normal mental status.

The appellant then confirmed that the facts were true and correct as narrated where upon the trial court convicted him, on his own plea of guilty, of the offence of aggravated defilement contrary to section 129 (3) and 4 (a) of the Penal Code Act. Both the prosecution and defence counsel Ms. Amooti Jane agreed to stand by the agreement which contained the following aggravating factors: the victim was only aged 12 years old, she sustained some injuries as a result of the penetration, the offence is rampant within the jurisdiction and there is need to curb it down, and that the victim will suffer trauma and stigma for the rest of her life. The mitigating factors presented in the agreement were that; the appellant is a breadwinner to his peasant parents, his family is suffering as the result of his incarceration, he pleaded guilty to committing the crime which saved court's time and government resources, he is remorseful, considering his youthful age he will add value to the government program once he is granted a lenient sentence.

Consequently, the appellant was sentenced to the agreed sentence of 16 years in the plea bargain agreement less the 1 year the trial Judge said he had spent on remand. He was therefore to serve a sentence of 15 years imprisonment.

Being dissatisfied with the decision of the court, the appellant appealed to this Court on one ground;

> *"That the learned trial Judge erred in law and fact when he confirmed the plea bargaining agreement and sentenced the appellant to a period of 15 years which was illegal, manifestly harsh and excessive in the circumstances, thus occasioning a failure of justice."*

At the hearing of this appeal, the appellant was represented by Mr. Innocent Wanambugo on State Brief while Mr. David Ndamuranyi Atenyi, a Senior Assistant Director of Public Prosecution represented the respondent.

Counsel for the appellant sought leave to appeal against sentence only which was granted. He then submitted that the trial Judge did not deduct the period the appellant spent on remand and therefore the sentence was illegal and should be set aside. Counsel added that the appellant was admitted in prison on 19/9/2013 and he was only 17 years old when he committed the offence. Further that, the appellant pleaded guilty and did not waste court's time. He was also a first offender and a bread winner to his parents. Counsel prayed that this Court allows the appeal, sets aside the sentence and imposes a fresh lenient sentence.

Conversely, counsel for the respondent conceded that the trial Judge did not consider all the period the appellant spent on remand thus denying him the benefit of the 6 months already served in lawful custody. Regarding the failure of the trial Judge to take into account the mitigating factors, counsel submitted that plea bargain is different from the normal plea of guilt arrived at in the normal plea taking process. He added that the trial Judge merely went by the plea bargain agreement and confirmed the sentence of 16 years agreed upon as he did not have the liberty to impose a sentence of his own. Counsel prayed that this appeal only be allowed in part by taking into account the 6 months that the trial Judge did not deduct.

We have carefully studied the court record and considered the submissions of both counsel. We are alive to our duty as the first appellate court to re-appraise the evidence on record and come up with our own conclusion as provided under rule 30 of the Judicature (Court of Appeal) Rules. See also ***Father Narsensio Begumisa & ors vs Eric Tibebaga, SCCA 17/2002***.

We are also mindful that this Court as an appellate court can only interfere with the trial court's discretion in sentencing on limited grounds as has been set out in various decisions of the Supreme Court such as ***Bernard Kiwalabye vs Uganda Criminal Appeal No. 143 of 2001*** where it was stated:

> *"The appellate court is not to interfere with the sentence imposed by a trial court where that trial court has 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 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 sentence or where the sentence imposed is wrong in principle."*

In this case the sentence having been agreed upon in a plea bargain, we are of the view that the trial Judge's discretion of determining the appropriate sentence was in a way curtailed. However, the complaint of the appellant which forms the issue to be determined in this appeal is on legality of sentence for failure to comply with the provisions of Article 23 (8) of the Constitution. By highlighting the mitigating factors, he also appears to indirectly be complaining about severity of the sentence.

Our own perusal of the records indicated that while sentencing the appellant at page 4 of the judgment, the learned trial Judge stated thus;

> *"Cases of defilement are rampant and the only way to curb them is by deterrent sentences. So I shall go by the Plea Bargaining Agreement and confirm the 16 years proposed. However, I shall subtract the one year on remand and I do hereby sentence you to serve 15 years imprisonment at Kigo."*

According to the court record, the appellant was admitted in custody on 19/9/2013 and he was sentenced on 19/3/2015 which means he spent a period of 1 year and 6 months on remand. We note from the above sentencing record that the learned trial Judge only considered 1 year as the period the appellant had spent on remand. We therefore accept the

submission of counsel for appellant that there was an arithmetical error in the calculation. The Supreme Court in ***Rwabugande Moses vs Uganda, SCCA No. 25 of 2014*** explained what taking into account as provided under Article 23 (8) of the Constitution entails. The Supreme Court stated thus;

> *"It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused"*

The trial Judge should have complied with that constitutional provision by deducting all the period the appellant spent on remand from the final sentence. We therefore find the sentence of 15 years imprisonment imposed upon the appellant illegal accordingly set it aside. Having done so, ordinarily we would invoke this Court's power under section 11 of the Judicature Act to sentence the appellant based on the plea bargain agreement upon deducting all the period spent on remand. However, we have discovered from the record some serious illegality which went to the root of the plea bargain agreement and it cannot be overlooked by this Court.

We note from the medical report of the appellant (as contained in Police Form 24 A) that the appellant was indicated to be approximately above 18 years at the time he was examined on 16/09/2013, a week after the offence was committed. In a plea bargain agreement which was signed by the appellant and his counsel on 9/03/2015 and recorded by the trial court on 19/03/2013, the appellant's age was indicated to be 19 years. It is noteworthy that the plea bargain agreement was recorded by the trial court after a period of 1 year and 6 months from the time the appellant was examined and said to be approximately above 18 years old. This means that the appellant was 17 years and 6 months old when he committed the offence.

Had the trial Judge properly addressed his mind to the uncertainty of the appellant's age he would have sought for clarification from the appellant or even ordered for another medical

examination to specifically determine his age. To our minds the disparity in the appellant's age created doubt as to whether he was already an adult at the time he committed the offence. From our own calculation as noted above, we find that the appellant was a minor. This offence was committed in September 2013 and the appellant was convicted and sentenced based on the plea bargain agreement in March 2015 before the Children Act, Cap 59 was amended. Section 104 (3) of the Children Act, Cap 59 (hereinafter referred to as Cap. 50) provided thus:

> *"In any proceedings before the High Court in which a child is involved, the High Court shall have due regard to the child's age and to the provisions of the law relating to the procedure of trials involving children."*

If the trial Judge had properly addressed his mind to the age of the appellant and the law relating to the procedure of trials involving children he would not have convicted the appellant and sentenced him based on the plea bargain agreement entered into in disregard of Section 94 (1) (g) of Cap 59. That section provides that the maximum penalty to be imposed on a minor who commits an offence punishable by death is 3 years. He would have also been guided by Section 100 (3) of Cap 59 which provides that:

> *"Where a child is tried alone or jointly with an adult in a court superior to a family and children court, the child shall be remitted to a family and children court for an appropriate order to be made if the offence is proved against him or her."*

In this case there was no trial. The appellant opted for a plea bargain without being advised that as a minor the maximum penalty he could get for the offence of aggravated defilement was 3 years. Had his counsel or the court informed him of this provision of the law, the appellant would have been assisted by a guardian to make an informed bargain and possibly agree on a sentence below 3 years.

We are of the view that in light of section 100 (3) of Cap 59 reproduced above, it would then have been appropriate for the appellant to be remitted to the family and children court for the

orders to be made. In which case, the period of 1 year and 6 months would then have been deducted from the agreed period and he would have served a sentence of one year or less. This was not done and consequently, we find that the plea bargain agreement was made in oblivion of the law thus resulting into an illegal sentence which caused injustice to the appellant.

For the above stated 2 reasons the appeal succeeds. Consequently, we set aside the sentence of 15 years and order for the immediate release of the appellant unless there are other charges which justify holding him in prison.

We so order.

Dated at **Kampala** this..8th.....day of.....June.....2019

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Elizabeth Musoke

JUSTICE OF APPEAL

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Hellen Obura

JUSTICE OF APPEAL

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Ezekiel Muhanguzi

JUSTICE OF APPEAL