THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA SITTING

AT JINJA

CRIMINAL APPEAL NO. 0487 OF 2014

WUNI STEPHEN::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High court of Uganda sitting at Tororo delivered on 29th April, 2014 in Criminal Case No. 161 of 2013 by Hon. Justice Kawesa I. Henry)

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE STEPHEN MUSOTA, JA

HON. LADY. JUSTICE PERCY NIGHT TUHAISE, JA

JUDGMENT

The appellant was indicted and convicted of the offence of aggravated defilement contrary to Sections 129(3) and (4) (a) of the Penal Code Act. The particulars of the offence were that on 3rd April 2012, he performed an unlawful sexual act with Nyamwenge Margret aged 12 years, a girl under the age of 18 years at Bison "B" zone in Tororo district. He was sentenced to 20 years imprisonment and

being dissatisfied with the sentence, he appealed to this Court against sentence only on the ground that:

1. The trial Judge excessively sentenced the appellant.

The brief facts of the case are that Nyamwenge Margret the victim who was at the time aged 12 years old, was staying with her brother at Bison A zone within Tororo municipality while in the neighbourhood of where she was staying. She met the appellant and after having a conversation they went together to her brother's place where she was staying. While there, the appellant forcefully had sexual intercourse with her and one of the neighbours saw them through a hole in the window, he locked the door from outside and called her brother. The brother came and both the victim and appellant were taken to the police. He was indicted, convicted and sentenced to 20 years imprisonment.

At the hearing of the appeal, Mr. Dhakaba Ishaq appeared for the appellant while the respondent was represented by Mr. Ssemalemba Simon, Assistant Director of Public Prosecution. The appellant was present in court.

Counsel for the appellant sought and was granted leave to appeal against sentence only. He submitted that the sentence of 20 years imposed by the trial Judge was harsh and excessive and faulted the trial Judge for not considering some other mitigating factors like family; the appellant had spent 2 years on remand before conviction; and the subsequent sentence was in 2014. He submitted that the appellant's sentence should be reduced to 7 years considering that the appellant is a young man in his 20s, capable of reforming and becoming

a better person and citizen. He relied on the murder cases of **Tumwesigye versus Uganda, CACA No. 46 of 2012 and Ndyomugenyi versus Uganda, SCCA No. 57 of 2016** and submitted that if court can reduce a murder sentence then it should also reduce the appellant's sentence as murder and aggravated defilement are capital offences.

In response, Counsel for the respondent submitted that the trial Judge was right to pass the sentence of 20 years imprisonment having taken into account the period spent on remand by the appellant and the complainant being 12 years old. He further submitted that the appellant had not shown that the sentence was manifestly harsh or excessive or illegal hence appeal should be dismissed.

From our perusal of the record, we note that the appellant was arrested 3rd April, 2012 and convicted on 29th April, 2014. This means that the appellant had been on remand for two years and 26 days. Further the appellant was sentenced on 29th May, 2014. This makes a total of two years and one month that the appellant had spent in remand right from 2012 when he was arrested to 2014 when he was sentenced.

Article 23(8) of the 1995 Constitution of Uganda provides 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."

In **Abelle Asuman versus Uganda, Supreme Court Criminal Appeal No.66 of 2016** the Supreme Court appears to have revisited the decision in Rwabugande Moses (supra) when it 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".

We note that the trial Judge stated that he had considered what had been submitted for the appellant in mitigation and also the aggravating factors. The Appellant's Counsel had clearly stated in mitigation that the appellant had been on remand since April, 2012. This meant that the trial Judge had, in our view, considered the remand period although he did not expressly state it. We find that the requirements of Article 23(8) of the Constitution were met.

As to whether the sentence of 20 years imprisonment was excessive in the circumstances of the case, **Sections 129 (3) and (4) (a) of the Penal Code (Amendment) Act 8, 2007** provide that;

"Any person who performs a sexual act with another person and where the person against whom the offence is committed 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."

An appellate Court will only alter a sentence imposed by the trial Judge if it is evident 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.

In sentencing the appellant, the trial Judge stated that;

"The mitigating factors are that the appellant has been on remand for 2 years and is a first offender. The aggravating factors are that the girl was too young and she was traumatised. There was penetration and the accused knew the girl was young. There was no excuse. The offence carries a maximum of death. Prosecution prayed for 35 years. To have the effects that prosecution prayed for of deterrence and rehabilitation only a custodial term can achieve that".

We note that the learned trial Judge while sentencing the appellant did not consider his age as a mitigating factor.

In **Kabatera Steven versus Uganda, CACA No.123 of 2001**; the appellant was convicted of defilement and sentenced to 10 years imprisonment and appealed to this Court that the learned trial Judge did not take into account the age of the appellant before imposing a sentence. In agreeing with him, the Court held that the only factor that he did not take into account was the age of the appellant. The age of an accused person is always a material consideration that ought to be taken into account before a sentence is imposed. For that reason, we set aside

the sentence and proceed under Section 11 of the Judicature Act to resentence the appellant.

The offence with which the appellant was charged carries a maximum sentence of death on conviction. PW 1, the complainant and PW 3, Ochwo Alibera testified that PW 1 was born in 1998 and was 12 years at the time the offence was committed. According to the evidence on record, the appellant was a juvenile aged 17 years old in 2012 when he was arrested and a first offender. He was in school in primary six, not married and had spent on remand two years and one month since 3rd April, 2012. The appellant was remorseful.

In **Ninsiima Gilbert versus Uganda, CACA No. 0180 OF 2010**; the appellant was convicted of aggravated defilement contrary to Sections 129(3) (4) (a) of the Penal Code Act and sentenced to 30 years imprisonment. Court concluded that the sentence of 30 years imprisonment that the trial Judge imposed upon the appellant was harsh and manifestly excessive. The same was substituted with the sentence of 15 years imprisonment, which was in line with sentences passed by Courts in previous cases having a resemblance to this one. Before resentencing, Court considered that the appellant was aged 29 years, a first offender, having spent 3 years and 4 months on remand, a person with family responsibilities and with dependants to support.

In **Babua Roland versus Uganda, CACA No. 303 of 2010**; the appellant was indicted, tried and convicted by the High Court for aggravated defilement contrary to Sections 129(3) and (4)(a) of the Penal Code Act. He was sentenced

to life imprisonment and appealed to Court of Appeal. Court allowed the appeal and the sentence of life imprisonment which had already been set aside for being wrong in law was substituted with a sentence of 18 years imprisonment considering that the convict was a first offender and a family man with responsibility. He was a youthful offender aged 32 years and capable of reforming. He was a teacher with Certificate in Primary School Teacher Education and had spent a period of 13 months on remand.

We find that while sentencing the appellant, the trial Judge did not consider that the appellant was 17 years at the time he committed the offence and a juvenile. We therefore allow this appeal, quash the conviction and set aside the sentence since the maximum period a juvenile can be imprisoned is 3 years, no retrial should be ordered for he would have served his sentence by court.

We so order

Dated at Jinja this.....17th.....day of.....July.....2019

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HON. MR.JUSTICE CHEBORION BARISHAKI

JUSTICE OF APPEAL

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HON. MR. JUSTICE STEPHEN MUSOTA

JUSTICE OF APPEAL

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HON. LADY.JUSTICE PERCY NIGHT TUHAISE

JUSTICE OF APPEAL

17.7.19

Appellant present.
Mr. [illegible] for the Resp.
Mr. [illegible] for the Appellant.
[illegible]: clerk.

Court: Judgment delivered in the presence of the above.

12/7/19