THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 319 OF 2010

(An appeal against Sentence of the High Court of Uganda at Kampala before Her Lordship Hon. Justice Bamugemereire Catherine, J dated 25/11/2010 in Criminal Case No. 98 of 2010)

WAMUSONZE WILSON::APPELLANT

VERSUS

UGANDA ::RESPONDENT

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA

HON. LADY JUSTICE HELLEN OBURA, JA

HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA

JUDGMENT OF THE COURT

Introduction

This appeal arises from the decision of the High Court of Uganda at Kampala in Criminal Session Case No. 98 of 2010 before Bamugemereire, J (as she then was) delivered on 25th November, 2010, in which the appellant was convicted 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 (Cap 120) and sentenced to thirty (30) years imprisonment.

Background of the case.

The prosecution's case was that on 08/6/2009, at about 7:00p.m, the victim, one Namboze Faridah, aged 12 years was heading to new Mulago

hospital, when she met the appellant. She asked the appellant for directions but the appellant instead took her to his home in Butakabukirwa and had sexual intercourse with her.

The following day, the 9th June 2009, the appellant left the victim in his house where the Chairperson for Women in the area, found her and she narrated the ordeal to her. When the appellant returned home, he failed to explain the relationship between the two. Both the victim and appellant were forwarded to Mawanda Road Police for investigations.

On 10/6/2009, the victim was medically examined on Police Form 3 and found to have been subjected to sexual intercourse. The appellant was subsequently indicted and he pleaded guilty to the offence of aggravated defilement, was convicted and sentenced to 30 years imprisonment. Being dissatisfied with the decision of the learned trial judge, the appellant with leave of this Court granted under Section 132 (1) (b) of the Trial on Indictments Act, Cap 23, appealed to this Court on sentence only.

The grounds of appeal as set out in his memorandum of appeal are as follows:-

1) ***The learned trial judge erred in law when sentencing the appellant when she failed to deduct the period spent on remand by the appellant from the sentence contrary to Article 23(8) of the Constitution.***

2) ***The learned trial judge erred in law when she failed to consider any of the appellants mitigating factors before passing the sentence.***

3) ***The sentence of 30 years imprisonment was excessive and unreasonable on a plea of guilty.***

Legal Representation.

At the hearing of the appeal, **Mr. Kafuko Ntuyo,** learned Counsel appeared for the appellant on State Brief, while **Ms. Asiku Nelly**, learned State Attorney, appeared for the respondent. The appellant was in court.

Appellant's Submissions.

Counsel for the appellant argued grounds 1 and 2 jointly, and ground 3 separately.

Ground 1 and 2

On ground 1, Counsel for the appellant faulted the learned trial judge for failing to comply with Article 23 (8) of the Constitution while passing the sentence of 30 years against the appellant, having failed to deduct from the sentence the period of 1year and 5 months the appellant had spent on remand. He relied on ***Rwabugande Moses vs. Uganda Supreme Court Criminal Appeal No. 25 of 2014*** where it was held that:

> ***".....consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence....."***

He urged this Court to find the sentence a nullity and to set it aside and impose an appropriate sentence.

Counsel submitted further, what in Court's view should have been in the alternative that the learned trial Judge had failed to take into account the mitigating factors on record, including the fact that the appellant was a first offender, aged only 30 years, and a parent with three children to look

after. The appellant had spent 17 months in pre- trial detention.

Ground 3

In the further alternative, counsel for the appellant faulted the trial court for imposing a sentence of 30 years imprisonment which he said was harsh in light of the fact that the appellant had pleaded guilty and saved court's time. He implored court to consider these mitigating factors and the sentencing range in similar cases. He relied on ***Livingstone Kakooza vs. Uganda, Court of Appeal Criminal Appeal No. 17/1993*** where the sentence of 18 years imprisonment for murder was reduced to 10 years imprisonment; and ***Naturinda Michael vs. Uganda, Criminal Appeal No. 244 of 2014*** in which a sentence of life imprisonment was reduced to 18 years imprisonment. He prayed that this Court should set aside the sentence of 30 years imprisonment and impose an appropriate sentence. He proposed a sentence of 10 years imprisonment from which the period of 17 months the appellant had spent in lawful custody prior to his conviction would be deducted.

Respondent's Submissions

With regard to ground 1 and 2, the learned State Attorney, conceded and agreed that the sentence was illegal as the learned trial Judge failed to take into account the provisions of Article 23 (8) of the Constitution. She asked this Court to invoke Section 11 of the Judicature Act, Cap 13 and exercise the power of the trial court to impose a sentence of its own. Counsel proposed a sentence of 17 years imprisonment from which the period the appellant spent in lawful custody would be deducted.

Counsel however made no submissions on ground 3 of the appeal.

Resolution by Court

We have considered the submissions of Counsel on either side, perused the court record and the law and authorities cited to us.

We are alive to the duty of this Court as a first appellate Court, to re-appraise all the evidence and to come up with our own inferences of law and fact. ***See Rule 30 (1) of this Court, and Bogere Moses vs. Uganda, Supreme Court criminal appeal No.001 of 1997.***

The principles upon which an appellate Court should interfere with the sentence imposed by the trial Court were considered in ***Bernard Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001***, the court had this to say,

> ***"The appellate court is not to interfere with the sentence imposed by a trial court that has exercised its discretion on sentence, unless the exercise of the 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".***

Further in ***Kizito Senkula vs. Uganda, Supreme Court Criminal Appeal No. 024 of 2001,*** the Supreme Court observed:

> ***".....in exercising its jurisdiction to review sentences, an appellate court does not alter a sentence on the mere ground that if the members of the appellate court had been trying the appellant they***

might have passed a somewhat different sentence; and that an appellate court will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in James vs. R (1950) 18 EACA 147, it is evident that the judge has acted upon some wrong principle or over-looked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case."

We note that the maximum sentence for aggravated defilement is death.

The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 provide guidance to Courts on sentencing.

The Sentencing Guidelines (supra) give a sentencing range between 30 years' imprisonment and death penalty. The above stated guidelines are to assist Courts of Judicature to have a uniform approach to sentencing. The ultimate responsibility to determine the appropriate sentence of a particular convict, however, lies with the court. Court does so by weighing all relevant factors and then exercising its discretion judiciously.
We shall bear the above said principles in mind, as we consider this appeal.

On ground 1, the learned trial Judge was faulted for not taking into account the period of time that the appellant had spent on remand, which was 1 year and 5 months.

While sentencing the appellant, the trial Judge stated thus,

"Convict pleaded guilty. Did not take Court through a full trial. He

however took advantage of a young girl of 12 years who was lost and seeking directions. Shouldn't we worry that each time a child is lost or seeks for help they will find a person like you who takes advantage of them? You should be most ashamed of your actions. Local council officials are commended for having the cries of this child and for taking her in. That is ought society to be. Caring and monitoring. You are sentenced to thirty (30) years imprisonment. May this serve as an example to all defilers out there, and in here, who plays on young children". (Sic)

Looking at the sentencing order by the trial court it appears to us that the learned trial Judge did not, before passing sentence, take into consideration the period the appellant had spent on remand.

Article 23 (8) of the Constitution requires that the period spent on remand by a convict be taken into consideration while sentencing. The above Article provides as follows:-

"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".

The above provision is the basis of ***Guideline 15 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*** which provides as follows:

1) ***The court shall take into account any period spent on remand in determining an appropriate sentence.***

2) ***The court shall deduct the period spent on remand from the sentence considered appropriate after all factors have been taken into account.***

In light of the forgoing provisions, we find, with due respect to the learned trial Judge, that she erred when she failed to take into account the period spent on remand by the appellant. This makes the 30 years sentence meted out to the appellant a nullity.

Therefore, ground 1 of appeal succeeds.

Accordingly we set aside the sentence of 30 years imprisonment and proceed under ***Section 11*** of the Judicature Act, Cap 13, which states:-

> ***"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 now consider both the mitigating and aggravating factors in order to arrive at the appropriate sentence. The appellant was a first offender. He had spent 1 year and 5 months on remand prior to his trial and conviction. At 30 years old, he was a relatively young man at the time of the commission of offence. He readily pleaded guilty which plea was accepted by the learned trial Judge. Nevertheless, we also note that the appellant committed a very serious offence which attracts a death penalty. We have also considered the degree of psychological injury and other negative effects inflicted on the victim when she was defiled and introduced to sex at such an early age of 12 years.

Having noted the above, we are also conscious of the need for courts to maintain consistency in sentencing. In ***Owinji William vs. Uganda, Court of Appeal Criminal Appeal No.106 of 2013,*** where the appellant defiled a 12 year old girl and never pleaded guilty, this Court set

aside a sentence of 45 years and substituted the same with one for 15 years imprisonment.

In another decision of ***Rugarwana Fred vs. Uganda, Supreme Court Criminal Appeal No.039 of 1995,*** the Supreme Court upheld a sentence of 15 years as not being excessive where a 5 year old victim was defiled in a latrine by the appellant who was an adult.

In ***German Benjamin vs. Uganda, Criminal Appeal No.142 of 2010,*** the victim aged 5 years was sexually ravaged by the appellant. The victim's mother found blood in her private parts soon after the defilement. She cried due to pain. The appellant was 35 years, fit to be father to the victim. He had spent 4 and half years on remand. He was a first offender and showed signs of reform. This Court set aside the sentence of 20 years imprisonment and substituted it with 15 years imprisonment.

In yet another decision in ***Bikanga Daniel vs. Uganda, Court of Appeal Criminal Appeal No.038 of 2000 (Unreported),*** the appellant had been convicted of defilement of a girl under 18 years of age. He detained the girl for two days in his house where he repeatedly defiled her. He was sentenced to 21years imprisonment. On appeal the sentence was found to be harsh and excessive. It was substituted with a sentence of 12 years. The age of the victim was not disclosed.

Having taken into account both the aggravating and mitigating factors set out above and the range of sentences in cases of aggravated defilement, we are of the considered view that a sentence of 12 years will be appropriate in the circumstances of this case. We deduct the 1 year and 5 months the appellant spent on remand, which leaves the appellant with a

period of 10 years and 7 months in prison from the date of conviction, which is the 25th November, 2010.

We so order.

Dated at Kampala this 25th 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