THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

CRIMINAL APPEAL NO. 0185 OF 2014

WAMONO WILFRED :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mubende before Hon. Lady Justice Elizabeth Ibanda Nahamya, J delivered on the 7/10/2013 in Criminal Session Case No. 218 of 2011.)

CORAM: HON. MR. JUSTICE RICHARD BUTEERA, DCJ

HON. LADY JUSTICE IRENE MULYAGONJA, JA

HON. LADY JUSTICE EVA .K. LUSWATA, JA

JUDGMENT OF THE COURT

INTRODUCTION

The appellant was indicted, tried and convicted on four counts for the offence of Aggravated Defilement contrary to sections 129(3), (4), (d) of the Penal Code Act, Cap 120 by the High Court (Elizabeth Ibanda Nahamya J.) on the 7/10/2013. He was sentenced to 23 years' imprisonment on his own plea of guilty.

Background

The facts of this case as ascertained from the Court record are that Wamono Wilfred, (appellant) on the 25/03/2010 called S.B (victim), a pupil to his home. While at the appellant's home, the victim was sexually assaulted by the appellant. The victim informed one of the teachers and his parents who in turn reported the matter to Police. In the course of the investigations, other victims including B.S, B and K.I showed up with similar complaints against the appellant. The appellant was accordingly charged with four counts of aggravated defilement. At the trial, the appellant pleaded guilty to all the four counts of aggravated defilement. He was convicted on his own plea of guilty and sentenced to 23 years of imprisonment on each count. The sentences were to run concurrently.

Being dissatisfied with the decision of the trial Court, the appellant appealed to this Court on the following ground;

1. ***That the learned trial Judge erred in law and fact when she passed a manifestly harsh and excessive sentence without due consideration to the mitigating factors.***

The respondent opposed the appeal.

Representation

At the hearing, Mr. Chan Geoffrey Masereka represented the appellant on State brief. Ms. Immaculate Angutoko, Chief State Attorney and Ms. Prisca Boonabaana,

State Attorney from the Office of the Directorate of Public Prosecutions (ODPP) represented the respondent. Counsel for the respective parties filed written submissions which they applied to Court and were granted permission to adopt and rely upon as their submissions.

Appellant's submissions

Counsel for the appellant applied for leave to appeal on sentence alone and Court granted him the leave. He submitted that the learned trial Judge in sentencing the appellant did not give much attention to the mitigating factors raised by appellant before his sentencing. It was submitted for the appellant that the trial Judge merely mentioned that the convict is 54 years old, has been on remand for three years and six months, is a first time offender and has a wife and children to take care of. That the learned Judge goes on to state that the convict's children are in the same bracket as those he defiled which showed that the learned Judge had already made up her mind before sentencing the convict.

Counsel for the appellant submitted that the learned trial Judge goes on to state that the aggravating factors overwhelm the mitigating factors. That instead of considering the mitigating factors, the learned trial Judge was vindictive when she stated that homosexuality has to be gravely and sternly punished. That the learned trial Judge states that the convict has a wife who was always available for sex. She

says that the Courts of law have been battling with defilement of girls and that the convict is introducing a new trend and attacking young boys and that this shows that despite the mitigating factors, the learned trial Judge was hell bent on passing a harsh sentence because in her mind she had already deduced that this was an un-African satanic habit.

Counsel for the appellant submitted that the appellant spent 3 years and six months on remand.

Counsel further submitted that there were mitigating factors that the trial Judge should have considered and these included; the fact that the appellant was a 54 year old at the time of conviction, a family man, a first time offender, had pleaded guilty and showed remorsefulness at the trial.

Counsel prayed to court that the above mentioned mitigating factors be considered and the appellant be given a lenient sentence to enable his earlier integration into society. Counsel further prayed that the appeal be allowed and the sentence of twenty-three (23) years imprisonment be substituted with a lesser sentence.

In support of his submissions, Counsel relied on the authority of ***Rwabugande Moses Vs Uganda SCCA No. 25 of 2014*** where the Court of Appeal set aside the appellant's sentence of 23 years and substituted it with a term of imprisonment of 21 years basing on the fact that the appellant had mitigating factors. He was a first

time offender, was aged fifty-four (54) and had acquired skills while in custody that would enable him to re-integrate into society as a useful citizen.

He implored this Court to reduce the appellant's sentence like it was done in the ***Rwabugande case.***

Counsel for the appellant submitted that the appellant spent three (3) years and six (6) months on remand which period was not considered by the learned trial judge when sentencing the appellant.

Respondent's Submissions

Counsel for the respondent opposed the appeal and submitted that the sentence of 23 years was appropriate. Counsel cited the authority of ***Kiwalabye Benard Vs Uganda SCCA No. 143 of 2001*** for the position that sentencing is at the discretion of the trial court and an appellate court will only interfere with the sentence imposed by the trial court if it is evident that the trial court acted on wrong principles or overlooked some material facts or the sentence imposed is manifestly harsh and excessive in view of the circumstances.

It was submitted for the respondent that the learned trial Judge paid attention to the mitigating factors raised by the appellant and the learned trial Judge gave reasons justifying the sentence of 23 years' imprisonment in respect of each count.

Counsel for the respondent argued that what Counsel for the appellant refers to as vindictiveness are the reasons the learned Judge gave for imposing particular sentence (s).

Counsel for the respondent contended that the learned trial Judge took into consideration all the mitigating factors and the period spent on remand by the appellant. That the sentence imposed by the trial Judge is appropriate in the circumstances and within the range of sentences meted out in similar cases.

In support of the appropriateness of the sentence handed down to the appellant counsel for the respondent relied on the authority of ***Kaserebanyi James Vs Uganda SCCA No. 10 of 2014*** in which the appellant was convicted on his own plea of guilty for aggravated defilement of his 15 year old daughter by the trial Court and he was sentenced to life imprisonment. This honourable Court dismissed his appeal against sentence and the sentence of life imprisonment was upheld by the Supreme Court.

Counsel also sought to rely on ***Seruyange Yuda Tadeo Vs Uganda Criminal Appeal No. 080 of 2010*** where the appellant was sentenced to 33 years by the trial Court for defiling a 9 year old. This Court found a sentence of 29 years' imprisonment appropriate. The period of 2 years he had spent on remand was deducted and he was ordered to serve 27 years' imprisonment.

Counsel prayed that this honourable Court does not interfere with the sentence of twenty-three (23) years imposed in the instant appeal. Counsel submitted that the three years and six months the appellant had spent on remand could be deducted from 23 years in exercise of Court's powers pursuant to section 11 of the Judicature Act.

Resolution by the Court

We have carefully studied the record of appeal and considered the written submissions of both Counsel as well as the law and authorities cited.

We are alive to the duty of this Court as a first appellate Court. This duty is to review the evidence on record and reconsider the materials before the trial Judge, and make up our own mind not disregarding the judgment appealed from but carefully weighing and considering it. See ***Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions, S.I 13-10 and the authority of Uganda Vs Ssimbwa, Supreme Court Criminal Appeal No. 37 of 1995).***

This Court is required to establish whether the learned trial Judge erred in law and fact when she passed a sentence that the appellant contends is manifestly harsh and excessive and that the same was passed without due consideration of the mitigating factors.

Counsel for the appellant submitted that the learned trial Judge did not take into consideration the mitigating factors while sentencing the appellant. He prayed that this court exercises its powers under S.11 of the Judicature Act to interfere with the sentence, consider the mitigating factors and reduce the appellant's sentence to a lesser sentence.

Counsel for the respondent submitted that the learned trial Judge considered the mitigating factors. That the sentence meted out was an appropriate one within the sentencing range for offences of a similar nature.

Counsel prayed that this Court upholds the sentence meted out by the trial Judge and deducts the period spent on remand if it deems it necessary.

The learned trial Judge had this to say while sentencing the appellant as per the record of court; -

> ***"I have considered the mitigating factors including the fact that the convict is 54 years old. He has been on remand for 3 years and 6 months. He is a first offender. He has a wife and 6 children. The eldest is a girl (15 years) and the 3 boys are aged 13 years, 11 years and 9 years. Your children are within the same age bracket as the defiled boys. The convict looks after 5 of his late brother's children. They all need him to look after them.***

However, the aggravating factors overweigh the mitigating factors. In the circumstances after considering all the above factors, I hereby sentence you as follows; -

Count 1-23 years' imprisonment

Count 2-23 years' imprisonment

Count 3-23 years' imprisonment

Count 4-23 years' imprisonment

The sentences will run concurrently. The period spent on remand shall be deducted from this period. Right of appeal against sentence in 14 days explained".

From the above excerpt of the record, it is clear that the learned trial Judge considered the mitigating factors. The trial Judge made mention of the period spent on remand being 3 years and 6 months. She also stated that the said period be deducted from the 23 years' sentence. The 3 years and 6 months were however not deducted from the 23 years.

Article 23(8) of the Constitution provides:

"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 **Rwabuganda Moses Vs Uganda Supreme Court Criminal Appeal No. 25 of 2014**, the Supreme Court discussed the effect of noncompliance with Article 23(8) of the Constitution in sentencing as follows:

"The record of both the trial Court and the first appellate reveals that in arriving at the sentence of 35 years, neither Court took the period spent on remand by the appellant into consideration. And yet Article 23(8) of the Constitution 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.

A sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory Constitutional provision. We therefore find that in re-evaluating the sentence, the learned Justices of Appeal erred in failing to take into account the period the appellant had spent on remand and instead upheld an illegal sentence".

The learned trial judge did not deduct the period the appellant had spent on remand at the time of sentencing. The sentence therefore is unconstitutional for failure to comply with the provisions of Article 23 (8) of the Constitution.

We shall invoke our powers under Section 11 of the Judicature Act and sentence the appellant afresh. We are mindful of the importance of consistency in sentencing persons convicted of similar offences and in comparable circumstances.

In **Opio Moses vs. Uganda, Court of Appeal Criminal Appeal No. 118 of 2010 (unreported),** this Court confirmed a sentence of 27 years' imprisonment for aggravated defilement for an appellant who was a biological father to the 9 years old victim.

In **Okello Geoffrey vs. Uganda, Supreme Court Criminal Appeal No. 34 of 2014 (unreported)**, the Supreme Court confirmed a sentence of 22 years' imprisonment in a case of aggravated defilement.

Having considered the sentencing ranges in similar cases as shown above, we find that the sentence of 23 years' imprisonment is appropriate especially taking into consideration that the appellant pleaded guilty to four counts in respect of four boys. We shall deduct 3 years and 6months being the period the appellant spent on remand from the 23 years.

The appellant shall serve a sentence of 19 years and 6 months' imprisonment.

In conclusion this appeal succeeds in part in respect to the term of imprisonment to be served by the appellant.

We so order.

Dated at Fort portal this 9th day of NOV 2022.

.....

RICHARD BUTEERA
DEPUTY CHIEF JUSTICE

.....

IRENE MULYAGONJA
JUSTICE OF APPEAL

.....

EVA. K. LUSWATA
JUSTICE OF APPEAL