THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

[*Coram: Kasule, Mwangusya & Egonda-Ntende, JJA*]

Criminal Appeal No. 16 of 2012

Friday Yasin==========Appellant

Versus

Uganda==========Respondent

[*An appeal from a judgment of the High Court of Uganda sitting at Fort Portal (Dan Akiiki-Kiiza, J.), in HCT-01-CR-SC-0044-2006, delivered on the 24 June 2010*]

Judgment of the Court

Introduction

1. The appellant was convicted by the High Court on 24 June 2010 of the offence of defilement. The particulars of the offence were that the appellant on 21 August 2005 had unlawful sexual intercourse with Lukiya Kansiime, a girl under the age of 18 years. He was sentenced to 19 years imprisonment. He dropped the appeal against conviction and now, with leave of this court, appeals only against sentence.

2. The facts of the case are fairly straight forward. On the 21 August 2005 the mother of the victim sent her to buy paraffin at a nearby trading centre. This was at about 6.00pm. The victim was 4 years old at the time. The appellant found her walking to the trading centre. The appellant carried the victim from the road into a nearby field of elephant grass and had sexual intercourse with her. They then continued to the trading centre. He cautioned her from revealing what had taken place and promised to buy her bread.

3. In the meantime the mother of the victim was worried as the victim had taken too long without returning. She went to the nearby trading centre

and found the victim in Mukuru's shop. The appellant was also present. The mother and victim went home where the victim revealed what had happened to her. The mother made a report to the local council chairman and the appellant was arrested. The appellant was then charged with the offence of defilement and successfully prosecuted. He was sentenced to 19 years imprisonment.

4. It is against that sentence that the appellant now appeals to this court.

Counsel's Submissions

5. Mr Collins Accellam, learned counsel for the appellant submitted that Appellant was convicted of the offence of defilement and sentenced to 19 years. He contended that the sentence of 19 years was excessive and harsh in the circumstances of the case. If the mitigating factors were taken into account and the period spend on remand the learned trial judge would have come up with a lesser sentence. The appellant was a young man who had prayed for lenience from the trial court. He was a student at Rutooma Primary School. He was in P5 and 19 years at the time. Mr Accellam prayed that this court exercises its discretion to allow the appeal to succeed and the sentence be substituted with one of less than 19 years. He promised to make 2 authorities available to the court after the hearing.

6. Ms Rose Tumuhaise, learned Principal State Attorney, appearing for the State opposed the appeal. She conceded that the trial judge was not clear on the issue of the period spent on remand. However, the trial judge looked at the aggravating factors and they outweighed the mitigating factors. The offence attracts a maximum sentence of death. This was not imposed. The convict committed a serious offence. The victim was only 4 years while the appellant was 19 years old. He should have provided protection to this minor. He pretended to be escorting her home but he took her into the bush and defiled her. All these factors were considered. The sentence of 19 years was appropriate. She prayed that the appeal be dismissed and sentence confirmed.

Analysis

7. It has been consistently held in numerous cases both by the Supreme Court and the predecessor 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 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.'

8. The foregoing principles are equally applicable in the instant case.

9. The sentencing order of the trial judge states,

> 'Accused is allegedly a first offender. He has been on remand for the last 4 years and 10 months. I take this period into consideration while considering the sentence to impose on him. He said to be a young man and a student. He has prayed for leniency. However, the convict committed a serious offence. It is a capital offence. The law takes serious view of defilers. The victim was only 4 years old at the time. Accused pretended to give her security up to her home, and the victim must have felt safe with him and she innocently accepted the offer. But the accused had other sinister plans in his mind. He planned to defile the victim and that's what he did to her. Such behaviour cannot be condoned y this Court. The accused in my view deserves a still sentence. Putting everything into consideration, I sentence the accused person to 19 (Nineteen) years imprisonment. Right of Appeal explained.'
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10. It appears to us that the learned judge first of all discounted the fact that the appellant was a first offender with the statement that the 'accused is allegedly a first offender.' There was no need for the judge to refer to the accused as allegedly a first offender. The state had conceded that it had no record for the accused. The trial judge ought to have taken the appellant as a first offender rather than taking the position that this was

only an allegation. In effect the learned trial judge ignored this point of mitigation in favour of the appellant.

11. It appears to us that the learned trial judge was intent on the retributive nature of punishment to the exclusion of other objectives of punishment like the possible reformative effect of the punishment on the offender. This was a very young man who in effect received a sentence of life imprisonment without being fully credited with the almost 5 years he had spent in pre-trial detention much as the judge said he had taken it into account.

12. In the case of Bikanga Daniel v Uganda Court of Appeal Criminal Appeal No. 38 of 2000 [unreported] the appellant had been convicted of defilement of a girl under 18 years of age. He detained the girl for 2 days in his house during which he repeatedly defiled her. He was sentenced to 21 years imprisonment. On appeal this sentence was found to be harsh and excessive. It was substituted with a sentence of 12 years. The age of the victim is not disclosed.

13. The other case referred to us is Kabwiso Issa v Uganda Supreme Court Criminal Appeal No. 7 of 2002 [unreported]. The appellant was convicted of defilement and sentenced to 15 years imprisonment. On appeal to the Court of Appeal it was confirmed. On further appeal to the Supreme Court the court found that the trial judge had not taken into account the period the appellant had spent on remand and reduced the sentence to 10 years imprisonment.

14. In both these cases the age of the victim is not discussed though in Bikanga Daniel v Uganda [supra] the multiple sexual intercourse with the victim over a period of two days may have been an aggravating factor. In the instant case the victim was only 4 years old. This is a significant aggravating factor. Nevertheless a sentence of 19 years where the appellant had spent almost 5 years on pre-trial remand is definitely excessive and harsh in the circumstances. It is out of range with sentences for this type of offence. We set it aside.

15. This court has the same powers as the High Court, pursuant to 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'

16. In the instant case the appellant was a first offender. He had spent almost 5 years on remand prior to his trial and conviction. He was 19 years old, a very young man at the time of the commission of offence. Nevertheless he committed a very serious offence whose victim was only 4 years old.

Decision

17. We are satisfied that a sentence of 15 years imprisonment from the date of conviction [24 June 2010] will meet the ends of justice in this case. We so order.

Dated, signed and delivered at Fort Portal this 18th day of December 2014

Remmy Kasule
Justice of Appeal

Eldad Mwangusya
Justice of Appeal

Fredrick Egonda-Ntende
Justice of Appeal