THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASINDI

CRIMINAL APPEAL N0. 487 OF 2017

WASAIJA ALEX ::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the judgment and sentence of High Court of Uganda at Hoima before Rugadya Atwoki, J in Criminal Session Case No. 0137 of 2012 dated 15th day of June,2017)

Reasons for the Decision

Introduction

At the hearing of this appeal on 26th of March 2024, we considered the appellant's sole ground of appeal on the sentence that was imposed by the trial court and the submissions of counsel. We found no reason to interfere with the sentence of 25 years' imprisonment imposed by the trial court so we confirmed it and dismissed the appeal. We undertook to give the reasons later and we now do so.

Brief Background Facts

This appeal arose from the decision of the High Court at Masindi (Rugadya Atwoki, J) by which the appellant was convicted of the offence of aggravated defilement contrary to section 129 (3) (4) (q) of the Penal Code Act and sentenced to 25 years' imprisonment. The particulars of the offence were that WASAIJA ALEX (the appellant) on the 8th day of February, 2012 at Bujumbura East, Bujumbura Division, Hoima Municipality, in the Hoima District, performed an unlawful sexual act with KF alias K, a girl under the age of 14 years.

The brief facts as ascertained from the lower court record are that on the 8th day of February 2012 at around 9:00pm, the victim's mother (PW1) left the victim who was aged 3 years old and her sibling inside her house to go to the toilet across which was 30 metres away from her house. While still chatting with a neighbour, PW1 realised that the door to her house was open and she together with her neighbour proceeded to her house to check what was going on. As they approached, the appellant emerged from PW1's house as he carrying the victim. She was crying. The appellant then handed over the victim to PW1. PW1 tried to carry her on the side but she could not open her legs due to pain. She continued to cry as PW1 laid her on the bed and checked her private parts. She saw blood coming out and the inner skin of her private parts had come out.

The appellant was subsequently arrested and the victim was examined by a medical doctor (PW3) and the report contained in PF3A revealed a raptured hymen and protrusion of the soft tissue from the vagina. There were other associated injuries around the vagina. During the examination upon touching of her private parts there was bleeding. The appellant was indicted and he pleaded not guilty. The prosecution called 3 witnesses to prove the offence but the appellant opted to exercise his constitutional right to keep quiet. The learned trial Judge found the appellant guilty, convicted and sentenced him as aforementioned.

Aggrieved by the sentence, the appellant with the leave of this Court appealed against sentence only on the sole ground: -

> *"That the sentence of 25 years' imprisonment the learned trial Judge meted out on the appellant is manifestly harsh and excessive on the account of the obtaining circumstances."*

Representation

At the hearing of this appeal, Mr. Edwin Mutaryebwa appeared for the appellant on State Brief while Mr. Joseph Kyomuhendo, Chief State Attorney held brief for Ms. Sharifa Nalwanga, Chief State Attorney from the Office of the Director Public Prosecutions. The appellant was

present in Court. Both parties filed written submissions which were adopted as their arguments in the appeal and have been considered by this Court. Counsel for the appellant sought and was granted leave to appeal out of time and to validate the notice of appeal on record that was filed out of time.

Appellant's Submissions

Counsel for the appellant submitted on the duty of this Court as the first appellate court. He supported his submission with the famous Supreme Court decision in ***Kifamunte Henry vs Uganda, SCCA N0. 10 of1997*** and the earlier decisions in ***Pandya vs R (1957) EA 336 at 338*** and ***Okeno vs R (1972) EA 32*** where a similar view was expressed. Counsel also alluded to the - decision in ***Charles Bitwire vs Uganda, Supreme Court Criminal Appeal No. 23 of 1985 at page 5*** where it was stated that even where the trial court has erred, the appellate court will interfere where the error has occasioned a miscarriage of justice.

On the merits of this appeal, counsel referred to the definition of mitigation in ***The Black's Law Dictionary 4th Edition on page 1153*** as the reduction, diminishing, or lessening of the amount of penalty or punishment. He then submitted that on page 53 of the record of proceedings, the trial court was informed that the appellant was a first time offender. The appellant himself informed court that he was a family man of 4 brother's children, that the period of 5 years and 4 months he had spent on remand had taught him a lesson and he had reformed. He therefore prayed for leniency. Counsel argued that had the learned trial Judge given a fair scrutiny of these mitigating factors, he would not have sentenced the appellant to 25 years' imprisonment.

He relied on the decision of this Court in ***Kibaruma John vs Uganda, Court of Appeal Criminal Appeal No.225 of 2010*** where it was stated that the Supreme Court in ***Kyalimpa Edward vs Uganda, Supreme Court Criminal Appeal No. 10 of 1995*** followed the holding in ***R vs Havilad (1983)5 Cr. App. R(s) 1O9*** that: -

"An appropriate sentence is a matter for discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises discretion. It's the practice that as an appellate court that this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to injustice".

Counsel cited a number of decisions of this Court where the sentences for aggravated defilement were either reduced or maintained but none of them exceeded 18 years' imprisonment. They include: - ***Byaruhanga Lazio vs Uganda: Court of Appeal Criminal Appeal No. 168 of 2OO9***, where this Court upheld a sentence of 14 years' imprisonment for the appellant who pleaded guilty of defiling his neighbour's daughter; ***Kisembo Patrick vs Uganda, Court of Appeal Criminal Appeal No.441 of 2014,*** where a sentence of life imprisonment was reduced to 18 years for the appellant who was convicted of aggravated defilement of a child of 4 years; **Kato Sula vs Uganda; Court of Appeal Criminal Appeal No.30 of 1999** where a sentence of 8 years' imprisonment was found to be rather lenient and confirmed; ***Ntambi Fred vs Uganda: Court of Appeal Criminal Appeal No. 0177 of 2009*** where a sentence of 14 years' imprisonment was confirmed for the appellant who defiled his daughter.

Based on the above decisions, counsel argued that the sentence of 25 years imposed on the appellant who was aged 27 years at the time of committing the offence on a 3-year-old victim was manifestly harsh and excessive in the circumstances. He urged this Court to consider the principle on uniformity of sentences as it reconsiders the appellant's mitigating factors. Counsel prayed that this Court finds the sentence manifestly harsh and excessive and substitutes it with 10 years' imprisonment.

Respondent's Submissions

Counsel for the respondent opposed this appeal and contended that the learned trial Judge properly evaluated and considered all the factors in this case and therefore a sentence of 25

years' imprisonment was not manifestly harsh and excessive in the circumstances. He pointed out that the offence of aggravated defilement carries a maximum sentence of death and guideline 19 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013, provides for a starting point of 30 years and above. According to counsel, 25 years' imprisonment is within the permissible range.

Counsel submitted that on page 54 of the record, the learned trial Judge gave reasons for arriving at the sentence. The trial court considered the mitigating factors; that the appellant was a first-time offender, was 27-year-old, had been on remand for 5 years and 4 months and that he had been remorseful having asked for forgiveness. Counsel added that on the same page the court considered the aggravating factors, namely that; the offence was serious, the victim was only 3 years old, the appellant being a neighbour abused the parental friendship and the injuries sustained by the victim. The court then arrived at a sentence of 30 years and 4 months' imprisonment from which the period of remand of 5 years and 4 months was deducted and the appellant was to serve a sentenced of 25 years' imprisonment. Counsel argued that the court having taken into account all the important factors and arrived at an appropriate sentence cannot be faulted. Neither can the sentence be said to be manifestly harsh and excessive as it was within the permissible range. He implored Court not to interfere with the sentence.

Counsel cited a number of cases where this Court found sentences of between 25 and 32 years for the offence of aggravated defilement within permissible range and confirmed them. They include: - ***Kabazi Issa vs Uganda, Court of Appeal Criminal Appeal No. 268 of 2015*** where a sentence of 32 years' imprisonment for two counts of aggravated defilement was upheld; ***Ddumba Fred vs Uganda, Court of Appeal Criminal Appeal No. 070 of 2012***, where a sentence of 25 years' imprisonment was upheld; ***Othieno John vs Uganda, Court of Appeal Criminal Appeal No 194 of 2010***, where a sentence of 29 years' imprisonment was confirmed; ***Opio Moses vs Uganda, Court of Appeal Criminal Appeal No.118 of 2010***,

where a sentence of 27 years' imprisonment for a 30 year old biological father of a 9 year old victim was confirmed; and ***Senoga Frank vs Uganda, Court of Appeal Criminal Appeal No' 074 of 2010***, where a sentence of 28 years was confirmed.

Counsel referred to ***Karisa Moses vs Uganda, Supreme Court Criminal Appeal No. 23 of 2016*** where it was held that an appropriate sentence is a matter for discretion of the sentencing Judge, each case presents its own facts upon which a Judge exercises his discretion. It is the practice that this Court as an appellate court will not normally interfere with the discretion of the sentencing Judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial Judge is manifestly so excessive so as to amount to an injustice. He then urged this Court not to interfere with the sentence imposed on the appellant considering that the learned trial Judge neither left out important factors nor acted on wrong principle of the law. He prayed that the sentence of 25 years' imprisonment be confirmed and the appeal be dismissed.

Analysis by the Court and Reasons for Decision

The appellant faulted the learned trial Judge for failing to consider his mitigating factors, particularly, the information he had given court that he is a family man of 4 brothers and kids. Further that the time he had spent on remand had taught him and he had reformed where upon he prayed for leniency. It was contended for the appellant that had the learned trial Judge given a fair scrutiny of the above mitigating factors, he would not have sentenced him to a manifestly harsh and excessive sentence of 25 years' imprisonment.

Conversely, counsel for the respondent maintained that the sentence of 25 years imposed on the appellant was not manifestly harsh and excessive. She demonstrated this by citing a number of cases where this Court confirmed sentences that were between 25 and 32 years' imprisonment for aggravated defilement having found that they were not manifestly harsh and excessive.

We are alive to the fact that in exercising its power to review sentences, the appellate court is governed by the principle that was well stated by the Supreme Court in ***Kizito Senkula vs Uganda, SCCA No. 24 of 2001*** that;

> *" ...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."*

See also: ***Kiwalabye Bernard vs Uganda, Criminal Appeal No.143 of 2001 (Unreported); James vs R, (1950) 18 EACA 147 and Ogalo s/o Owoura vs R, (1954)24 EACA 270***

In the instant appeal, we have found it pertinent to reproduce the sentencing proceedings in its entirety and in the style and manner in which it was recorded so as to establish whether indeed the learned trial Judge did not consider the mitigating factors as contended for the appellant.

> "***"SENTENCING PROCEEDINGS***
>
> *Arinaitwe absent - RSA*
>
> *Baryabanza for Accused.*
>
> *Accused present.*
>
> *Kentalo C/C*
>
> ***Court:*** *Judgement read in open court. Accused convicted.*
>
> ***Sgd***
>
> ***Judge***

29/6/17

RSA –

-1st offender -27yrs.

- Remand - 5yrs, 4months

- Victim 3yrs

- Defilement rampant.

- Deterrent sentence

- Pray for 40yrs.

Baryabanza:

-1st offender.

- Remand for 5yrs 4months

- Family duties - 4 brother's kids

- Aged 27yrs

- Remand has taught him.

- Has reformed.

- Pray for leniency.

- Seek 10yrs.

Allocutus: Accused:

-My health has changed.

-Remand has taught me.

-Would never repeat the offence. I have repented.

- I seek judgment and also the same from the mother of the child.

SENTENCE AND REASONS

- 1st offender

- Young 27yrs

- Been on remand for 5yrs and 4 months

- Remorseful - asked for forgiveness.

Aggravating:

- Offence serious

- Victim 3yrs old.

- Was neighbour - abused parental friendship.

- Injuries to the child

Sentence: 30 years 4 months less remand therefore sentenced to 25 years Imprisonment.

Sgd.

Judge

29/6/17

Court: *Right of Appeal explained.*

Sgd.

Judge

29/6/17."

Our analysis of the sentencing proceedings and the ruling indicates that although the learned trial Judge abridged his recording of the sentencing proceedings and the ruling, at least it clearly indicates that he considered all the mitigating factors presented by the appellant except his family duties over 4 brothers' - children. There was no mention of the whereabouts of the parents of those children who would have direct responsibility over them. Therefore, in our view, even if the learned trial Judge had considered that particular mitigating factor, it would not have had the effect of reducing the sentence that was imposed on the appellant given the aggravating factors. The injury the 3-year-old victim suffered in the hands of a 27-year-old appellant, as described by PW3, was extensive. When court asked PW1, the mother of the victim about the condition of the child, she stated that she was fine but she kept passing urine. She did not know whether that was the effect of her being defiled. In our view, that possibility cannot be ruled out given the extensive damage of the victim's private parts.

We accept counsel for the respondent's submission that the offence of aggravated defilement carries a maximum sentence of death and ***guideline 19 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013***, provides for a starting

point of 30 years and above. That makes the sentence of 25 years imposed on the appellant fall within the permissible range of sentences for aggravated defilement. This position is demonstrated by the earlier decisions of this Court that were cited by counsel for the respondent as highlighted above.

It was therefore our finding that the important factors that ought to have been considered like the appellant's age, his past record, his remorsefulness and the periods he spent on remand were all considered by the learned trial Judge before arriving at the final sentence that was imposed. The only factor that was omitted as indicated above, in our view, did not cause a failure of justice to the appellant. We are fortified by section 139 (1) of the Trial on Indictment Act which provides as follows: -

> ***"139. Reversability or alteration of finding, sentence or order by reason of error, etc.***
>
> *(1) Subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission, irregularity or misdirection in the summons, warrant, indictment, order, judgment or other proceedings before or during the trial unless the error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice."*

Since we found that no failure of justice was occasioned to the appellant by the omission to consider the mitigating factor that he had family duties over his 4 brothers' children, we did not find any plausible reason to interfere with the sentence.

We wish to observe with concern that there is a growing practice where counsel place before this Court a number of authorities with lesser sentences to make a case for reduction of their clients' sentence. We must point out that the Supreme Court and this Court have expounded on the principles for interfering with a sentence imposed by a trial court as we already alluded to above. Counsel for the appellant himself cited the Supreme Court decision in ***Kyalimpa Edward vs Uganda*** (Supra) which clearly spells out the circumstances under which an appellate court may interfere with the sentencing discretion of the trial court. However, in his

submission he fell short of demonstrating to this Court the fault of the learned trial Judge and the resultant failure of justice occasioned to the appellant to justify interference with the exercise of sentencing discretion.

We must therefore emphasise that this Court will not interfere with the sentencing discretion of the trial court simply because there are sentences in previous cases that are lower than what was imposed. One must specifically show important factor(s) or principle(s) that the trial court did not consider that resulted in the sentence being either illegal or manifestly excessive or so low as to amount to an injustice. We note that in cases of aggravated defilement like this one, there are other cases like the ones cited by counsel for the respondent above where this Court and the Supreme Court have given higher sentences.

In conclusion, we did not find any reason to interfere with the sentence of 25 years imposed on the appellant by the trial court and accordingly, the sentence was confirmed and the appeal dismissed for the above reasons.

Dated at **Masindi** this....24th.....day of.....APRIL..... 2024.

.....
Richard Buteera

DEPUTY CHIEF JUSTICE

.....
Hellen Obura

JUSTICE OF APPEAL

.....
Irene Mulyagonja
JUSTICE OF APPEAL