THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA AND MULENGA, JJ.SC)

CRIMINAL APPEAL NO. 24 OF 2001

B E T W E E N

KIZITO SENKULA: :::::::::::: :::::: :::::: APPELLANT

AND

UGANDA: :::::::::::: :::::: RESPONDENT

(Appeal from the judgment of the Court of Appeal in Kampala (Kato, Okello and Twinomujuni, JJ.A) dated 10-08-01 in Criminal Appeal No. 127 of 1999).

JUDGMENT OF THE COURT

The appellant was tried by the High Court at Mubende on an indictment of two counts. The first count was defilement, c/s 123(1) of the Penal Code Act, the particulars of which were that on 10-05-1997, at Butuni Village, Mubende District he had unlawful sexual intercourse with Nakilembeko Amooti, a girl under the age of 18 years. The second count was incest, c/s 144 of the Penal Code Act, the particulars of which were that on the same date and place, the appellant being a male person, had unlawful sexual intercourse with the same girl who, to his knowledge, was his grand daughter.

At the end of the trial, he was acquitted of the charge of incest, but he was convicted of defilement and sentenced to 15 years imprisonment. His appeal

against conviction and sentence to the Court of Appeal was dismissed. Hence this appeal.

The memorandum of appeal to this Court contained two grounds of appeal. The first one was against conviction, and the second was against sentence. When the appeal was called for hearing, the appellant's learned counsel abandoned the first ground and, with leave of the Court, amended the second one, to read as follows:

> ***"The learned Justices of Appeal failed to direct themselves to the fact that the trial court had acted on wrong principle in sentencing the appellant."***

The facts of the case are simple. Briefly, they are these: *The victim of the defilement, Nakilembeko Amooti was 11 years old at the material time. She was the daughter of Ednance Bigwire (PW3) her mother, and Simon Semutira (PW4) her father. The latter and the appellant were relatives. On the morning of the day in question, PW4 sent the girl to the appellant to collect Shs. 3000= which the appellant owed him. The girl found the appellant at home. It started raining as she arrived. The appellant invited her into the house. She delivered her fathers message. The appellant closed the door, forced the girl to lie down m a mat on the floor in the sitting room and defiled her. She raised an alarm, which was answered by several people, including her mother Ednance Bigwire. The girl informed her of what had happened. The mother took her home, where she was examined by her grand mother, Praxeda Namazzi (PW5). The examination indicated signs that the girl had been sexually assaulted. The mother informed the father of what had happened, and he reported the incident to the authorities. The appellant was promptly arrested.. The victim was taken to Mubende Hospital, where she was medically examined by Dr. Odongo (PWl); whose medical report showed that she had been defiled and that she was 11 years of age.*

The appellant was eventually indicted and ***tried*** *for defilement and incest, with the consequences we have already mentioned.*

In his argument in respect of the ground of appeal, the appellant's learned counsel, Mr. Stephen Mubiru, agreed with the Court of Appeal's statement of the law on sentencing but he complained that, that Court failed to direct itself regarding what the learned trial judge said when sentencing the appellant. This was that the appellant was unrepentant for the offence he had committed. Learned counsel contended that failure by the appellant to repent appears to have influenced the learned trial judge in imposing the sentence of 15 years imprisonment. Absence of repentance on the appellant's part should not have been an aggravating factor in imposing the sentence against him. This was a misdirection. Learned counsel relied on ***Mattaka and Others -vs- Republic (1971) E.A. 495.***

Mr. Michael Elubu, Principal State Attorney, for the respondent, opposed the appeal. In his submission in reply he said that this Court should not follow the case of ***Mattaka*** (supra) because first, the Court of Appeal for East Africa in that case did not reduce the sentence although it criticized the trial judge for commenting that the appellant did not appear to be repentant, and secondly, because that decision was bad law. In the instant case, the learned Principal State Attorney contended, there were many other aggravating factors which justified the imposition of the sentence of 15 years imprisonment.

We asked both learned counsel to comment on whether the learned trial judge, and the Court of Appeal in upholding the sentence, took into account the period of two years which the appellant had spent in remand before his trial, in view of the provisions of article 23(8) of the Constitution. Both counsel were in agreement that since what the learned trial judge said was vague about the matter, the sentence of 15 years should be reduced by the two years spent by the appellant on remand. We shall revert to this issue later.

The record of the trial Court regarding sentencing of the appellant reads as follows:

*"**Court:** Sentence - Reasons for it:*

He is a first offender. However, he is a first offender who has started his journey in criminality in a high gear. What he did to this girl was to say the least treacherous. He introduced her to sex at such a young age of 11 years. Inspite of the message of castration to be meted out to such men, accused appears to be unconcerned about it. He has not, in the least, looked repentant for what he did. He has a large family of 7 children, but the heinous offence he committed weighs down such a mitigating factor. He spoils other parents' children and wants his to be highly regarded. It is important that a <u>deterrent</u> sentence be imposed in this case considering the circumstances under which it was committed. The sentence should fit both the crime and the offender.

In the premises, the most leniency this Court can extend to an accused who on the face of it is un repentant is to reduce the sentence from death to a term of fifteen (15) years imprisonment, the period spent on remand since 15-05-97 inclusive."

As we have already mentioned the appellant appealed against the sentence to the Court of Appeal. In dismissing that appeal, the Court of Appeal, rightly in our view, followed the principle in ***Ogalo s/o Owowa - vs- R (1954) 24 EACA 270,*** which is 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. In the instant case, the Court of Appeal did not consider the trial judge's remark that the appellant was unrepentant. It did not do so, probably because, according to the record, such a remark was not the subject of a complaint by the appellant as it has been before us.

In ***Mataka and Others -vs- Republic*** (supra), four of the six appellants were convicted of treason and the remaining two were convicted of misprision of treason. In sentencing the second, third and fifth appellants the trial judge stated that there appeared to be a complete absence of penitence and that this could be taken into account when

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passing sentence. In its criticism of this approach to sentencing, the East African Court of Appeal said:

> ***"With respect, we regard this as a misdirection in law. A person who has pleaded not guilty and has maintained his innocence throughout and who intends to appeal cannot be expected to express repentance, which would amount to a confession of guilt. A person who has been found guilty may believe himself innocent as a matter of fact or law, and that belief may be upheld by an appellate court. If, however, lack of repentance could be treated as an aggravating factor, the right of appeal would be fettered, because the convicted person would, in effect, be put to a choice, whether to risk a heavier sentence by maintaining his innocence or to abandon his right of appeal in the hope of leniency.***
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> **This** ***position is analogous to that when a person is pleading to a charge. It is well established law that a plea of guilty springing from genuine repentance may be treated as***

a factor in mitigation. It is equally well established that the fact that a person has not pleaded guilty may not be treated as an aggravating factor, because that would derogate from the right of every accused person to be tried on the charge laid against him."

Notwithstanding the misdirection by the trial court in that case, the East African Court of Appeal did not interfere with the sentences imposed on the appellants, because they had been convicted of treason one of the most serious crimes in Tanzania, the maximum sentence for which was death. All the appellants were of good character, but the nature of the offence was such that it demanded a severe sentence, both as a deterrent and also as a punishment for the individual. If the treasonable plot had succeeded, the whole of Tanzania might have been thrown into a state of complete chaos and resulted in the death of many of its Citizens. In the circumstances, the Court of Appeal found no reason to interfere with the exercise of the trial court's discretion in the matter, and the appeal against sentence was dismissed.

In the instant case, it is clearly our view that it was a misdirection in law for the learned trial judge to have regarded appellant's absence of repentance as an aggravating factor in sentencing him. Equally, with respect, the learned Justices of Appeal failed to direct themselves on the matter. We agree with the view of the law as stated in the decision in ***Mattaka's*** case (supra). Absence of repentance by an accused person should never be an aggravating factor in considering what sentence the trial court should impose. However, we are of the view that in the instant case, the misdirection by the trial court and the failure of the learned Justices of Appeal to direct themselves on the matter, did not cause a failure of justice. There were legitimate aggravating factors which the learned trial judge took into account, namely, that what the appellant did to the victim was treacherous; and that he spoilt her when he introduced her to sex at such a young age of 11 years.

We note that the learned trial judge also took into account certain factors in favour of the appellant.

In this regard, the Court of Appeal referred to ***Ogalo s/o Owowa*** (supra) and concluded:

> ***"In the instant case, the trial Judge considered the appellant's own personal responsibility, the period he spent on remand against the gravity of the offence and within his discretion chose a sentence of 15 years imprisonment. In our view, he did not act on a wrong principle in assessing the sentence and the sentence he imposed is not manifestly excessive. We thus find no Justification to interfere with the sentence."***

Save for the failure by the learned Justices of Appeal to direct themselves on the matter, to which we have referred, and, subject to what we shall say shortly about the effect of article 23(8) of the Constitution, we think that the learned Justices of the Appeal were justified in not interfering with the sentence imposed by the learned trial judge. We think that the circumstances of this case called for deterrent sentence.

Article 23(8) 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 the instant case, it is clear that the learned trial judge took into account the period of two years the appellant had spent in remand. But it is not clear whether he considered that the sentence to be imposed should be 17 years, reduced by 2 years to make 15 years; or whether the sentence was 15 years to be reduced by 2 years to 13 years. Both the learned Principal State Attorney and the counsel for the appellant were of the view that the latter was what the learned trial judge must have meant. The Court of Appeal did not advert to it.

As we understand the provisions of article 23(8) of the Constitution, they mean that when a trial court imposes a term of imprisonment as sentence on a convicted person the court should take into account the period which the person spent in remand prior to his/her conviction. Taking into account does not mean an arithmetical exercise. Further, the term of imprisonment should commence from the date of conviction, not back-dated to the date when the convicted person first went into custody.

In the circumstances of this case, we would set aside the appellant's sentence of 15 years imprisonment and substitute it with one of 13 years from the date he was convicted of the offence of defilement. This appeal succeeds to that extent. It is ordered accordingly.

Dated at Mengo this 19th day of December 2002.

B.J. ODOKI

CHIEF JUSTICE

A.H.O. ODER

JUSTICE OF THE SUPREME COURT

J.W.N. TSEKOOKO

JUSTICE OF THE SUPREME COURT

A.N. KAROKORA

JUSTICE OF THE SUPREME COURT

J.N. MULENGA

JUSTICE OF THE SUPREME COURT