

UGANDA / JUDGMENT

Birungi v Uganda (Criminal Appeal 194 of 2014) [2024] UGCA 251 (3 September 2024)

[2024] UGCA 251

COURT

Court of Appeal of Uganda

BEFORE

Eva K. Luswata, JA/JCC, Kihika, JA /JCC, Asa
Mugenyi, JA/ JCC

CASE / FILE NUMBER

Criminal Appeal 194 of 2014

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT MBARARA

CRIMINAL APPEAL NO. 194 OF 2014

(Arising out of the Judgment and orders of His Lordship V. T Zehurikize at *Mbarara in Criminal Session No. HCT-05-CR-CSC-0278-2012 dated 23rd July* \$2013)\$

BIRUNGI CHARLES ::::::::::::::::::::::::::::::::::

VERSUS

UGANDA ::::::::::::::::::::::::::::::::::

CORAM: HON. JUSTICE EVA LUSWATA, JA HON. JUSTICE OSCAR KIHICA, JA HON.
JUSTICE ASA MUGENYI, JA

JUDGMENT OF COURT

The Appellant was indicted of the offence of Aggravated Defilement contrary to Section 129 (3) & (4) of the Penal Code Act and was convicted on his own plea of guilty. He was sentenced to 18 years' imprisonment. The Appellant was dissatisfied with the sentence passed by the trial court and filed this appeal on the following grounds;

- 1. Thee learned trial Judge erred in law and fact when he sentenced the Appellant to a harsh and excessive sentence.

- 2. The learned trial Judge erred in law when he sentenced the Appellant without deducting the time the Appellant had spent

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on remand thereby occasioning a miscarriage of justice to the Appellant.

Background

The facts of the case as accepted by the trial court are that sometime in the year 2010 Birungi Charles (the Appellant) found the victim, one Kushemererwa Anaslazia aged 11 years alone at her home in Mpasha cell in Ibanda District. The Appellant took advantage and forcefully had sexual intercourse with the victim without a condom. The Appellant thereafter warned the victim not to tell anyone and indeed she feared to tell her mother. In 2011 the victim developed a skin condition on her leg. She was treated but there was no improvement. On 6th March 2012 the victim's mother took her to Ruhoko Health Centre and the Doctor advised her to take the victim for an HIV test.

The victim was tested and she was found to be HIV positive. That the victim's mother then asked the victim if she had ever had sexual intercourse with anyone and she revealed to her that in the year 2010 the Appellant forcefully had sexual intercourse with her. The matter was reported to police and the Appellant was arrested, indicted and convicted of the offence of aggravated defilement on his own plea of guilt.

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Representation

At the hearing of this appeal, Mr. Tumwebaze Emmanuel on State brief, appeared for the Appellant while Ms. Happiness Ainebyona appeared for the Respondent. Both parties filed written submissions which were adopted as their legal arguments.

The appellant sought leave under Section 132 (1) (b) of the Trial on Indictment Act (TIA) to appeal against sentence only and leave was accordingly granted by this Court.

Appellant's submissions

Ground one

Counsel relied on the decision in *Kiwalabye Vs Uganda Supreme Court Criminal Appeal No. 143 of 2001* for the proposition that an appellate court cannot interfere with the sentencing discretion of the trial court unless it is satisfied that the sentence imposed is manifestly excessive or so low as to amount to a miscarriage of justice or where the trial court ignores to consider important matters which ought to be considered. Counsel submitted that there is need for consistency and uniformity while sentencing persons convicted of similar offences.

Counsel argued that the sentence of 18 years' imprisonment was harsh and excessive and is not consistent with sentences in similar cases. Counsel relied on the decision in *Kibaruma John Vs Uganda CACA No. 225 of 2010* in which an appellant defiled a girl of 9 years had been sentenced to 15 years' imprisonment and on appeal, was

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sentenced to 11 years' imprisonment. Counsel argued that the appellant in this case had no knowledge of this HIV status and ought to be given a more lenient sentence.

Ground two

Counsel submitted that the Appellant had spent 17 months on remand and the period was not arithmetically deducted by the trial Judge. Counsel relied on the decision in *Rwabugande Vs Uganda POIn UGSC (3 March 2017)* for the notion that taking into account the period spent on remand is arithmetical in which case the period is known with precision and certainty. Counsel prayed that this court invokes its powers under Section 11 of the Judicature Act to resentence the Appellant and deduct the period he spent on remand.

Respondent's submissions

Counsel submitted that it is settled law that sentence is a discretion of a trial judge and an appellate Court will only interfere with a sentence imposed by the trial Court if it is evident that it acted on a wrong principle or overlooked some material fact or if the sentence is manifestly harsh and excessive. Counsel argued that the Appellant's contention that a sentence of 18 years' imprisonment in the circumstances was manifestly harsh and excessive was a joke and mockery to the victim.

Counsel argued that the circumstances of this case are deserving of a higher sentence considering that the appellant was a neighbor to

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the victim, he knew his status as being HIV positive and went ahead to not only defile the victim but infected her with HIV.

Regarding the illegality of the sentence, counsel submitted that the appellant was sentenced on the 23rd October 2014, way before the decision in *Rwabugande Moses V Uganda* SCCA No. 25 of 2015 which requires an arithmetic deduction of the period spent on remand. Counsel argued that from the wording of the sentencing order of the trial Judge, the period the Appellant spent on remand was duly considered.

Court's consideration of the appeal

Duty of the First Appellate Court

For this Court, as a first appellate court, to interfere with the sentence of a trial Court it must be shown that any one or more of the factors below exist:

- 1. The sentence is illegal.
- 2. The sentence is harsh or manifestly excessive.
- 3. There has been failure to exercise discretion.
- 4. There was failure to take into account a material factor.
- 5. An error in principle was made.

See: *Rwabugande Moses Vs Uganda*, Supreme Court Criminal Appeal No. 25 of 2014; *Kyalimpa Edward Vs Uganda*, Supreme Court Criminal Appeal No. 1() of 1995; *Kamya Johnson Wavamuno Vs Uganda*, Supreme Court Criminal Appeal No. 16 of

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2000; and *Kiwalabye Bernad Vs Uganda*, Supreme Court Criminal Appeal No. 143 of 2001.

Further, the court may not interfere with the sentence imposed by a trial Court simply because it would have imposed a different sentence had it been the trial Court. See: *Ogalo S/O Owoura Vs Republic* [1994] 24 EA CA 270.

We shall bear in mind the above principles while resolving this appeal while, at the same time, not losing sight of the general duty of this court, as first appellate court, to re-appraise all the evidence that was adduced before the trial court and come to its own conclusions of fact and law while making allowance for the fact that the court neither saw nor heard the witnesses testify. (See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, S. I 13-10; *Fredrick Zaabwe vs. Orient Bank Ltd* Civil Appeal No. 4 of 2006; and *Kifamunte Henry vs. Uganda SCU* Cr. Appeal no. 10 of 1997 the Supreme Court of Uganda.

Analysis

The appeal is against sentence only. It is the appellant's claim that the sentence is illegal on account of the failure of the trial Judge to arithmetically deduct the remand period in accordance with the Supreme Court decision in *Rwabugande Moses Vs Uganda* (op cit) and Article 23 (8) of the Constitution of the Republic of Uganda.

While sentencing the appellant, the trial Judge stated as follows:

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"I have considered submissions of both counsel. I notice that the convict is a first offender. He pleaded guilty thereby not wasting court's time and scarce resources. It understands he has a family. However, on the other hand he committed a serious offence attracting a maximum sentence of death. He defiled a young girl aged 12 years. She was a neighbor and he should have been protective of her. But worst still he infected her with AIDS. From the time she was tested and found positive, she has been aware of this intractable deadly disease

When court, acting under section 98 of the TIA, called the victim to say something, she told court that the whole village knew that she is sick, her fellow pupils know that she has AIDS. There is no doubt that she is traumatized and she will for the rest of her life live in state of uncertainty.

The victim's mother expressed statements that the convict deliberately infected her daughter. It is most likely that he was aware of his HIV status at the time of committing this offence. No wonder he would go for such a young girl moreover a neighbor.

I would have sentenced the convict for life but considering the period he has spent on remand and the fact that he pleaded guilty, I will be lenient.

I sentence the convict to a term of eighteen years' imprisonment."

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Article 23 (8) of the Constitution of the Republic of Uganda, 1995 requires the sentencing court to consider the remand period in the following terms:

"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." [Emphasis added]

The above underlined words are, in our view, the operative words when resolving the issue of illegality raised by the appeal. In the *Rwabugande* case, the expression "take into account" the remand period was interpreted by the Supreme Court to involve arithmetical deduction thus:

"It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused."

Subsequently, the Supreme Court clarified the meaning of the expression "take into account" in the case of *Abelle Asuntan Vs Uganda*, Supreme Court Criminal Appeal No.66 of 2016 (delivered on 19th April 2018) thus:

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"What is material in [the *Rutabugande*] decision is that the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according to the case of *Rwobugande* that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This Court used the words to deduct and in an arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from the Constitution.

Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution." [Emphasis added]

In a more recent decision of *Nashimolo Paul Kibolo v Uganda* [2020] UGSC 24 (9 September 2020) the Supreme Court clarified the discrepancy between the decision in *Rwabugande* (supra) and *Abelle Asuman* (supra) and held that where there is a departure from a previous decision under Article 132 (4) of the Constitution, the court ought to take cognizance of its previous decision and also give reasons for the departure from that position.

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In *Nashimolo Paul* (supra), the Supreme Court found that their Lordships in *Rwabugande* *Moses* outlawed their previous position in the cases of *Kizito Senkula vs Uganda* and *Bukenya Joseph vs Uganda* and gave a justification for the departure. Their Lordships held further that it is unlikely that the Supreme Court gave ^a justification for the departure and then unceremoniously reinstated it a year later in *Abelle Asuman*. Their Lordships in *Nashimolo Paul* (supra) held as follows;

*In the *Abelle Asuman* case, the Court quoted the outlawed position, it was followed by an unequivocal statement that:

"In its judgment this Court made it clear that it was departing from its earlier decision in *Kizito Senkula* vs. Uganda SCCA I[o. 24/2001; *Kabuge Senuano* vs. Uganda SCCA /Vo. 2 of 2002; *Katende Ahmed* vs. Uganda SCCA No. 6 of 2004 and *Bukenga Joseph* vs. Uganda SCCA IYo. 17 of 2010 which held that "taking into consideration of the time spent on remand does not necessitate a sentencing court to apply a mathematical formula.

This Court and the Courts below before the decision in *Rwabugande* (supra) were following the law as it was in the previous decisions above quoted since that was the law then.

After the Court's decision in the *Rwabugande* case this Court and the Courts below have to follow the position of the law as stated in *Rwabugande* (supra). This is in accordance with the principle of precedent." (Emphasis ours)

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It is in our view, brought clarity on the prevailing position of the law as contained in the case of *Rwabugande Moses* vs. Uganda (supra).

The decision in *Abelle Asumanus*. Uganda (supra) was made per incurious to the extent that it made reference to an outdated position."

From the above excerpt, it is our considered view that this court is bound by the decision in *Nashimolo Paul* (supra) and finds that from the sentencing order of the learned trial Judge, the period the Appellant spent on remand was not deducted. We accordingly allow the appeal and set aside the sentence of the trial Court.

Re-sentencing

Section 11 of the Judicature Act vests this court with the same powers as the trial Court in the following terms:

"77. 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."

In the exercise of the above mandate, we adopt both the mitigating and Aggravating factors as set out by the trial judge in his sentencing decision. We are also alive to the principle of uniformity and consistency in sentencing which we are required to comply with. See:

Sentencing Principle No.6(c) of the Constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions, 2013 -Legal Notice No.8 of 2013, and Aharikundira Yustina Vs Uganda, Supreme Court Criminal Appeal No. 27 of 2015. We , note that the sentence of 18 years' imprisonment originally imposed by the trial Court was within the range of sentences imposed by this court and the Supreme Court for the offence of aggravated defilement

Decision

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ASA MUGENYI Justice of Appeal

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