

UGANDA / JUDGMENT

Katsigazi v Uganda (Criminal Appeal 175 of 2014) [2023] UGCA 194 (1 August 2023)

[2023] UGCA 194

COURT

Court of Appeal of Uganda

BEFORE

Kibeedi Mutangula, JA, Gashirabake, JA, Luswata, JA

CASE / FILE NUMBER

Criminal Appeal 175 of 2014

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⁵ THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA HELD AT MBARARA

(Coram: Muzamiru Mutangula Kbeedi, Christopher Gashirabake & Eva K. Luswata, JJA)

CRIMINAL APPEAL NO. 0175 OF 2014

10 KATSIGAZIJANUARIO APPELLANT VERSUS

UGANDA [Appeal from the decision of the High Court of Uganda at Mbarara (Hon. Justice V. T Zehurikize) in Criminal Session Case No. 0304 of 2010 delivered on 13/08/2013] RESPONDENT

JUDGMENT OF THE COURT

Introduction

The appellant was indicted with the offence of aggravated defilement contrary to section 129(3) and (4)(a) of the Penal Code Act, Cap 120 (PCA) and sentenced to a 21 years' imprisonment term after deducting the remand period of three years and three months.

- 20 The facts of the case as established by the trial court were that on the 24th April 2010 at Rwentama cell in Ibanda District, at around 5:00pm, the victim, who for purposes of this appeal will be referred to as "RA" or "the victim" or "PW1", went to use herself in an outside toilet (pit latrine). While there, the appellant came in the same toilet and told her that he was going to give her some maize.

- 25 The appellant then sat down, put the victim on his laps and started having sex with her. In the process the mother of the victim, one Justina Kyomugisha (PW2), came to the toilet to ease herself only to find the appellant having sex with her daughter. At the time, the victim was 6 years old.

The mother raised an alarm which attracted some of the neighbors who arrested the appellant and tied him up and reported him to the Local Council Chairman. He was subsequently handed over to the police and charged with defilement C/S 129 (3) and (4)(a) of the PCA. The victim was medically examined and found with bruises consistent with recent sexual activity on the victim's private parts.

35 In his defence, the appellant told court that he knew both witnesses, and that on the date of the alleged commission of the offence, he was coming from his mother's home and branched to ease himself in the same pit latrine. That when he was approaching the toilet, PW1 was coming out. He entered and started easing himself. Then PW2, came peeped in the toilet and went back and started raising an alarm that she had found a man in a toilet where her daughter had been.

40 That many people gathered and started beating him. That people from the nearby trading center arrested him before he finished easing himself and that he had not put on his trousers properly. He was taken to Ibanda police station and thereafter, he was charged with the offence of aggravated defilement.

45 The appellant underwent full trial and, as already stated, was convicted and sentenced to 21 years' imprisonment. Being dissatisfied with decision of the High Court, the appellant filed Criminal Appeal 0175 of 2014, against both the conviction and sentence.

Grounds of appeal

The appellant set out two grounds of appeal which were couched as follows:

- ¹ The learned trial Judge erred in law and fact when he relied on inconsistent and contradictory evidence of the prosecution witnesses thus occasioning miscarriage of justice.
- 2. The learned trial Judge erred in law and fact when he imposed a harsh and excessive sentence of 21 years' imprisonment on the appellant.

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55 Representations

At the hearing of the appeal, Ms. Benita Namusisi represented the appellant; while Ms. Carolyn Hope Nabaasa, a Principal Assistant Director of Public Prosecutions and Ms. Amelia Tukamushaba, a State Attorney, both from the office of the Director of Public Prosecutions (DPP), represented the respondent.

The parties proceeded by way of Written Submissions as directed by Court. However, Counsel 60 for the parties briefly addressed court when the appeal was called for hearing. This judgment has therefore been prepared largely on the basis of the Written Submissions. However, the oral submissions have also been considered.

Appellant's written submissions

- On ground 1, Counsel for the appellant contended that there were grave contradictions in the 65 prosecution evidence in three aspects, namely: -
- \$1.\$ Evidence as to whether there was performance of a sexual act on the victim: That the victim during her examination in chief testified that her mother came to the toilet and found her having sex with the appellant and she made an alarm and "removed him from me." That however, PW2 Justina Kyomugisha contradicted PW1 when she said that "when [the appellant] saw me, [he] got scared and pushed away the victim."
- \$2.\$ Contradiction as regards the injuries sustained by the victim: That while PW1 stated that she did not get injuries and was not treated for pain, her statement was contradicted by PW2's statement when she said that the victim was taken to the doctor by the Police Woman at Ruhoko and that she did not go with them.

The appellant's counsel argued that a young girl of 6 years old who has been defiled by an adult man for almost 30 minutes, must bleed but the victim testified that she did not bleed, or she did not see anything on her private parts and she did not cry during the

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intercourse that lasted for over 30 minutes. That this shows that there was no penetration of the victim by the appellant.

3 Medical evidence: That although the Medical Form PF3 (Exhibit PE1) shows that there were some signs of penetration, hymen ruptured and some discharge, but the same report contradicted the evidence of PW1 who said that she was examined by the Police Officer at police and did not go to any hospital

85 Counsel for the appellant submitted that the contradictions of PW1, PW2 and the medical report leads to the conclusion that the witnesses were untruthful, and that there was no medical examination carried out on the victim which makes the Medical Report also untruthful. Counsel argued that these contradictions are grave and prayed that this Court rejects such evidence.

90 Regarding ground two, Counsel for the appellant contended that the sentence imposed on the appellant by the learned trial Judge was not only harsh and excessive, but also out of the sentencing range for similar offence. Counsel cited several cases to show the sentencing range for the offence of aggravated defilement. In *Katende Ahamad V Uganda*, Sc. Cr. App No.6 of 2004, the Supreme Court upheld the sentence of 10 years' imprisonment for the offence of aggravated defilement, yet the appellant was father to the victim of 9 years. In *Opio Samuel V*

95 *Uganda*, COA, Cr. App No. 123/2018, the sentence of 15 years was reduced to 14 years' imprisonment by this Court on account that the appellant was young and capable to reform. In that case, the victim was 8 years and suffered mental retardation.

100 Counsel argued that the appellant had no criminal record, was 22 years at that time and he was on remand for 3 years and 3 months, never attempted to run away at the time of his arrest but instead was tied up and beaten. That as a young man, his age is part of the labour force and there are hopes of him being an obedient citizen in future having learnt a lesson. That had the above compelling mitigation factors been taken into account, the learned trial Judge would not have imposed a harsh sentence of 21 years' imprisonment against the appellant.

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105 Counsel prayed that the Court allows the appeal, quashes the conviction, and sets aside the sentence. Alternatively, that in the event that the conviction is upheld, the impugned sentence be substituted with an appropriate one as determined by this Court.

Respondent's submissions in Reply

Counsel for the respondent supported the conviction and sentence handed down by the learned trial Judge.

110 With regard to ground 1 on inconsistencies and contradictions, Counsel contended that the appellant had not demonstrated the gravity of what he pointed out as inconsistencies or how they go to the root of prosecution case.

With regard to the inconsistencies as to the performance of the sexual act on the victim, Counsel submitted that the inconsistency as to whether the mother removed the victim from the appellant or the appellant pushed the victim away, is so minor that it does not go to the root of prosecution case. That what is key is that the two witnesses corroborate each other in placing the appellant at the scene of crime.

1,20 Counsel submitted that the alleged contradiction in respect of the injuries sustained by the victim, was not a contradiction since each witness testified about what happened separately. That PW2 staying at police while victim was taken for examination does not affect the prosecution case. That PW1 was only 6 years at the time the offence and the issue of whether she left her mother at police or not is of no consequence.

725 As regards the medical evidence, Counsel submitted that Medical Report was admitted in Court without any objection, and that whatever inconsistencies are raised about it, if any, were minor that did not go to the root of the case. That the appellant's contention that it is possible that the victim was not medically examined and that the PF3 on the Court record was a mere concoction is devoid of merit, since the Medical Report (PF3) was among the agreed

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- documents tendered in evidence, and the victim's examination on PF3 was never contested at trial by the appellant.
- 130 Furthermore, Counsel submitted that although medical examination of the victim is very key in cases of defilement, Courts can still convict in absence of PF3 report on record especially if there is other circumstantial evidence indicating that the appellant participated in commission of the offence. That in this case, the appellant was fully identified by both the victim and her mother and, in his defence he also admitted to have been present at the crime scene. Counsel
- cited the case **Byaruhanga Julius Vs Uganda Criminal Appeal No. 902 of 2014**, where this 135 Court safely maintained a conviction of the appellant in absence of the victim's testimony and relied on other evidence that confirmed participation of the appellant.

Lastly, with regard to the appellant's submission that the absence of bleeding on the part of the victim implied that there was no penetration. Counsel for the respondent submitted that it has no basis in law. According to Counsel, a victim of defilement must not bleed at all times as

contended by the appellant; that penetration, however slight, suffices in defilement cases.

Counsel implored Court to find the inconsistencies, if any, to be too minor to affect the prosecution case.

With regard to ground 2 on harshness and excessiveness of the sentence, Counsel for the respondent submitted that the learned trial Judge, while sentencing the appellant was alive to 145 all material mitigating and aggravating factors which he put into consideration while exercising his discretion as a Judge who heard the evidence on oath and also had an opportunity to watch the demeanor of the witnesses as they testified in Court. That the learned trial Judge exercised his discretion judiciously under the precincts of the law and spared the appellant the maximum sentence and found that the sentence of 21 years would meet the ends of justice. 150

Counsel concluded by praying to this court to dismiss the appeal.

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Resolution of the appeal

We have carefully read the submissions of both counsel and we have also read the record and the authorities cited to us, and others not cited by the parties. The appeal before us is against both conviction and sentence. As a first appellate court, it is our duty to re-appraise all evidence that was adduced before the trial court and come to our own conclusions of fact and law while making allowance for the fact that we neither saw nor heard the witnesses testify. (See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, S.l 13-10; Fredrick Zaabwe vs. Orient Bank Ltd, Supreme Court Civil Appeal No. 4 of 2006; and Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997. 155 160

We shall bear in mind the above principles as we resolve the grounds of appeal in the order set out by the parties.

Ground 1:

16s Ground 1 was couched as follows: -

The learned trial Judge erred in law and fact when he relied on inconsistent and contradictory evidence of the prosecution witnesses thus occasioning miscarriage of justice.

The inconsistencies complained about by the appellant were in three aspects namely: -

- 1. Evidence as to what transpired when the victim's mother found her daughter on the lap of the appellant.
- 2. Contradiction as regards the injuries sustained by the victim following the sexual act on her.
- 3. Evidence of the Medical Form PF3 (P1), which Counsel for the appellant alleged to have been concoction.
- In our view, all the alleged inconsistencies highlighted in the appellant's submissions on ground one of the appeal boil down to whether or not the trial Court erred in finding that the prosecution 775

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proved, beyond reasonable doubt, that a sexual act was performed on the victim in light of the contradictions highlighted by the appellant.

180 185 Courts have repeatedly stated the law on contradictions to be that major contradictions and inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained away. On the other hand, minor contradictions will only lead to rejection of the evidence if they point to deliberate untruthfulness on the part of the witness- see

Allred Tajar vs Uganda E. A,C. A Cr. Appeal NO. 167 of 1969 (unreported); Sarapio Tinkamalirue Vs. Uganda, Cr. Appeal NO. 27 of 1989 (SC) and Twinomugisha Alex and 2 others Vs. Uganda, Cr. Appeal No.35 of 2002 (SC).

We have reviewed the trial record. From the outset of the judgment, the trial Judge rightly set out the three ingredients which the prosecution had to prove in order to secure a conviction for the offence of aggravated defilement, namely: 1) That the victim was under the age of 14 years; 2) That a sexual act was performed on the victim; and 3) The participation of the accused in the performance of the sexual act.

He then proceeded to evaluate the evidence in respect of each ingredient and concluded that each one of them was proved by the prosecution to the prescribed standard. The appellant has not challenged, and rightly so, the trial Judge's findings in respect of ingredients one and three. The complaint of the appellant is that much as he was at the scene of the crime at the material time, the evidence to prove that the sexual act was indeed performed on the victim contained major contradictions to warrant a proper conviction for the offence.

As regards the first contradiction raised by the appellant, namely, the evidence as to what transpired when PW2 found the appellant with PW1 in the toilet, the record of appeal indicates that PW1 testified that:-

'...my mother came and found us having sex and she made an alarm, she removed him [the appellant] from me" ,--) a,?l/" On the other hand, PW2 testified that: t,yr Page I of 19

'when he saw me, the accused got scared and pushed away the victim'

We accept the respondent's submission that the aforesaid inconsistent evidence as to whether the appellant was removed by the victim's mother, or the appellant simply pushed the victim is a minor contradiction. It simply confirms that the appellant was successfully put at the scene of the crime.

The second area of contradictions raised by the appellant relate to the injuries sustained by the victim as a result of the sexual assault on her, as narrated by her and her mother and about the 2LO carrying out of the medical examination.

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When dealing with the contradictions raised by the appellant about the prosecution's evidence as to the injuries and the medical report, the trial Judge stated:

" ... according to the victim, the accused found her in the toilet and he sat down put her on his lap and put his penis in her vagina. It is when the accused was having sex with her that PW2 came and caught them red-handed.

According to the medical report the victim suffered an act of penetration, and her hymen was ruptured. The rupture was recent. She sustained some injuries around her private parts which were consistent with force having been used sexually. The doctor observed some foul smelling brownish discharge.

220 Ms. Kentaro, Counsel for the accused submitted that the medical report was a concoction and that no sexual act was performed on the victim.

> Her reasoning was based on the fact that PW2, the mother of the victim, did not bother to examine her daughter soon after the incident and that PW1 said that she was not taken to any hospital for treatment.

225 But PW2 explained that when she found the accused defiling the victim, she was so sure that she did not bother to examine her private parts.

> I do not find this strange. Having caught the accused red handed she might not have found it necessary to examine her. It was obvious to her that her daughter had been sexually ravaged. According to her evidence, she looked at her private parts the following day.

> On the other hand, PW1 who was then six years old and was giving evidence some years later could not as well have revealed whether she was taken to the hospital or not.

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All in all, in view of the evidence adduced by the prosecution, it is clear to me that the fact of sexual act having been performed with the victim was proved beyond reasonable doubt.'

The trial Court's findings and conclusions cannot be faulted. The argument by the appellant's Counsel that the victim had no injuries and did not suffer penetration, on account of the absence of bleeding in her private parts, is without any basis. Any penetration, however slight, of the victim's sexual organ, is sufficient to prove the ingredient. See: Section 129(7) of the Penal Code Act.

PW1 testified that after the incident, she felt pain while walking. The medical examination found "bruised vaginal walls, ruptured hymen, with a foul smelly discharge". The evidence of the medical report corroborates that of PW1 and PW2 as to the sexual act.

- 245 Counsel for the appellant repeated the claim that the victim was not medically examined and that the PF3 (Exhibit P1) is simply a concoction. According to the appellant, while the Medical Form PF3 (Exhibit P1) shows that there were some signs of penetration, hymen ruptured and some discharge, the same report contradicts the evidence of PW1 who said that she was examined by the Police Officer from the Police and did not go to any hospital.
- 250 On the other hand, the respondent argues that PF3 having been tendered in evidence by consent of the parties, the appellant is estopped from challenging it at the appellate stage.

After examining the record of appeal, we agree that the respondent raises a valid point. The points raised by the appellant were part of the "agreed facts" before the trial court. The proceedings preceding the admission of the Medical Report are as follows: -

255 "Mr, Onenchan:

20 We have agreed facts: the victim was examined on PF 3 by Dr. Kwikhize B Dalon of Ruhoko Health Centre IV Ibanda. She is called Ainembabazi. She was examined on 244/2010. Srgns of penetration on her private parts. The hymen recently ruptured. There were injuries around her private parts consistent with force having been used 260 sexually. The injuries were classified as harm, Signed and stamped.

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The accused was examined on PF 24 by the same doctor on 26/4nU0 at Ruhoko Health Centre IV Ibanda. He was found to be 22 years old. Had a swollen face and mentally normal.

Court: Ifind the medial reports as Exhlblfs P1 and P2 respectively.

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25/7/2013',

Judge

From the above proceedings, it is our finding that the medical report (PF3) having been admitted in evidence by the trial Court with no challenge to it, or to the agreed facts, by the appellant's counsel, the appellant thereby became estopped from subsequently challenging the

270 agreed facts and the report.

> We are also satisfied that a close examination of the testimonies of PW1 and PW2 regarding the victim being taken to the hospital and/or examination by the doctor were simply different perspectives about the same matter, rather than being seen as contradictory. PW1 stated in her evidence that:

275 "I felt pain. When walking I would feel pain. I did not go to any hospital, I was not injected, I was given tablets by my mother."

The above were answers which were given by a child who was about six years old and from a rural background. It is not far-fetched for such a child to associate "hospital" with "injection" or a place where it is injected from. As such, the examination of the child's private pa(s) having taken place without any "injection" being part of the process, it would not be farfetched for the child not to label the place where the exercise was performed as not being a hospital. That is a perfect perspective for such a child with such a background.

On the other hand, the victim's mother (PW2) testified as follows: -

'I did not find the victim crying. She told me she was feeling pain in her private parts. At that time, I did not examine her private parts. She was examined by the police officer while at police. It was a policewoman who examined her. She was taken to the doctor by a policewoman at Ruhoko. I did not go with them, I remained at police. She was taken on 26/4/2010. I first returned to the Police on 25/4/2010. They told me to take her to, Page 17 of 19 back on 26/4/2010."

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- 'The above testimony was simply a reflection of the extent of the PW2's involvement and knowledge in respect of the process of the examination of the victim by the doctor. PW2's direct involvement ended at the Police Station. She was not involved when the victim was taken by the Policewoman for examination by the doctor. The fact of non-involvement of PW2 cannot, by itself, render the Medical Report a concoction as contended by the appellant's counsel.
- In all, upon review of the evidence before the trial Court, we find that ground one has no basis at all and must fail.

Ground 2 - Harshness and excessiveness of the sentence

The gist of the appellant's complaint in ground two is that the sentence of 21 years' imprisonment imposed on him, after deducting the three years and three months spent on remand, exceeded the range of sentences imposed in previous cases of aggravated defilement by this court which rendered the appellant's sentence harsh and excessive in the circumstances.

The respondent disagreed.

As an appellate court, we can interfere with the discretion of the sentencing Judge only if it is shown that any one or more of the factors below exist(s):

- 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.
- 310 5. An error in principle was made.

See; Rwabugande vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014; Kyalimpa Edward Vs Uganda, Supreme Court Criminal Appeal No. 10 of 1995; Kamya

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Johnson Wavamuno Vs Uganda, Suprerne Court Criminal Appeal No. 16 ol 2000; and Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001.

315 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 SIO Owoura Vs Republic [1954] 24 EA CA 270.

The learned trial judge's sentencing order was couched as follows:

"Ruling on sentence

- 320 I have considered submssions by both counsel. The convict ls a frst offender. He is a young man who can be useful to society. But on the other hand he commifted a serious offence to the preludice of a small (sic!) of 6 years. This kind of conduct must be upon by society and the girl child deserves prolection from the likeness of the accused.
- 325 Having considered all the ctcumstances ofthls case and the peiod of 3 years and 3 months having been deducted and doing the best I can, I would sentence the convict to a term of 24 years' imprisonment but having made the above deduction I sentence him to a term of 21 years' imprisonment.

Right of appeal explained,

Judge

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On the face of it, the sentencing order of the trial court does not give any indication that the trial Judge considered any decided cases of a similar nature and circumstances while sentencing the appellant. The obligation of the court to ensure consistence of its sentences with those of decided cases is set out under Sentencing Principle No.6(c) of the Constitution (Sentencing Guidelines for Courts of Judicature)Practice Directions, 2013 - LegalNotice No.8 of 2013 in the following terms:

> 'Every courl shall when sentencing an offender take into account ... the need for consistence with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances."

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340 The importance of the principle of consistency in sentencing was stated by the Supreme Court of Uganda in the case of Aharikundira Yustina Vs Uganda, Supreme Court Criminal Appeal No.27 of 2015,_thus'.

> "...It is the duty of this coul while dealing with appeals regarding sentencing to ensure consistency wdh cases that have similar facts. Consistency is a vital pinciple of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation."

A review of the decisions of this court in cases of aggravated defilement indicates that the sentencing range is between 11 to 15 years where the convict is a first offender and there is no exposure of the victim to HIV infection. In *Taremwa Apollo Vs Uganda*, Court of Appeal

350 Criminal Appeal IVo. 193 of 2014 where the girl defiled was 8 years old; while the appellant was of the age of 29 years at the time he committed the offence, and a first offender, this Court reduced the sentence of 21 years' imprisonment imposed by the High Court to 15 years' imprisonment.

355 360 In *Alinsiima Gilbert Vs Uganda*, Court of Appeal Criminal Appeal No.0180 of 2010, the appellant was convicted of the offence of aggravated defilement and sentenced to 30 years' imprisonment by the High Court. The victim was 8 years old. On appeal, this court while reducing the sentence to 15 years' imprisonment stated, "the appellant being aged 29 years, a first offender, having spent 3 years and four months on remand, a person with family responsibilities and with dependents to support, we find that a sentence of 15 years imprisonment is appropriate and is in line with sentences passed by courts in previous cases having a semblance to this one."

Recently, in *Tweshengyerize Gideon Vs Uganda*, Criminal Appeal No.376 of 2014 this Court (Muzamiru M. Kbeedi, Christopher Gashirabake & Eva K. Luswata, JJA) after reviewing the decided cases reduced the 18 years' imprisonment imposed by the trial court to 15 years. The victim was aged 6 years, while the appellant was aged 25 years, a first offender and had pleaded guilty to the offence.

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However, there are instances where higher sentences have been imposed or confirmed by this court. In *IVshemeire Denis Vs Uganda*, Court of Appeal No. 131 of 2014 this court (Egonda-Ntende, Catherine Bamugemereire and Christopher Madrama, JJA) found the sentence of 18 years' imprisonment to be appropriate in the circumstances. The appellant in the said appeal was 30 years at the time he defiled the child aged 5 years.

In *Abale Muzamil Vs Uganda*, Court of Appeal Criminal Appeal No.0039 of 2014, this court confirmed a sentence of 19 years' imprisonment for the offence of aggravated defilement. In that case, a neighbour defiled the victim who was aged 9 years at the time of the offence.

- 375 380 The above cases give this court a clue as to the kind of sentences imposed in previously decided cases of aggravated defilement. Such a comparative view constitutes what can be termed "the horizontal comparative analysis", that is, comparison and analysis of the sentences for the same offence of aggravated defilement over a period of time. However, in our view, evaluation of compliance of the impugned sentence with the principle of consistency has another aspect which can be termed, "the vertical consistency/comparative analysis". This involves a review and comparison of the relationship between the impugned sentence with the sentences for other types of offences which are either of a higher/lower gravity or in the same class as the offence whose sentence is complained about. Of particular relevance to this particular case are the sentences in murder cases.

- 385 In Akbar Hussein Godi Vs Uganda, Supreme Court Criminal Appeal No.03 of 2013, where the appellant was convicted of murder by shooting his wife to death, after having previously threatened her several times to kill her, he was sentenced to 25 years' imprisonment.

390 In Rwabugande Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014, the Supreme Court reduced the sentence for the offence of murder from 35 years to 21 years' imprisonment on appeal. The murder in that case was committed by the appellant, jointly with his herdsmen, by beating the deceased to death for failing to release the appellant's cattle which had trespassed into the deceased's land.

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In Jackline Uwera Nsenga Vs Uganda, Court of Appeal Criminal Appeal No. 824 of 2015, this court upheld the appellant's conviction for the murder of her husband by knocking him down at the gate of their home using their car and running over him. This court also confirmed the sentence of 20 years imprisonment imposed by the High Court for the offence of murder.

From the above vertical comparative analysis, we find that by the trial court sentencing the appellant in the instant matter to a term of imprisonment of 21 years after deducting the remand period of 3 years and 3 months, the total period of imprisonment to be served by the appellant comes to 24 years. This term of imprisonment is similar to and, in some instances, higher than that which this court and the Supreme Court has, in the recent past, imposed in cases of murder which we have quoted above. In our view, at the time the offence of aggravated defilement was created by the 1990 amendment of the Penal Code Act, the then prevailing interpretation of the sentence for a murder convict was mandatory death under section 189 of the Penal Code Act. This was due to the interpretation accorded to the word 'shall' in the punishment for murder under section 189 of the Penal Code Act which was couched as below:

"189. Punishment of murder

Any person convicted of murder shall be sentenced to death. ' [Emphasis added]

410 On the other hand, the then prevailing interpretation of the sentence for aggravated defilement was that the death sentence was simply a maximum and not mandatory. This interpretation was derived from the use of the expression 'liable to suffer death' as set out in section 129 (3) of the Penal Code Act as below:

"129. Defilement of persons under eighteen years of age

...(3) Any person who performs a sexual act with another person who is below the age of eighteen years in any of the circumstances specified in subsection (4) commits a felony called aggravated defilement and is, on conviction by the High Court, liable to suffer death.

- (4) The circumstances referred to in subsection (3) are as follows
- but where the person against whom the offence is committed is below the age of fourteen years ... [Emphasis added]

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425 430 435 The interpretation that the punishment for murder was a mandatory death remained in place till the Supreme Court decision was rendered in the case of Susan Kigula & Ors versus Uganda, SC Constitutional Appeal No 1 of 2014, where it was held that the death sentence in murder convictions was discretionary upon the court under the 1995 Constitutional era. After that decision, it became common for murder convicts to be sentenced to differing terms of imprisonment. However, in our view, what is material for purposes of our vertical analysis of the offences is that by the legislators creating what they thought in 1990 to be a less stringent punishment for aggravated defilement than that provided for the offence of murder at the time, it is indicative that in their view, the offence of aggravated defilement was not to be treated as being as grave as the offence of murder. As such, the expectation of the people of Uganda, on whose behalf the legislature acts when enacting laws, is that the courts of law would likewise treat aggravated defilement as a less grave offence than the offence of murder. Consequently, for the trial court to pass the sentence in the instant matter the effect of which was to bundle the offence of aggravated defilement in the same class with the offence of murder which involves total loss of life and was, in the opinion of the legislators a graver offence, we find that this would be contrary to the values and aspirations of our people which Article 126 (1) of the Constitution enjoins court to conform with in the exercise of its mandate. This, in our view, was not a proper exercise of discretion by the trial court.

440 One of the circumstances under which the appellate court may interfere with the sentence of the trial court is where " .. it is evident that the [trial] judge had acted on some wrong principle or overlooked some material factor. (See: James S/O Yoram V R [1950] 18 EACA 147 at page 149 and Muhwezi Bayon Vs Uganda, Court of Appeal Criminal Appeal No. 198 of 2013.)

445 On account of the aforesaid, we allow ground two and set aside the sentence of the trial court. We shall now proceed to sentence the appellant afresh pursuant to Section 11 of the Judicature Act which provides as follows:

"11. Court of Appeal to have powers of the court of original jurisdiction.

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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 our exercise of the above mandate, we have considered the appellant being a first offender, a young man who was approximately 22 years of age at the time of commission of the offence as mitigating factors. At the age of 22 years, the appellant is capable of reform. This court also considers the aggravating factors being: the age of the victim at the time of commission of the offence of 6 years; the seriousness of the offence and the fact that it was rampant in the area.

In accordance with the principle of horizontal and vertical uniformity and consistency as elucidated above, we consider the term of 15 years' imprisonment as the appropriate sentence in the circumstances of this case. From that sentence, we deduct the period of about 3 years and 3 months spent by the appellant in pre-trial remand. Accordingly, the appellant shall serve a term of 11 and 9 months commencing from the 13th day of August 2013, the date of conviction.

DECISION

- 1. The conviction of the appellant is upheld
- 2. The sentence imposed by the High Court is hereby set aside
- The appellant shall serve a term of 11 years and 3 months commencing from the 24th day of 13th day of August 2013, the date of conviction 46s ³

We so order.

Delivered and dated this day of Ar^q \) i\A*r*""^

MUZAMIRU MUTANGULA KIBEEDI Justice of Appeal

\$m12\$ CHRISTOPHER GASHIRABAKE Justice of Appeal

\$\pmb{\gamma}\$ 7 \$\sim\$

EVA K. LUSWATA
Justice of Appeal

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