

UGANDA / JUDGMENT

Kemba v Uganda (Criminal Appeal 870 of 2014) [2025] UGCA 77 (12 March 2025)

[2025] UGCA 77

COURT

Court of Appeal of Uganda

BEFORE

Mulyagonja, JA, Tibulya, JA/JCC, Kazibwe, JA

CASE / FILE NUMBER

Criminal Appeal 870 of 2014

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Mulgagonja, Tibulya & Kazibute Kawum| JJA

CRIMINAL APPEAL NO. COA. OO. CR. CN. O870.2014

BETWEEN

KEMBA PATRICK: APPELLANT

AND

UGANDA: RESPONDENT

(An appeal against the decision of Gidudu, J. delivered on 10 October 2014 in Mbale Criminal Session Case No 110 of 2012)

JUDGMENT OF THE COURT

Introduction

I

The appellant was indicted with the offence of aggravated defilement contrary to section 129 (3), (+) (a) and (b) of the Penal Code Act. After a full trial, on 10 October 2014 he was sentenced to 20 years' imprisonment.

Background

The facts that were accepted by the trial judge, were that on 29th July 2011, Nafuna Hadija, received a phone call to inform her that a good Samaritan found her niece, who we shall refer to as NK, a girl who was 6 years old.

- 20 She rushed home only to find the appellant who claimed that the girl destroyed his vegetables and he wanted compensation. Nafuna pleaded with him and paid him shs 5,000/ for finding her niece. But as he turned to leave, Nafuna noticed that he had a bottle of local gin. She became suspicious and examined the girl and found that she had been defiled. She reported this to
- 25 the local authorities who arrested the appellant.

NK was then medically examined and it was found that her hymen was freshly ruptured and it was confirmed that she was 6 years old. The appellant was also examined and found to be of sound mind, smelling of alcohol, drunk and HIV positive. He was indicted with aggravated defilement.

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- 5 The appellant denied the offence but the trial judge found sufficient evidence to convict him and sentenced him to imprisonment for 20 years. Being dissatisfied with the sentence, he appealed to this court on one ground as follows:
 - 1. The learned Trial Judge erred in law when he sentenced the Appellant
 - to an illegal Twenty year (20) custodial sentence which was harsh, excessive and without consideration of the pre-trial remand period.

It was proposed that the appeal be allowed, the sentence be set aside, and substituted with a more appropriate sentence of 13 years imprisonment. The respondent opposed the appeal.

Representation 15

At the hearing of the appeal on 10th March 2025, the appellant was represented by Mr. Eddie Nangulu on state brief. The respondent was represented by Ms T\rmuhaise Rose, Assistant DPP from the Office of the Director of Public Prosecutions.

Counsel for both parties filed written submissions as directed by the Registrar, which we considered before the hearing. At the hearing, they each applied that the submissions be considered as their final arguments in the appeal. This judgment was therefore based on the written submissions. 20

Counsel for the appellant sought for leave to file the Memorandum of Appeal

- out of time under rule 5 of the Court of Appeal Rules. He further applied for leave to appeal against sentence only, as is required by section 131 (1) of the Trial on Indictments Act. Since counsel for the respondent did not object, leave was granted. 25
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Submissions of Counsel

The appellant's complaints were that the trial judge sentenced him to 20 years'imprisonment without deducting the period that he spent on remand which his advocate opined resulted in an illegal sentence. He further contended that the said sentence was harsh and excessive in the circumstances of the case.

Counsel for the appellant relied on Attorney General v. Susan Kigula E/\$ 417 Others Constitutional Appeal No 3 of 2010,6, for the submission that court must take the period spend on remand into account together with other 10 mitigating factors. She further submitted that as it was held in Abasa Johnson & Another v Uganda, Supreme Court Criminal Appeal No 54 of 2016, the omission to consider the period spent on remand is fatal and renders the sentence illegal. She cited many other decisions of this court and the Supreme Court to support her submission.

15 20 Counsel then referred to the ruling of the trial judge on sentence, at page ¹⁸ of the Record, where he stated that "I deduct three aeqr from his final sentence," and submitted that the trial judge merely acknowledged the period spent on remand but failed to deduct it from the sentence imposed. He concluded that the failure to deduct the remand period resulted in an illegal sentence and this court should quash it.

Counsel further submitted that the sentence imposed was harsh and excessive in the circumstances. That the appellant stated mitigating factors before he was sentenced, including that he was 42 years old, remorseful and had a family to take care of. He asserted that the trial judge ignored these

25 mitigating factors. Further, that at the time of this appeal, the appellant had spent 13 years and 6 months in prison. He opined that this should suffice and he should be released. He invited court to set the sentence aside and substitute it with a more appropriate sentence.

In reply, counsel for the respondent recounted all the mitigating factors that were stated in favour of the appellant, at pages 23, 24 and 25 of the Record, including that he was a hrst time offender, he was sickly for he suffered from HIV and had dependants to take care of. Counsel also pointed out the aggravating factors and submitted that the trial judge considered these and sentenced the appellant to 20 years'imprisonment but he forgot to deduct the period spent on remand. She prayed that this court exercises its powers to deduct the period of 2 years spent on remand from the sentence imposed and sentences the appellant to 13 years'imprisonment, so that the appellant serves the remaining 7 years of his sentence.

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Consideration of the Appeal

The principle that this court will only interfere with a sentence imposed by the trial court when it is illegal or founded on wrong principles of law has been settled for a long time. The court will also interfere with the sentence where the trial court has not considered a material factor in the case; or has imposed a sentence which is harsh and manifestly excessive in the circumstances of the case. [See *Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 143 of 2000* (unreported), *Bashir Ssali v Uganda* [2005] UGSC 21 and *Livingstone Kakooza v Uganda* U9941UGSC 15

17].] We took cognizance of these principles in disposing of this appeal. 20

The appellant's complaints, in a single ground that we considered to be omnibus because the second complaint was not in the alternative, was that the sentence imposed upon him was illegal and harsh and excessive, at the same time.

The rule that the sentencing judge must take into account the period spent on remand where they sentence a person to a term of imprisonment is ^a constitutional one contained in Article 23 (S) of the Constitution. It was held in *Rwabugande Moses v Uganda*, SCCA No 25 of 2014; [2017] UGSC 8, 25

that in order to demonstrate that the sentencing judge complied with Article 23 (8) of the Constitution, he/she has to deduct the period spent on remand, which is definite and known, from the sentence imposed on a convict. Further that the failure to take the period spent on remand into account results in an

5 illegal sentence.

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The Supreme Court in *Abelle Asuman v. Uganda*, SCCA No 66 of 2016; [2018] UGSC 10, observed that prior to the decision in *Rwabugande* trial Judges had different methods of demonstrating that they complied with Article 23 (8) of the Constitution. At page 6 of its judgment, the court observed that:

"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.'

'The court then held that after *Rwabugande*, sentencing courts had to comply with the rule in *Rwabugande*'s case and deduct the period spent on remand from the sentence imposed.

While sentencing the appellant, on the 10th October 2014, at page 46 of the Record, the trial judge found and held thus:

"Conuict is afirst offender utho has been onremandforthree Aears. He is gailtg of defiling a kid uho has been so traumatized that she is getting mentallg retarded. He is HIV+ and was leading a hfe of (a) drunken rogue. He did not onlg defile the uictim but also got rewarded by SOOO/: shillings from the guardian of the uictim. He was so callous and more of a bully. He has been on remand for 3 years. I deduct these Uears from his .final sentence. This court will houeuier keep away such persons so as to protect the children of this country from dangerous predators who afi,er getting infected with AIDS, go about recklesslg defiling Juueniles. I sentence conuict to 20 years' imprisonment."

{Emphasis added}

Since this decision was before the Supreme Court decision in **Rwabugande** (supra) was handed down on the 3rd March 2017, the trial judge made no error when he did not deduct the period spent on remand from the sentence of 20 years' imprisonment that he imposed. However, it is clear the he demonstrated that he took that period into account and deducted it from

\$\mathsf{S}\$ the final sentence. Since he sentenced him to 20 years imprisonment, it then becomes evident that the intended sentence was 23 years imprisonment.

We therefore find that the sentence was legal and we shall not disturb it on allegations that the judge omitted to deduct the period spent on remand.

As to whether the sentence was harsh and excessive in the circumstances of \$10\$ the case, the Supreme Court in *Aharikundira Yustina v Uganda* observed thus:

There is a high threshold to be met for an appellate court to intervene with the sentence handed down by a trial judge on grounds of it being manifestly excessive. Sentencing is not a mechanical process but a matter of judicial discretion therefore perfect uniformity is hardly possible. The key word is "manifestly excessive". An appellate court will only intervene where the sentence imposed exceeds the permissible range or sentence variation.

This behaves this court to consider sentences that have been handed down in cases with similar facts to those in the instant case in order to establish \$20\$ whether the sentence that was imposed was harsh and excessive in the circumstances of this case. We reviewed sentences in that category in order to do so.

In Ssentongo Latibu v Uganda; Criminal Appeal No. 73 and 111 of 2016,

the appellant appealed against a sentence of 48 years' imprisonment for two \$25\$ counts of aggravated defilement. The court considered both mitigating and aggravating factors and found that a sentence of 25 years' imprisonment met the ends of justice.

In Asega Gilbert v Uganda; Criminal Appeal No. 016 of 2013, the appellant defiled two minor children aged 9 and 6 years respectively. This Court confirmed a sentence of 30 years'imprisonment per count.

In Ssenoga Frank v Uganda; Criminal Appeal No. 074 of 20LO, the victim was under the age of 14 years. This court sentenced the appellant to 28 years and 4 months' imprisonment.

Given the sentences that we reviewed for similar offences, the sentence of 20 years'imprisonment seems to be on the lower side. However, it shows that it was not outside the sentencing range for such offences. We will therefore not disturb it and it is hereby upheld,

This appeal has therefore substantially failed and it is dismissed. The appellant shall continue to serve the sentence that was imposed upon him by the trial court and it is so ordered.

Dated, signed and delivered at Mbale this 12th day of March 2025

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JUSTICE OF APPEAL

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JUSTICE OF APPEAL

25 Moses If;azibwe Kawumi JUSTICE OF APPEAL

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