

UGANDA / JUDGMENT

Kiiza v Uganda (Criminal Appeal 148 of 2019) [2025] UGCA 145 (21 May 2025)

[2025] UGCA 145

COURT

Court of Appeal of Uganda

BEFORE

Kazibwe, JA, Nakachwa, JA/JCC, Kakooza Sabiiti,
JA/ JCC

CASE / FILE NUMBER

Criminal Appeal 148 of 2019

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA CRIMINAL APPEAL NO. 0148
OF 2019 (ARISING FROM MBARARA CRIMINAL SESSION NO. 002 OF 2012)

KIIZA EVARISTO :..... 10

VERSUS

UGANDA :.....

(Appeal from the judgment of the High Court of Uganda sitting at Mbarara, delivered by the Hon. Justice. Bashaija K. Andrew on 31st October 2012)

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(CORAM: Moses Kazibwe Kawumi, Florence Nakachwa, Cornelia Kakooza Sabiiti JJA)

JUDGMENT OF THE COURT

Background

- The appellant, Kiiza Evaristo, was indicted and convicted on two counts of 20 aggravated defilement contrary to Section 129 (3) and (4) (a) and (b) of the Penal Code Act, Cap 120. According to the particulars of the offence, the accused Kiiza Evaristo on the 9th day of December 2011 at Rwemikunyu Village in the Mbarara District while infected with HIV unlawfully performed a sexual act with AB and AC, two girls aged below 14 years.

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The facts by the prosecution were that on the 9th December 2011, at Rwemikunyu \$ \mathsf{S} \$ Village in Mbarara district, the accused Kiiza Evaristo had sexual intercourse with two girls, both below the age of fourteen. The first victim of the sexual abuse is AB, a girl aged 6 years at the time. The second victim is AC, a girl who was aged 8 years. The accused lured the girls to his house and gave them shs. \$100/\$ = (Shillings one hundred) each before proceeding to perform sexual acts on them. 10

The victims were in great pain, and it was reflected in their movements. When their parents asked them what had happened, they said the accused had sexual intercourse with them. The accused was arrested and subjected to medical examinations. He was found to be HIV positive. The girls were also subjected to a medical check-up. During the interrogation at the Police station, the accused denied having committed

\$15\$ the offence.

\$25\$

At the hearing of the case, the accused pleaded guilty. The trial court convicted the accused on his own plea of guilty on both counts and sentenced him to 16 years of imprisonment on each count to run consecutively. The appellant, being dissatisfied, appeals to this court on the following grounds:

- 1. The learned trial judge erred in law and fact when pronounced a compound sentence of 32 years of imprisonment onto the appellant, which is deemed harsh and excessive, thereby occasioning a miscarriage of justice.
- 2. The learned trial judge erred in law and fact when he failed to deduct the period the appellant spent in lawful custody before sentencing, thereby occasioning a miscarriage of justice.

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Representation \$ \mathsf{S} \$

At the hearing of the appeal, **Counsel Geoffrey Chan Masereka** appeared for the appellant. The respondent was represented by **Happiness Ainebyoona**, Chief State Attorney, holding brief for **Kulu Idhambi**, Assistant Director of Public Prosecutions.

- 10 Before the hearing, counsel for the Appellant orally made an application to validate the Notice of Appeal. The application by the appellant counsel was not objected to by counsel for the respondent. Accordingly, the court validated the Notice of Appeal. Counsel filed submissions prior to the hearing, and the same were adopted by the Court as their arguments for the appeal.

- We have studied the record of the lower Court, applicable law and relevant 15 authorities to this appeal and have applied them in resolution of the appeal.

Duty of the first Appellate Court.

This being a first appeal, the duty of the first appellate court is to re-appraise all the evidence adduced at the trial and arrive at its own conclusions and draw inferences on questions of law and fact, bearing in mind that it did not see the witnesses testify. (See *Kifamunte Henry v Uganda SCCA No. 10 of 1997*, *The Executive Director of National Environmental Management Authority (NEMA) v Solid State Limited SCCA No. 15 of 2015* (unreported) and *Pandya Vs R* [1957] EA 336.) We shall bear the above principles in mind as we resolve this appeal.

Ground 1

The Appellant's submissions

Counsel for the appellant contended that the record of proceedings only reflects that the trial judge acknowledged the aggravating and mitigating factors, but placed emphasis on the gravity of the offence. This implied that the judge imposed the 32-

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years sentence based primarily on the aggravating factors, without considering the mitigating circumstances, resulting in a miscarriage of justice.

In counsel's view, had the Court considered the mitigating factors, it would have arrived at a fair and reasonable sentence instead of 32 years, which is manifestly harsh and excessive. Counsel relied on the cases of **Rwanyaga Charles vs. Uganda**

Criminal Appeal No. 35 of 2014 and *Aharikundira Yustina vs. Uganda SCCA No. 27 of 2015*, where Courts required the trial judges to weigh the mitigating factors against the aggravating factors.

Counsel also cited the case of *Ninsiima Gilbert vs. Uganda CACA No. 180 of 2010*, where the victim was 8 years old and the appellant had been sentenced to 30 years, and this Court, after considering all factors, substituted the sentence with one

The Respondent's submissions.

of 15 years.

Counsel for the respondent, on the other hand, invited this Court to consider that although Courts have passed sentences less than that imposed on the appellant for

aggravated defilement, we should consider that Courts have also imposed sentences \$20\$ higher than that on the appellant where an appellant had a duty to protect the victim, but did not.

Counsel referred us to the following cases to find that the sentence imposed on the appellant was neither harsh nor excessive-

Bonyo Abdul Vs Uganda SCCA 007 of 2011, where the Court upheld a sentence \$25\$ of life imprisonment against an appellant who was convicted of aggravated defilement and was HIV positive.

Bacwa Benon vs. Uganda CACA No.0869 of 2014, where the appellant, who was HIV positive, was sentenced to life imprisonment, and this court confirmed the sentence.

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Kawesi Wasswa vs. Uganda CACA 0282 of 2016, where the appellant, who was S HIV positive and pleaded guilty to aggravated defilement was sentenced to 40 years of imprisonment, and the same was upheld by this Court.

The cases of Kabazi Issa vs. Uganda CACA No. 0236/2015, Okello-Basil Mugenyi vs. Uganda CACA No. 128 of 2023, and Benywanira Emmanuel Vs

Uganda CACA No. 0339 of 2023; where this Court upheld sentences of 32 years 10 imprisonment against the appellant who exposed the victim to HIV on pleading guilty to aggravated defilement.

Court's consideration of Ground 1

It is trite law that an appellate Court will only alter a sentence imposed by the High \$15\$ Court if it is evident that it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive given the circumstances. See: Livingstone Kakooza vs. Uganda Supreme Court Criminal Appeal No. 17 of 1993, Kyalimpa Edward vs. Uganda Criminal Appeal No. 10 of 1995.

\$20\$

This Court is generally reluctant to interfere with a sentence imposed by the sentencing Court. In the Supreme Court decision of Kiwalabye Bernard vs. Uganda, Criminal Appeal No. 143 of 2001, the Court emphasized that:

"The appellant court is not to interfere with the sentence imposed by a trial Court

which has exercised its discretion on sentence unless the exercise of the discretion \$25\$ is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial Court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence or the sentence imposed is wrong in principle."

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- At trial, the following aggravating factors were presented by the prosecution:, but he \$
 $\overline{\{5\}}$ defiled minors when he knew he was HIV positive. The offence was grave and needed to be punished. There is a need to protect the girl child. The mitigating factors listed by counsel Agaba were that: the convict was a first-time offender, a 35-year-old married man with five children and the only breadwinner. He is HIV positive, and
- there is no proper medical attention. He is remorseful and repentant. He has been 10 on remand almost one year. The accused prayed for a lenient sentence, pointing out that he did what he did ignorantly and that he had learnt his lesson.

During sentencing, the trial judge stated as follows:

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"The offence of defilement is grave. The convict defiled two minors to sex when he knew he was HIV positive. The girl child needs protection, and the law considers these as aggravating facts.

I have taken these aggravating facts against the mitigating facts. The convict is sentenced to sixteen years' imprisonment on each count. The sentence will run conservatively. Rights to appeal explained."

The record above clearly shows that, contrary to the appellant's claims, the trial 20 judge considered both the aggravating and mitigating factors before passing sentence.

According to the 3rd Schedule of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, the offence of aggravated defilement carries a starting sentence of 35 years, with the maximum being the death penalty. After considering both aggravating and mitigating factors, the applicable sentencing range is between 30 years and the death penalty.

In addition to the above guidelines, while assessing whether the sentence was harsh, it is important for the Court to maintain consistency and uniformity in exercising its

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sentencing discretion, even though crimes may differ and are rarely committed under \$
 S identical circumstances.

In the case of Lwanyaga Joseph versus Uganda, CA Criminal Appeal No. 535 of 2016, the appellant was indicted for aggravated defilement. He had defiled a 7-yearold child. This Court sentenced the appellant to 22 years' imprisonment after deducting the period spent on remand

\$10\$

In Saruyange Yuda Tadeo vs. Uganda, CACA No. 080 of 2020, this court found a sentence of 29 years' imprisonment appropriate in the circumstances in a case where the Appellant defiled a nine-year-old girl.

Further still, in this Court's recent decision of Ndayishimye Karyeja vs. Uganda

Criminal Appeal No. 0222 of 2019 (decided on 14th May 2025), 30 years of 15 imprisonment imposed on the appellant was held not to be harsh or excess the appellant having defiled a 12-year-old.

In the instant case, the appellant, who was 32 years old at the time, knowing he had HIV, defiled two minors aged 6 and 8 years. The trial judge, having taken into account both the aggravating and mitigating factors, sentenced him to 16 years' imprisonment on each count, to run consecutively, resulting in a total sentence of 32 years. Upon review, we find that the trial judge duly considered the mitigating factors and, in fact, imposed a lenient sentence on each count. We cannot fault the trial judge and find that the sentence was neither harsh nor excessive.

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Ground 2 The Appellant's submissions

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Counsel for the appellant strongly relied on the case of Rwabugande Moses vs. Uganda (2017) UGSC 8 on the application of Article 23(8) of the 1995 $\text{\textit{S}}$ Constitution on sentencing courts have since the 3rd May 2017 be required to arithmetically deduct the period spent on remand, and failure to do so renders the imposed sentence illegal. He submitted that the decision clarified that, from 3rd May 2017 onwards, sentencing courts are required to arithmetically deduct the period an accused has spent on remand. Failure to do so renders the sentence imposed illegal. \$10\$

Counsel submitted that the trial court was duly informed that the appellant had spent one year in lawful custody prior to sentencing. However, the sentencing court neither deducted nor took this period into account, in contravention of Article 23(8) of the Constitution. In support of this argument, Counsel relied on authorities in which this Court set aside sentences for failure to deduct time spent on remand and proceeded 15 to resentence the appellants accordingly: Muhanguzi Happiness vs. Uganda CACA No. 416 of 2015, Birungi Charles vs. Uganda CACA 194 of 2014, Kohonaho Nasasira David vs. Uganda CACA No. 0353 of 2014, and Twesigye Michael Alias Muhoora vs. Uganda CACA No. 0709 of 2014.

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The Respondent's submissions

While citing Article 23 (8) of the Constitution, counsel conceded to the fact that the trial judge did not take into consideration the period spent on remand. Counsel invited this Court to invoke its powers under Section 11 of the Judicature Act and take into consideration the one year which the appellant had spent on remand.

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Court's Consideration of Ground 2 S

Article 23 (8) of the 1995 Constitution provides as follows;

"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." $\$10\$$

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Further still, Regulation 15(2) of the Constitutional (Sentencing guidelines for Courts of Judicature) (Practice) Directions 2013 enjoins Court to deduct the period spent on remand from the sentence, considering an appropriate sentence after all factors have been taken into account.

While sentencing, the trial judge proceeded as follows: $\$15\$$

"I have taken these aggravating facts against the mitigating facts. The convict is sentenced to sixteen years' imprisonment on each count. The sentence will run conservatively. Right to appeal explained."

We have considered the above record, and we noted that there was a typographical error by the use of the word "conservatively" instead of consecutively. Be that as it may, there was no mention or consideration of the period the appellant had spent in lawful custody.

This law in regards to the inclusion of the period spent on remand is mandatory. Court must comply with it while sentencing a convicted person to a term of imprisonment. In *Rwabugande Moses v Uganda* [2017] UGSC 8, the Supreme Court held that a sentence arrived at without taking into consideration the period spent on remand by deducting the same from an appropriate sentence violates article 23 (8) of the Constitution.

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- Although the sentence in this case was imposed prior to the **Rwabugande case**, it $\$$ remains a constitutional requirement for the trial judge to give due consideration to the period the appellant spent in remand. The learned trial judge failed to demonstrate that this period was considered, either explicitly through arithmetic deduction or by inference, in determining the final sentence.
- We therefore allow ground 2 of the appeal and set aside the sentence for violation $\$10$ of Article 23 (8) of the Constitution of the Republic of Uganda, 1995.

In the absence of a remand form on record, we have relied on the date of the charge form (3rd January 2012) to determine the period the appellant spent on remand. The sentence was imposed on 31st October 2012, indicating a remand period of ten (10) months, contrary to counsel's assertion of one year spent in remand.

Because the appellant had properly taken plea at the beginning of the trial and was convicted of murder on his own plea of guilty, we invoke the provisions of section 11 of the Judicature Act that grants this Court the same powers as that of the trial Court to impose a sentence we consider appropriate. We re-sentence the Appellant to 16 years on each count from which we deduct the 10 months the appellant spent on remand, and hereby sentence the appellant to 15 years and 2 months on each count. The sentences will run consecutively.

It is so ordered.

Signed, delivered, and dated at Mbarara this

Moses Kazibwe Kawumi Justice of Appeal

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Florence Nakachwa Justice of Appeal

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Cornelia Kakooza Sabiiti Justice of Appeal

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