

UGANDA / JUDGMENT

Mayanja v Uganda (CAO-00-CR-CN 149 of 2012) [2024] UGCA 294 (4 October 2024)

[2024] UGCA 294

COURT

Court of Appeal of Uganda

BEFORE

Egonda-Ntende, JA, Gashirabake, JA, Kihika, JA

CASE / FILE NUMBER

CAO-00-CR-CN 149 of 2012

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THE REPUBLIC OF UGANDA**IN THE COURT OF APPEAL OF UGANDA AT MBALE****[Coram: Egonda-Ntende, Gashirabake, Kihika, JJA]****CRIMINAL APPEAL NO. COA-00-CR-CN-0149-2012**

(*Arising out of HCT-04-CR-SC-110-2011*)

BETWEEN

MUYANJA MOSES ::::::::::::::::::::::::::::::

AND

UGANDA :::::::::::::::::::::::::::::: 10

JUDGMENT OF COURT**Introduction**

The appellant was convicted by the High Court on 23 April 2012 Aggravated Defilement contrary to section 129 (4) (a) of the Penal Code Act. He was sentenced to 18 years' imprisonment. He filed this appeal, with leave of this court, against sentence only.

Background

The facts of the case are as follows: On the 24th of February 2011 at Namamba village, Mugiti sub-county in Budaka District, the victim went with one Mwanani David, her brother, in the bush to give cows water. The victim's brother untied the cows while at the swamp since there was a stream for the cows to drink water. The appellant was

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seated under a mango tree eating sugarcane. The victim's brother left her there and went to fetch water about 250 meters away. While the victim's brother was away, a person came and blocked the victim's mouth and took her to the bush. The victim identified the person as Moses, the Appellant. The appellant removed the victim's knickers and tied her legs with a rag. He then had sexual intercourse with her. When the victim's brother returned, he found the Appellant putting on his underwear and trousers. The victim was seated down while crying.

Mwanami David asked the appellant what had happened and he said 10 brown ants had bitten the victim. The appellant then gave the victim's brother a small radio, a chapatti and 1900 shillings and told him not to talk. He promised to give him more money. David gave the animals water as the victim cried. On their way home, the victim told the brother what had happened and when they got home, they 15 informed the mother of the victim, which later led to the arrest of the Appellant.

Representation

At the hearing of the appeal Ms. Agnes Wazemwa on state brief appeared for the appellant, while Mr. Semalemba Simon Assistant DPP appeared for the respondents.

Counsel for the appellant sought leave to appeal against sentence only, which leave was granted.

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Both parties filed written submissions which have been considered by the court.

Counsel's submissions

Counsel for the appellant submitted that whereas the learned trial \$\overline{5}\$ Judge mentioned having taken into account the period spent on remand, he imposed a sentence of 18 years' imprisonment and did not deduct the 1 year and 2 months that the appellant had spent on remand. Counsel argued that failure to deduct the period spent on remand was a violation of the appellant's constitutional right to 10 liberty.

Counsel relied on the decision in *Rwabugande Moses Vs Uganda Criminal Appeal No. 25 of 2014* for the proposition that period spent on remand has to be arithmetically deducted from the sentence passed by the court. Counsel prayed that the period spent on remand 15 be deducted from the sentence passed by the trial court.

In reply, Counsel for the respondent submitted that the trial court passed its judgment on 23/04/2012, prior to the decision in *Rwabugande Moses Vs Uganda* (supra) and should therefore not be faulted for failing to arithmetically deduct the period of 1 year and 2 months that the appellant spent on remand. Counsel argued that the period the appellant had spent on remand was taken into account by the learned trial Judge on page 25 of the Record of Appeal.

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Analysis

It has been consistently held in numerous cases both by the Supreme Court and the predecessor Court of Appeal for East Africa, and more specifically in the case of *Livingstone Kakooza v Uganda SC Criminal Appeal No. 17 of 1993* [unreported] that:

'An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration: See *Ogalo S/O Owoura v R* (1954) 21 E. A. C. A. 270.'

The sentencing order of the trial judge states;

"In sentencing the convict, I will take into account the respective submission on both sides. I will consider the convict a first offender. I will take into account the time spent on remand. I however note that the convict committed a grievous crime. He abused the modesty and innocence of a nine-year girl by defiling her, thus traumatizing her. These type of offences are rampant and this court has and duty to protect the young generation from such erroneous men. Although the maximum sentence is death, I will not award it for it is a reserve of extreme cases. In the circumstances I will sentence the convict to 18 years' imprisonment.

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Right of appeal explained."

Whereas Counsel for the Respondent argued that the sentence which is the subject of this appeal was passed on 23/04/2012, prior to the decision in *Rwabugande Moses Vs Uganda* (supra) and that therefore, failure to mathematically subtract the period spent on remand was not fatal, the 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 *Abbele Asuman* (supra). It 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.

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 15 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; 20

"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 No. 24/2001*; *Kabuye Senvano vs. Uganda SCCA No. 2 of 2002*; *Katende Ahmed vs.*

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Uganda SCCA No. 6 of 2004 and *Bukenya Joseph vs Uganda SCCA No. 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* $\overline{5}$ (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 10 precedent." (Emphasis ours)

This 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 Asuman vs. Uganda* (supra) was made per incurious to the extent that it made reference to an outlawed position." 15

Given the above holding, it is our finding that the trial court did not clearly demonstrate that in sentencing the appellant to the 18 years' imprisonment term, it did take into account the period he spent on remand.

We accordingly allow the appeal, as submitted to by the appellant, 20 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:

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"11. 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 consider that the appellant was a first offender and that he was 22 years of age at the time he committed the offence. However, he indeed abused the modesty and innocence of a nine-year girl by defiling her, and thus traumatizing her. These types of offences are rampant and this court has and a duty to protect the young generation.

In the circumstances, we are of the view that the appropriate sentence to be served shall be 18 years' imprisonment, from which we deduct the period of 1 year and 6 months which was the time that the appellant spent on remand.

Decision

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This appeal succeeds.

- 2. The sentence passed by the learned trial Judge is hereby set aside.
- 3. The appellant is re-sentenced to 18 years imprisonment from which is deducted the period of 1 year and 6 months being the period he spent on remand.
- 4. The Appellant is to serve a prison sentence of 16 years and 5 months from \$23/4/2012\$ the day of conviction.

We so order.

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.....day of \$\ldots\$ \$\mathbb{Q}\$ \$\mathbb{Q}\$ Dated and delivered this \$...\$. \$.2024\$

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FREDRICK EGONDA NTENDE 10 Justice of Appeal

CHRISTOPHER GASHIRABAKE

Justice of Appeal

OSCAR JOHN KIHKA Justice of Appeal

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Prepared on 13 October 2026 · Esheria