THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0549 OF 2016
(Arising from Masaka Criminal Session Case No. 096 of 2013)

SSEGIRINYA FULUGENSIO :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

CORAM: Hon. Mr. Justice Richard Buteera, DCJ
Hon. Lady Justice Eva K. Luswata, JA
Hon. Mr. Justice Oscar Kihika, JA

JUDGMENT OF COURT

Introduction

This is an appeal against the decision of the High Court of Uganda at Masaka, (Dr. Flavian Zeija, J), dated the 13th day of December 2016 in which the appellant was convicted of the offence of aggravated defilement contrary to sections 129 (3) & (4) of the Penal Code Act, Cap 120, and sentenced to 43 years' imprisonment.

Brief facts

It was the prosecution case that on the 26th day of February 2013 at Butayunja village, Kibinge in Bukomansimbi District, the appellant performed a sexual act with the victim, N.R, a girl aged 2 and a half years. The victim had been left under the care of a one Nazziwa Betty by her mother who had gone to fetch water from the well. When she returned and asked for her daughter, Nazziwa told her that the appellant had taken her to give her sweet bananas. The victim's mother decided to look around the neighbourhood but she saw neither the victim nor the appellant. While at home, Nazziwa saw the victim

arriving with the appellant. Shortly thereafter, the victim's mother arrived as well and found the appellant seated on the verandah with the victim. She got hold of the victim and went home.

At home, the victim started crying which compelled the mother to take her to the clinic from where the nurses informed her that the victim had bruises in her private parts. The victim's mother reported the matter to Police. The victim was examined on Police Form 3 and she was found to be 2 years and 3 months with bruises in her private parts.

The appellant was arrested, indicted, tried and convicted of the offence of aggravated defilement. He was sentenced to 43 years' imprisonment (period spent on remand to be deducted), hence this appeal against conviction and sentence.

Grounds of Appeal

1. That the learned trial Judge erred in law and fact when he relied on hearsay evidence to convict the appellant.
2. That the learned trial Judge erred in law and fact when he passed a manifestly harsh, excessive and vague sentence against the appellant.

Representation

At the hearing of the Appeal, the appellant was represented by Mr. Henry Kunya, while the respondent was represented by Hajati Fatinah Nakafeero, Chief State Attorney from the Office of the Director of Public Prosecutions. Both counsel applied to Court to adopt their written submissions and their applications were granted.

Case for the appellant

Ground 1

Counsel for the appellant noted that it should be pointed out at the very outset that the prosecution led evidence of only two witnesses, namely; PW1; Nassolo Agnes (mother of the victim) and PW2; No. D/W/CPL Nakibuuka Ruth, the Investigating Officer (I.O.).

He contended that the victim who would have been about 6 years old, her friends with whom they were playing on the fateful day and more importantly, the old woman, a one Nazziwa Zabete, under whose care she had been left by PW1, were never availed to support the prosecution case and cause.

He invited this court to draw an adverse inference that they were deliberately omitted or left out by the prosecution for fear of painting/ portraying a contrary picture to the chagrin of the prosecution.

Counsel argued that worse still, there was no charge and caution statement extracted from the appellant let alone even a plain statement by which one would reasonably infer that he alluded to the admission of any involvement as regards the alleged offence.

He noted that the learned trial Judge was alive to the hearsay evidence attributed to the said Nazziwa and also what the victim is deemed to have shared with the mother. It was his submission that it was erroneous for the trial court to convict the appellant on the basis of hearsay evidence. He invited this court to be pleased to allow this ground.

Ground 2

Counsel observed that it is now settled law that the appellate court is not to interfere with sentence imposed by the trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice. See **Kiwalabye vs. Uganda; S.C. Cr. Appeal No. 143 of 2001** cited in **Kimera Zaverio vs. Uganda; C.A. Cr. Appeal No. 427 of 2014**.

Counsel submitted that the appellant was a first time offender and was of a youthful age of 20 years at the time of sentencing hence capable of reforming and being re- integrated in the society. That he had been on remand for a period of three years and 9 months as from March 2013 when he was arrested till December 2016 when he was convicted and not 2 years and 8 months.

It was counsel's considered submission that the sentence of 43 years' imprisonment (period spent on remand to be deducted) was manifestly harsh and excessive and was out of the sentencing range for cases of aggravated defilement. He cited **Byera Denis vs. Uganda; C.A. Cr. Appeal No. 99 of 2012**, where the appellant had been sentenced to 30 years' imprisonment for the offence of aggravated defilement of a 3-year-old victim and on appeal, this honourable court reduced the sentence to 20 years' imprisonment which was further reduced to 18 years and 4 months after taking into account the period spent on remand.

Counsel contended that in this case, on account of the period spent on remand, it was his considered submission that a sentence of 13 years' imprisonment from the date of conviction would meet the ends of

justice. He further submitted that the sentence was vague since the learned trial Judge did not take into account the actual period spent on remand and left this obligation to the prison authorities which was erroneous. He referred to **Naturinda Tamson vs. Uganda; C.A. Cr. Appeal No. 123 of 2011**.

He thus prayed that Court be pleased to allow the appeal, quash the conviction and set aside the attendant sentence. In the alternative, if the conviction is confirmed, he prayed that the sentence be substituted with an appropriate one as would be judiciously determined in a bid to meet the ends of justice.

Case for the respondent

Counsel for the respondent submitted that the learned trial Judge relied on the evidence of PW1, mother of the victim, who relayed what her 2-year-old daughter told her; that the appellant was disturbing her. The victim indeed had bananas when she was returned by the appellant which led to confirmation of Nazziwa's information that the appellant had picked the victim under the pretext of giving her bananas.

Counsel submitted that the learned trial Judge also relied on the evidence of PW2, the I.O., who interviewed the old lady, Nazziwa, who told her that the appellant had taken the victim to give her bananas. She noted that it was on record that the old lady could not testify due to advanced age. She cited **Omuroni vs. Uganda; SCCA No. 22 of 2001**, where neither the victim nor the doctor who examined her were brought to testify. The Court held:

> **"The evidence was circumstantial as the victim who would have given direct evidence as the only eye witness**

did not testify but nonetheless constituted sufficient proof of the offence of which the appellant was convicted as it was amply corroborated by independent evidence. Although the victim did not testify, PW1's evidence that the victim accused the appellant of having sexual intercourse with her, was admissible as the accusation was made contemporaneously with the offence and therefore, was part of res gestae and is an exception to the hear say rule."

Counsel submitted that the above captions of evidence indicated that the evidence of PW1 and PW2 was not hearsay and could ably sustain the charge against the appellant as rightly found by the learned trial Judge.

Counsel referred to Section 133 of the Evidence Act, Cap 6, which provides that subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact. She cited **Bukenya & others vs. Uganda (1972) EA 549**, where the East African Court of Appeal noted that the DPP has the discretion to decide who are the material witnesses to call. She also cited **Bassita Hussein vs. Uganda; SCCA No. 35 of 1995**, where the victim was aged 8 years' old and upon conducting an inquiry, the learned trial Judge found that she was too young to understand the nature of an oath or the difference between telling lies and truth. Her grandmother testified and there was no medical evidence tendered because the learned trial Judge found that there was proof beyond reasonable doubt that sexual intercourse (as was the requirement then)

by the appellant against the victim had been proved. The Supreme Court held that:

> **"the evidence of PW2, PW3 and PW5 that the appellant made such an admission does not appear to have been challenged by the appellant in cross examination of these prosecution witnesses... In the circumstances we are satisfied that although the complainant did not give evidence and medical evidence was not adduced by prosecution, there can be no doubt that the appellant had sexual intercourse with the complainant and that the case against him was proved beyond reasonable doubt."**

On the strength of the above authorities, counsel submitted that failure to parade all the other witnesses by the prosecution was not fatal to the prosecution's case. That the appellant further made admission to PW2 during interrogation that he had a sexual act with the victim but did not penetrate her and that this was on the record of appeal. She prayed that their Lordships be pleased to find these pieces of evidence accordingly sufficient to uphold the conviction.

She further submitted that although the victim and Nazziwa did not testify, the evidence of PW1 and PW2 was firm and unshaken by the defence. She submitted that the prosecution evidence as noted from the testimony of PW1 and PW2, the Police Form 24 (Exhibit PE1) all proved that there was a sexual act performed on the victim, and that the requirement of the law under Sections 129 (3)(4) (a) of the Penal Code Act is proof of occurrence of a sexual act against the victim but not the number of times it occurred in a case of this nature. And that

the learned trial judge rightly convicted the appellant on the strength of that evidence.

Counsel cited **Ntambala Fred vs. Uganda; SCCA No. 34 of 2015**, where their Lordships referred to the case of **Mukasa Evaristo vs Uganda; SCCA No. 53 of 1999** and acknowledged that:

> **"...rapture of hymen of a victim of defilement was not essential for arriving at a verdict of defilement...what would be of essence is whether on the evidence available, the prosecution has proved beyond reasonable doubt that the accused before court had had sexual intercourse with the child. The fact that a child's hymen is already raptured does not mean that the victim cannot be defiled subsequent to the rapture of the hymen."**

Counsel also cited **Sewanyana Livingstone vs. Uganda; SCCA No. 19 of 2006,** where their Lordships noted that **"what matters is the quality and not quantity of evidence".** Counsel referred to the Judgment where the learned trial Judge noted that:

> *"I am convinced that the prosecution has proved the participation of the accused beyond reasonable doubt. PW2 was truthful witness and answered all the questions straight without first thinking about them."*

She submitted that in view of the above caption, the trial Judge was alive to the value of observation of witnesses and was convinced that in this case, the appellant had performed a sexual act with the victim and indeed admitted to PW2 that he had not penetrated the victim. To

counsel, this was sufficient to prove the case beyond reasonable doubt and the learned trial Judge rightly convicted the appellant.

Counsel further observed that the factors favouring correct identification as enunciated in the celebrated case of **Abdallah Nabulere vs. Uganda; SCCA No. 9 of 1978**, were also present. That in this case, the Supreme Court guided that:

> **"when the quality of identification is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused well before, a court can safely convict even though there is no 'other evidence to support the identification evidence; provided the court adequately warns itself of the special need for caution. If a more stringent rule were to be imposed by the courts, for example if corroboration were required in every case of identification, affronts to justice would frequently occur and the maintenance of law and order greatly hampered. When, however, in the judgment of the trial court, the quality of identification is poor, as for example when it depends solely on a fleeting glance or on a long observation made in difficult conditions; if for instance the witness did not know the second accused before and saw him for the first time in the dark or badly lit room, the situation is very different. In such a case the court should look for 'other evidence' which goes to support the correctness of identification before convicting on that evidence alone. The 'other evidence' required may be**

corroboration in the legal sense; but it need not be so if the effect of the other evidence available is to make the trial court sure that there is no mistaken identification. A good example is the case of Wasajja v. Uganda (1975) EA 181. The coincidence of a person previously identified behaving strangely by putting up a fabricated alibi of his movements at the time the offence was committed or telling lies in some material aspect of his evidence can, in a proper case, amount to 'other evidence' sufficient to support a conviction."

Counsel thus submitted that in the instant appeal, all the factors favouring correct identification were present and the witnesses remained firm even during cross examination. Further, that they were sufficient to place the appellant at the scene of the crime as rightly found by the trial Judge. She thus prayed that this court be pleased to uphold the conviction of the appellant and dismiss ground one of this appeal.

Ground 2

Counsel for the respondent cited **Kiwalabye Bernard vs. Uganda; SCCA No. 143 of 2001**, that agreed with **Kamya Johnson vs. Uganda; SCCA No. 16 of 2000**, on the role of the appellate court on sentencing. She also cited **Kyalimpa Edward vs. Uganda; SCCA No. 10 of 1995**, where Court referred to the case of **R vs. De Haviland (1983) 5 Cr. App. R 109** and laid down the principles upon which an appellate court may interfere with a sentence imposed by the trial court.

Counsel submitted that on the ground of harshness of sentence, the appellant only deliberated on the element of consistency when he

quoted a number of cases and submitted that a sentence of 13 years' imprisonment would be sufficient. Counsel contended that it was important to point out the aggravating circumstances of this case while making arguments in support of the sentence. She noted that the victim was a toddler aged only 2 years and a half, but was lured heartlessly by the 20-year-old appellant who mercilessly defiled her instead of executing his duties as a guardian. That the victim suffered serious injuries and was introduced to sex at an early age and that as was noted by the learned trial Judge and the assessors, the appellant needed to be taken out of circulation to ensure a safer community for the young girls.

Counsel argued that the physical and psychological effects of the heinous acts of the appellant on the victim were irreparable and the victim would have to forever live with them. She thus prayed that this Court evaluates those aggravating factors to uphold the sentence of 43 years' imprisonment.

Regarding the appellant's contention that the sentence was vague for not factoring in the 3 years and 9 months that the appellant had spent on remand and instead considered 2 years and 8 months, counsel referred to the allocutus notes where it was stated thus:

> *'We appreciate the gravity of the offence. We write and consider that. The convict is a just offender of 22 years. He can still learn from his mistakes. We pray for courts lenience in passing sentence. We write court and consider the 2 years and 8 months the accused has been on remand.'*

Counsel submitted that the learned trial Judge considered the mitigating and aggravating factors before arriving at the final sentence when he stated:

'...in the result, I sentence him to 43 years in prison. The time he has been on remand shall be reduced from this period.'

Counsel noted that this was a sentence delivered on 13/12/2016 which was a pre- **Rwabugande** period and that there was demonstration of consideration of remand time by the learned trial Judge and that he could not be faulted for the failure to do a mathematical deduction. Counsel further noted that a quick look at the warrant of commitment on the sentence dated 13/12/2016, the learned trial Judge made it specific that the period spent on remand was to be deducted from the sentence of 43 years. To counsel, the period spent on remand was considered sufficiently.

She argued that the offence with which the appellant was indicted attracted a maximum penalty of death and under the 3rd Schedule of The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) (Directions), 2013, the starting point for aggravated defilement was 35 years and the sentencing range was between 30 years and death. Counsel submitted that the sentence of 43 years' imprisonment as meted out to the appellant was not manifestly harsh and court rightly directed itself to the law and applied it to the facts.

She cited **Bonyo Abdul vs. Uganda; SCCA No. 07 of 2011**, where the Supreme Court confirmed life imprisonment for aggravated defilement of a 14-year-old victim who had been exposed to HIV infection. She also cited **Bacwa Benon vs. Uganda; CACA No. 869 of 2014** where this Court confirmed life imprisonment for aggravated defilement of a ten-year-old who was also predisposed to HIV infection. Counsel further cited **Kaserebanyi James vs. Uganda; SCCA No. 10 of 2014**, where the

appellant was sentenced to life imprisonment for defiling and impregnating his biological child.

On the strength of the above authorities, and in view of the aggravating factors, counsel prayed that this court be pleased to dismiss the appeal and confirm both conviction and sentence.

Court's consideration

It is trite that the duty of a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. In so doing, the first appellate court must consider the evidence on any issue in its totality and not any piece thereof in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court. See **Baguma Fred v Uganda; SCCA No. 7 of 2004**. We shall keep in mind the above duty as we resolve the two grounds of appeal that were raised in the Memorandum of Appeal.

Ground 1

The gist of this ground is that the learned trial Judge premised his judgment on insufficient evidence to convict the appellant of the offence of aggravated defilement. That the evidence of the victim's mother amounted to hear say and the trial Judge should not have relied on it to convict the appellant. Counsel for the respondent argued that there was no particular number of witnesses required to prove a case and that what mattered was the quality of the evidence.

In this case, it is not disputed that it was only the mother of the victim and the I.O. who testified. It was the mother's testimony that she left her child, the victim, with an old lady named Naziwa Zabete and went to fetch water from the well. That upon her return, she inquired about the victim and was told by Nazziwa that the appellant took the children and gave them bananas. That the mother looked around for her in vain and when she came back later to Naziwa's house, she found the victim at Naziwa's home. She was crying with bananas. That she took her home while still crying and when she asked the child to rest a bit, the child told her that the appellant had been disturbing her. Further, that when she went to urinate, she saw her crying and told the mother that her vagina was paining. That in the evening when she was bathing her, the victim was crying when the mother touched her private parts. And when she checked her, there were some injuries in her private parts.

That she took the child to a mid-wife who examined her and it appeared that the victim had been defiled but advised her to take the victim to a doctor. That the doctor told her that the child had been defiled but the penetration was not deep.

The victim's mother reported the matter to Police. The victim was examined on Police Form 3 and she was found to be 2 years and 3 months with bruises in her private parts. Police Form 24 which was admitted in evidence as 'PE1' indicated that the doctor confirmed that there was a foul smell in her genitals with a bruise and a small laceration between the labia minor and majora. The doctor indicated that the case was attempted penetration.

From the above evidence, it is the direct evidence of PW1, the victim's mother that when she returned to Nazziwa's house, she found the

appellant had brought back the victim and the victim was seated on Naziwa's verandah. The victim had sweet bananas but she was crying. This confirmed to her the information she had been given by Naziwa that the appellant had taken the victim away to give her sweet bananas.

In this case, we discern that the learned trial Judge premised on circumstantial evidence to convict the appellant. The law on circumstantial evidence has been stated in a number of cases. The test to be applied was re-stated in **Simoni Musoke vs. R [1958] EA 715** that

> "**in a case depending exclusively upon circumstantial evidence, the Court must find before deciding upon conviction that inculpatory facts were incompatible with the innocence of the Accused and incapable of explanation upon any other reasonable hypothesis than that of guilt and also before drawing the inference of guilt the Court must be sure that there are no co-existing circumstances which would weaken or destroy the inference of guilt.**"

In **Bassita Hussein vs. Uganda; SCCA No. 35 of 1995**, the Supreme Court held that even without the testimony of the victim, court can draw an inference of guilt from the other available evidence.

In the instant case, the appellant took the victim away and brought her back a while later. This was confirmed by the victim's mother who had spent some time looking for her child, in vain. The child told the mother that the appellant was disturbing her and when she bathed her, the child complained of pain in the vagina. When the child was medically examined, it was discovered that she had bruises and had signs of slight penetration. It is, therefore, not too far- fetched to suspect that it was

the appellant who had caused the injuries in the victim's private parts. We would therefore find that the learned trial Judge rightly based on the above evidence to find the appellant guilty.

As to the appellant's contention that prosecution intentionally neglected to call the victim and Nazziwa as witnesses. It is on record that the old lady, Nzziwa, could not testify due to advanced age. The child could not testify because at the time the incident occurred she was only 2 years old. However, there was medical evidence on Police Form 3 that was admitted as prosecution evidence and marked 'PE1'. This evidence was an agreed document and therefore uncontested by the defence. The medical evidence proved that the child had bruises in her private parts and a foul smell associated with defilement.

With the above evidence, we find sufficient reliance on Section 133 of the Evidence Act, Cap 6, which is to the effect that no particular number of witnesses shall in any case be required for the proof of any fact. We confirm that it is not about the number of witnesses lined up but rather the quality of evidence available that matters. In this case, we find that there was quality evidence to prove that it was the appellant who took the victim away and since he was the last person seen with the victim, it was reasonable to conclude that he was the one that caused her the injuries that were making her cry. For those reasons, we find that the learned trial Judge rightly found the appellant guilty and duly convicted him of aggravated defilement. We hereby reject ground 1 for lack of merit.

Ground 2

It was the appellant's case that the sentence imposed upon the appellant was manifestly harsh and excessive and was out of the

sentencing range for cases of aggravated defilement. To answer this contention, we will cite the sentencing part of the trial Judge's decision, for ease of reference. He stated thus:

> *'Court appreciates that the convict is a first offender and a young man. However, offences of the defilement are on the increase. The victim performed a monstrous act of defiling a girl of 2 years. The age of the victim is telling about the nature of the person before this court. He needs to be taken out of circulation in order to protect the innocent victims out there that may fall prey to his lustrous activities. In the result, I sentence him to 43 years in prison. The time he has been on remand shall be deducted from this period.'*

We also wish to point out that the maximum penalty for the offence of aggravated defilement with which the appellant was convicted is death. Further, under the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) (Directions), 2013, the starting point for aggravated defilement was 35 years and the sentencing range is between 30 years and death.

In this case, we take keen cognisance of the fact that the appellant, a youthful man, defiled a two-year-old child. A two-year-old child is basically helpless and needs care and protection but instead the appellant decided to abuse her. This Court has issued higher sentences in cases where the victims were much older than two years. In **Bonyo Abdul vs. Uganda; SCCA No. 07 of 2011**, the Supreme Court confirmed life imprisonment for aggravated defilement of a 14-year-old victim who had been exposed to HIV infection. In **Bacwa Benon vs. Uganda; CACA No. 869 of 2014**, this Court confirmed life imprisonment for

aggravated defilement of a ten-year-old who was also predisposed to HIV infection. In **Kaserebanyi James vs. Uganda; SCCA No. 10 of 2014**, the appellant was sentenced to life imprisonment for defiling and impregnating his biological child.

In the instant case, whereas the victim was not exposed to HIV, we find her tender age to be an aggravating factor that would justify the sentence that the trial court meted out. From the cited portion on sentencing, it is seen that the learned trial Judge considered both the mitigating and aggravating factors. He went ahead to note that the age of the victim was a tell- tale of the nature of the person that the appellant was.

The law on interference with trial court's sentencing powers is well established. In **Aharikundira Yusitina vs. Uganda; SCCA No. 27 of 2015**, the Supreme Court held that:

> **"There is a high threshold to be met for an appellate court to interfere with the sentence handed down by a trial judge on the 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."**

In light of the above, we would not find the sentence of 43 years' imprisonment to be in any way unrealistic.

Regarding the contention that the sentence was ambiguous for not deducting the period the appellant had spent on remand. We will highlight the sentencing part of the Judgment for ease of reference. The learned trial Judge stated:

> '*Court appreciates that the convict is a first offender and a young man. However, offences of the defilement are on the increase. The victim performed a monstrous act of the defiling a girl of 2 years. The age of the victim is telling about the nature of the person before this court. He needs to be taken out of circulation in order to protect the innocent victims out there that may fall prey to his lustrous activities. In the result, I sentence him to 43 years in prison. The time he has been on remand shall be reduced from this period.*
>
> *I so order. The accused has a right of appeal within 14 days.*'

We note that the above sentence was passed in December 2016. This was before the legal position requiring mathematical deduction was laid down in the decision of **Rwabugande Moses vs. Uganda; SCCA 25/2014** that was delivered on 3rd March 2017. At that time, it was sufficient that the learned trial Judge was alive to the need to take into consideration the period the appellant had spent on remand. This is how the trial Judge discharged his obligation to take into account.

However, in this case, we find it peculiar in the sense that the learned trial Judge stated: '*the time he has been on remand shall be reduced from this period.*' That would imply that the intention of the learned Judge was to deduct the period which he did not. It has been held by this Court that it is the duty of the sentencing Judge and not the prison authorities to deduct the period spent on remand and give a clear

unambiguous sentence that can then be lawfully executed. It is not for the prison authorities to figure out what the sentencing Judge meant or intended to do.

In the cases of **Omundanihare Godwin vs. Uganda; C.A. Criminal Appeal No. 0176 of 2017** and **Kabogere Patrick vs Uganda; C.A. Criminal Appeal No. 083 of 2021**, this Court considered the question of who should make the deduction. It relied on the authority of **Naturinda Tamson vs. Uganda; C.A. Criminal Appeal No. 13 of 2011**, where it was held that:

> **"Where a court determines that a sentence of imprisonment is the appropriate sentence the trial court is required to take the period spent on remand in account in determining the sentence. Much as the learned trial judge stated that he is taking into account the long period spent on remand he left it to those who would administer the sentence to deduct the period spent on remand from the sentence he had imposed. This was a misdirection. This duty belonged to the trial judge and not to the prison authorities. This misdirection rendered the sentence a nullity."** (Emphasis added)

In this case, we find that the learned trial Judge issued an ambiguous sentence when he failed to deduct the remand period himself. The sentence is accordingly set aside.

We shall invoke the powers of this Court under Section 11 of the Judicature Act to re- sentence. In resentencing, we are alive to our earlier findings that the sentence of 43 years' imprisonment was not in any way excessive or out of the sentencing range. We cited authorities

that demonstrated that much. We are fortified in our decision by the fact that the appellant defiled a child of a very tender age, that is 2 years. Children ought to be protected and not violated. In the allocutus, defence counsel informed court that the appellant had been on remand for 2 years and 8 months. We shall deduct that period from the sentence of 43 years' imprisonment. In the result, the appellant shall serve an imprisonment term of 40 years and 4 months' imprisonment from the date of conviction.

Dated at Kampala this 9th day of August 2024

Richard Buteera
Deputy Chief Justice

Eva K. Luswata
Justice of Appeal

Oscar Kihika
Justice of Appeal