REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA
AT FORT PORTAL

CRIMINAL APPEAL NO. 143 OF 2010

(Appeal from the Conviction and Sentence of the High Court of Uganda at Fort Portal (Akiiki-Kiiza,J.) dated 30.07.2010 in HCT-01-CR-SC-0082/2006)

Bizimana Jean Claude:::Appellant

Versus

Uganda :::Respondent

Coram: **Hon. Mr. Justice Remmy Kasule, JA**

Hon. Mr. Justice Eldad Mwangusya, JA

Hon. Mr. Justice F.M.S. Egonda-Ntende, JA

JUDGMENT OF THE COURT

The appellant appealed to this Court against his conviction for rape c/s123 and 124 of the Penal Code Act and the sentence of 18 years imprisonment.

The grounds of appeal are that:

1. The learned trial Judge erred in law and in fact when he failed to properly evaluate the evidence on record and thereby came to wrong conclusions which occasioned a miscarriage of Justice to the appellant.

2. The learned trial Judge erred in law and in fact when he convicted the appellant on uncorroborated evidence of the victim and this occasioned a miscarriage of justice to the appellant.

3. The learned trial Judge erred in law and in fact when he held that the respondent had proved its case against the appellant beyond reasonable doubt, whereas not, and this occasioned the appellant a great injustice.

4. The sentence passed against the appellant was manifestly excessive in the circumstances.

At the hearing of the appeal ground No. 1 of the appeal was withdrawn by the appellant's Counsel as the same was wrong in law, having been drawn contrary to Rule 66(2) of the Rules of this Court.

Learned Counsel Bwiruka Richard for the appellant argued grounds 2 and 3 together and ground 4 separately.

In respect of grounds 2 and 3 he submitted that the learned trial Judge erred to convict the appellant of rape on the basis of the evidence of Pw1, the alleged victim, when her evidence was weak and uncorroborated. She had been attacked at night when bending, thus having no opportunity to recognize her attacker. The tadooba light was insufficient to enable her identify the attacker. She had reported late to the Police her having been raped, and this

supported the defence version that she had never been raped. There was no evidence to support the prosecution assertion that the appellant had fled from the scene of the crime or that he had failed to honour his bond when released on police bond. Therefore there was no independent evidence to corroborate pw1's evidence as to how she had been raped, let alone to put the appellant at the scene of the crime. The appellant's alibi that on 28.12.04 at 9.00 p.m. when the offence is stated to have been committed, he was at the home of Rukundo Sepirian, his neighbour and villagemate had not been destroyed.

As to ground No. 4, Counsel submitted that the fact that the appellant was aged 36 years, had spent five (5) years on remand, was a first offender, a father of two (2) young children and the sole supporter of a mother aged above sixty (60) years, made the sentence of 18 years imprisonment, harsh and manifestly excessive. This Court should reduce the same, if the appellant's conviction is not quashed.

For the state, the learned Principal State Attorney, Tumuhaise Rose, opposed the appeal. She maintained in respect of grounds 2 and 3, that the prosecution had proved beyond reasonable doubt the essential ingredients of the charge of rape, namely sexual intercourse, lack of Consent and the appellant's participation in the crime. The alibi put up by the appellant had been destroyed by the prosecution evidence of Pw1, Pw2 and Pw3 that placed the appellant at the scene of the crime.

Pw1 had not made an alarm because she had been overpowered by the appellant who was armed with a knife. Her evidence had been corroborated in material particulars.

As to the sentence of 18 years imprisonment, Counsel submitted that the same was appropriate. The trial Judge considered all the relevant material factors that were before him in passing that

sentence. The aggravating factors were the seriousness of the offence of rape, the trauma caused to the victim, her spouse and the two young children who were with her, while the mitigating ones consisted of the period of 5 years appellant was on remand, his being a first offender, and the sole bread winner of the family, being aged only 36 years and having prayed for leniency. Counsel thus prayed Court to disallow the appeal.

This is a first appellate Court and as such its duty is to hear the case on appeal by reconsidering all the materials which were before the trial Court and make up its own mind.

See: Bogere Moses & Another vs Uganda: SCCA 1/97

[1998] KALR1

KIFAMUNTE VS UGANDA SCCA 10/97

PANDYA VR [1957] EA 336

and

RUWALA VR [1957 EA 570.

In compliance with the above duty we proceed to determine this appeal.

The learned trial Judge, correctly in our view, addressed himself and the assessors, to the fact that the prosecution had the burden to prove beyond reasonable doubt the ingredients of the charge of rape against the appellant and that the appellant had no duty to prove his innocence of the same. The appellant, who put up an alibi, had also no legal duty to prove the alibi. It is the prosecution that had the burden to destroy that alibi See: SSEKITOLEKO VS UGANDA: [1967] EA 537.

The testimony of Pw1 at trial was that on 2.12.04 at 9.00 p.m. she was in her house at Swese-Kitonzi, with her two children, respectively aged 3 and 4 years. The appellant, whom pw1 knew

very well kicked open the door and forcefully entered pw1's house. He kicked down Pw1 who had just bathed and was in a night dress without knickers, and while armed with a knife, raped her after which he ran away. There was light in the house from a tadooba lamp. The appellant, as he ran left Pw1 and her two children inside the house whose door he locked from outside.

Thereafter, Pw2, husband to Pw1, returned home and found the door of the house locked from outside with Pw1and the two children inside. Pw1 immediately reported to her husband how appellant had raped her. She was in a confused state quarrelling with herself. The children were also crying. Pw2 at first suspected that Pw1 might have consented to have had sex with the appellant but on realizing that, if this had been the case, then Pw1 and the children would not have been locked inside the house from outside, came to believe Pw1 was telling the truth. Pw2 thus reported the matter to a neighbour Ntagonzera and later to Kyaka Police post, while Pw1 who at first had been threatened with further violence from her said husband, Pw2, ran to another neighbour, Sinamenye Jamali, Dw1, where she reported the rape and how Pw2 was threatening to beat her. She spent the night there.

The appellant at trial raised an alibi that at the material time of the offence he was at a neighbour's place one Rukundo Sepirian from where he returned home at 9.00 p.m. He was arrested by police in January, 2005. He denied raping pw1 and was released on Police Bond. On 20.10.05 he was re-arrested and on 25.11.05 he was charged in Court with having raped PW1. He admitted knowing pw1 and Pw2 as village mates. He stated he was being framed by both of them because of a dispute between him and Pw2, over a plot of land.

DW1, Sinamenye Jamali, confirmed that Pw1 ran and stayed at his home for the night of 28.12.04.

The witness was however contradictory as to what Pw1 told him as to what made her ran to his home on 28.12.04 at night. In his evidence in chief Dw1 stated Pw1told him that she ran to him because thieves had stolen money from her house and Pw2 was beating her for this loss. In his police statement Dw1 stated that Pw1 ran to him because Pw2 had suspected a man had been inside the house having sex with her and Pw2 had beaten Pw1 demanding to know why this had been so.

Dw2, Isa Lubega, the area LCI Chairman confirmed that the appellant, Pw1, Pw2 and Dw1 were residents of this area. He knew there was a dispute between pw2 and appellant over a plot of land. According to him the rape of Pw1 by appellant had not been taken to the LC I authorities.

We have carefully subjected to fresh scrutiny the above evidence adduced at trial. We too, like the trial Judge did, find that the prosecution, on the totality of the evidence adduced, proved beyond reasonable doubt that Pw1 was at the material time and place subjected to an act of sexual intercourse. Though no medical evidence was adduced to prove sexual intercourse, there was other cogent evidence to prove that pw1 was subjected to an act of sexual intercourse. Pw1 an adult married woman narrated to her husband Pw2 what had happened to her immediately Pw2 returned home. She also immediately reported the rape to Dw1, a neighbour, though Dw1 tried later to hide this fact from Court in his evidence to Court. But he admitted that he had stated earlier in his statement to police that Pw1 had told him that Pw2 had tried to beat her because of suspicion of another man having been with her in the house. There is no reason why she should not have been believed on this point.

It is not a necessary requirement that for a charge of rape to be established there must always be injuries proved to have been sustained by the victim: See: Court of Appeal Criminal Appeal No.

126 of 1999: OYEKI CHARLES VS UGANDA. Therefore, the absence of a Medical Report as to the injuries on Pw1 does not, given the other evidence adduced in this case, amount to the prosecution having failed to prove its case that a sexual act was done upon Pw1.

As to appellant's Counsel's submission that Pw1 consented to the sexual act, our review of the evidence does not support that submission. The learned trial Judge believed the evidence of Pw1that the one who had a sexual act with her at that material time forcefully entered the house and put her down against her will by kicking her while armed with a knife. The attacker then forcefully had sex with her without her consent. On finishing the act, the attacker locked Pw1 and her two children inside the house but from the outside. This was possibly to ensure that the attacker gets away from the scene of crime undisturbed by Pw1, the victim. .

Further, the depressing conditions in which Pw2 found Pw1: locked up inside the house, quarreling, crying, confused and her two children crying, all go to prove beyond reasonable doubt that the sexual act done to Pw1 was without her consent.

We accordingly have no reason to disturb the finding of the learned trial Judge that the sexual act to which Pw1 was subjected at the material time and place was without her consent. We reject the submission that Pw1consented to the sexual act.

Appellant's Counsel further submitted that the conditions were such that Pw1 could not have been able to identify her attacker. She had been attacked from behind, she was under fear as the attacker was armed with a knife and there was darkness as the tadooba light could not provide sufficient light in the house for Pw1 to identify her attack. The appellant was just framed by Pw1 and Pw2 because of the dispute between Pw2 and the appellant over a plot of land.

For the respondent, it was submitted that the trial Judge properly analysed the evidence as to identification and as a result concluded that it is the appellant who raped Pw1.

Our appreciation of the law is that in the case of a single eye witness, Court ought to satisfy itself from the evidence before it, whether the conditions under which the identification is said to have been made by that witness were or were not difficult. The Court must also warn itself of the possibility of mistaken identity. Each piece of evidence must be considered by Court in relation to all the evidence relating to identification so as for Court to rule out mistaken identity. The factors favouring correct identification and those that render identification difficult must be considered by Court. Any doubt that may arise in the course of this evaluation must be resolved in favour of the accused: See: RORIA V. REPUBLIC [1967] EA 583 at p. 584 D-E., and Supreme Court Criminal Appeal No. 7 of 1991 SULAIMANI KATUSABE VS UGANDA, unreported.

Court must look at other evidence, whether direct or circumstantial, pointing to the correctness of identification from which it can reasonably be concluded that the evidence of identification can safely be accepted as being free from the possibility of error. Such other evidence need not necessarily be independent corroboration evidence as for example is necessary in the case of an accomplice: See: ABDULLA BIN WENDO & ANOTHER vs R [1953]20 EACA 166 and also: MOSES KASANA vs UGANDA, Cr. App. No. 12 of 1981 [1992-93] HCB 47.

The need for care on the part of the Court is not only required in the case of a single identifying witness but also where there are more than one eye witness as long as identification is the basic issue at stake. The trial Judge must therefore invariably warn him/herself as well as the assessors of the need for caution before

convicting on the basis of evidence of identification. See: **Abdala Nabulere & Another vs Uganda: Cr. App. No. 9 of 1978.**

In this case, both in his summing up to the assessors and in his Judgement, the learned trial Judge warned the assessors as well as himself of the danger of the possibility of mistaken identity by Pw1as to her attacker. The Judge then cautiously evaluated the identification evidence that was before him. He considered the admitted fact that both the appellant and Pw1 had known each other for almost 10 years since 1995 to the date of the offence i.e. 28.12.04. Both were refugees from Rwanda who had come and stayed together in Sweswe-Kitonzi, Uganda. Both had been neighbours for a number of years until appellant shifted to another place, a mile away from Pw1's home.

The trial Judge believed Pw1's evidence that there was light from a tadooba lamp in the house where Pw1 was raped and that Pw2 found this tadooba still giving light. Thus Pw1 with this light was able to identify the appellant as her attacker. Further, by the very nature of the crime of rape, both the appellant and the victim, Pw1, were close to each other for Pw1 to see the appellant as her attacker. There was no evidence that Pw1 had been hoodwinked so as not to see her attacker.

The Judge also believed Pw2 that at both Kyaka and Kyegegwa Police Posts the appellant told Pw2, in the presence of Pw1 and one Mugabo, that he, appellant, had had sex with Pw1 and that he would continue to sleep with her again if he got another chance. The Judge concluded from this evidence that the appellant carried out the act of raping Pw1 for a considerably long period.

The Judge also found that Pw1could not resist the appellant, given her frail physical nature which the Judge observed in Court. The appellant was also armed with a knife while raping her. No one was present in the immediate neighbourhood to come to her rescue.

The Judge carefully considered the appellant's alibi as part of the whole evidence adduced. He found that the prosecution had destroyed the alibi by placing the appellant at the scene of the crime. He believed the evidence of Pw1 and Pw2 as truthful and reliable. On the other hand, the learned trial Judge found the appellant shifty in the witness box and avoiding eye contact and failing to answer simple questions put to him.

We have ourselves, on reviewing the evidence on record, concluded that the appellant was inconsistent as to when on 28.12.04 he went, stayed and left his neighbour's place, one Sepirian Rukundo. At first he was emphatic in his evidence that by 9.00 p.m. on 28.12.04 he was at Rukundo's place talking to him. Then appellant changed his story by stating that he had gone to Rukundo's place at 8.00 p.m. and by 9.00 p.m. he had already returned to his home sleeping. Appellant did not claim he was not sure of the time he was talking of. Yet the time of about 9.00 p.m. is the very material time that Pw1 asserted she was raped.

There was also no evidence as to why there should be a conflict between the appellant on the one hand and Pw1 and Pw2 on the other, over a plot of land. The appellant stated that he had to bury the remains of his child in Pw2's land because the appellant's land was too far for the body to be taken there. But in a direct contradiction he also stated that the remains of the child were buried in land only about 5 meters from the land Pw2 had sold to him. Thus the appellant had land where he could have buried the remains of his child, which land was only 5 metres from that of Pw2 where ultimately the remains of appellant's child were buried. There was thus no necessity to bury the remains of his deceased child into the land of Pw2 a factor that the appellant claimed was the cause of the conflict between him and both Pw1 and Pw2.

It is of significance that Dw1, Sinamenye Jamali, a witness to support the appellant's version to the case, proved to be a liar when

he testified that Pw1 ran to his home on 28.12.04 at night because her husband Pw2 had beaten her over the issue of money stolen from the house. Yet in this witness's (Dw1) statement to the Police, he had stated that Pw1had ran to his home because Pw2, suspecting that another man had been in the house with the consent of his wife, had threatened to beat Pw1. Pw2 suspected that Pw1 had had consensual sex with that man. It is thus safe to conclude from this contradictory evidence that the appellant and his witness Dw1 colluded to hide from Court vital evidence so as to protect the appellant from conviction.

We accordingly find, on our own evaluation of the evidence, that the learned trial Judge was right to conclude that the appellant was shifty, a liar and thus unreliable in his evidence to Court. So too were his witnesses Dw1 and Dw2. The learned trial Judge therefore rightly rejected the appellant's alibi that he was away from the scene of crime when Pw1 was being raped.

It follows therefore that the appellant was properly identified and placed at the scene of crime as the one who raped Pw1. We accordingly find no merit in appellant's submission that appellant was never properly identified.

Appellant's Counsel further submitted that the evidence of Pw1 had not been corroborated and as such the trial Judge erred to base his conviction of the appellant upon such evidence.

As we have already stated, the learned trial Judge warned himself and the assessors of the danger of acting on the uncorroborated testimony of Pw1, but having done so, also directed himself and the assessors, rightly in our view, that, even in the absence of corroboration, a conviction was possible if he satisfied himself that the evidence of Pw1 as the complainant was truthful. The learned trial Judge then proceeded to evaluate the evidence as a whole and concluded, that the evidence of Pw1 was truthful and a conviction could be based upon it.

However, there was also evidence that provided corroboration that sexual penetration of Pw1 took place and that it is the appellant who committed the rape, that the trial Judge, also acted upon.

This evidence consisted of Pw2 having found Pw1 talking in a quarrelsome and confused manner to herself and the children crying. She was traumatized. The doors of the house had been damaged due to forceful entry and on Pw2 returning he found Pw1 and the two children locked inside the house but the door locked from outside. Pw1 told Pw2 straight away on arrival that she had been raped by the appellant. The appellant himself stated, later on, which the Judge believed, that he had had sex with Pw1, and that he would continue sleeping with her if he got another chance in future. All this evidence provided corroboration to Pw1's evidence that she had been raped.

Further, the inconsistent evidence of the appellant as to where he was and what he was doing on 28.12.2004 between 8.00 p.m. to 9.00 p.m., coupled with the fact that his witness Dw1 lied to Court in order to falsely bolster the appellant's case as to what had made Pw1 ran away from her home and from Pw2 on the night of 28.12.2004 after 9.00 p.m. to the home of Dw1, all provided corroboration to Pw1's assertion that it is the appellant who committed the rape upon her.

The assertion by the appellant that he was being framed by Pw2 and Pw1 because of the existence of a dispute between them and him over a piece of land remained not substantiated. The appellant and his witness Dw2 failed to explain properly how the said dispute could have come about.

We are accordingly unable to accept the submission of appellant's Counsel that the learned trial Judge erred in convicting the appellant of rape basing on Pw1's evidence that was not corroborated. Grounds 2 and 3 of the appeal therefore fail.

With regard to ground 4, appellant's Counsel submitted that the sentence of the appellant to 18 years imprisonment for rape was harsh and excessive as appellant had spent 5 years on remand, was aged only 36 years and thus still had a future within which to reform and be useful to his family and the nation. He was also a first offender, a father of 2 young children whom he solely supported and was also looking after his mother of above 60 years old.

Learned Counsel for the state opposed a reduction in the sentence imposed upon the appellant. Counsel contended that the trial Judge had considered both the mitigating and aggravating factors before he imposed the sentence of 18 years. The sentence was not illegal, harsh or excessive, given the brutal and humiliating circumstances Pw1 and her family were subjected to.

In order to succeed in an appeal against sentence, the appellant has to show that the sentence passed was illegal or manifestly excessive or inadequate: See: **R V Mohamed Jamal (1948) 15 EACA 126 Jackson Zita v Uganda SCCA No. 19/1995,** unreported.

We agree with state Counsel that before the trial Judge imposed the sentence of 18 years imprisonment, he considered the mitigating factors we have stated above.

The Judge also considered the rape case to be very serious, with a death penalty as the maximum sentence. The victim of the offence was physically frail, a refugee from Rwanda who came for better and secure life in Uganda, a married woman and a mother, and the rape was committed in the presence of her young children. All this traumatized Pw1.

We have ourselves reviewed and subjected to fresh scrutiny the evidence that was before the trial Judge and the factors he considered in arriving at the decision to sentence the appellant to a term of imprisonment of 18 years. We observe however that the

learned trial Judge did not address himself to any past Court decision for guidance as to sentence in cases having a resemblance of facts similar to those of the case under consideration.

We have on our own had the benefit of considering and being guided by the decision of this Court in **Criminal Appeal No. 126 of 1999: OYEKI Charles v Uganda** (unreported). In the case, the victim a mother who was walking back to her home together with her daughter was raped in a public path by the appellant. The act of rape was at about 9.00 p.m. and was done to the victim in the presence of the victim's daughter and other people who came to answer the victim's alarm and found the appellant on top of the victim. The victim suffered some injuries. The appellant had spent 4 (four) years on remand. He was a first offender. He was sentenced to 15 (fifteen) years imprisonment. This Court did not disturb the sentence on appeal.

We find that the facts of the **Oyeki Charles case** have some resemblance to those of the case before us. In both cases the modesty of a mother was violated in front of her children and other persons who knew the victims very well or who found the victim either being raped or when the act of rape had just stopped, a very painful and disturbing situation to a victim of rape. The period spent on remand by the appellants ranged from 4 to 5 years in both cases and the appellants had been first offenders.

Having considered the circumstances pertaining to the case before us and bearing in mind the above cited decision of this Court, we conclude that the sentence of 18 (eighteen) years passed upon the appellant was to some extent harsh and excessive. We accordingly set it aside. We substitute the same with a sentence of 15 (fifteen) years imprisonment. We accordingly allow ground 4 of the appeal.

Therefore this appeal stands dismissed as to conviction of the appellant, but is partly allowed on sentence. The appellant is

hereby sentenced to serve a term of imprisonment of 15 (fifteen) years as from the date of his conviction of 30.07.2010.

We so order.

Dated at Fort Portal this ..18th..... day of December, 2014.

Hon. Justice Remmy Kasule
Justice of Appeal

Hon. Justice Eldad Mwangusya
Justice of Appeal

Hon. Justice F.M.S. Egonda-Ntende
Justice of Appeal