THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Remmy Kasule, Kenneth Kakuru & Fredrick Egonda-Ntende, JJA*]

Criminal Appeal No. 13 of 2011

Naturinda Tamson==========Appellant

Versus

Uganda==========Respondent

[*On appeal from a judgment of the High Court of Uganda sitting at Masaka (Lugayizi, J.), in High Court Criminal Session Case No 20 of 2009, delivered on the 16 December 2010*]

JUDGMENT OF THE COURT

Introduction

1. The appellant was convicted by the High Court on 16 December 2010 of the offences of rape, defilement and robbery together with another co accused. The particulars of the first count of rape were that the appellant together with a co accused on the 22nd December 2008 had unlawful carnal knowledge of one KH at Kyengyeze village in Lyatonde District. The appellant and his co accused were sentenced to 18 years imprisonment. The particulars of count 2 were that the appellant on 22nd October 2008 had unlawful sexual intercourse with NJ, a girl under 18 years of age. He was sentenced to 18 years imprisonment on this count. The particulars of count 3 were that the appellant together with a co accused robbed KH of cash shs.100,000.00, 18 plates, 1 matress, 1 shirt, 1 trouser, 2 hurricane lamps, 1 panga, 4 hoes and 1 flask and at the time of the said robbery used a deadly weapon, to wit a panga and iron bar, on the said KH. The appellant and his co accused were sentenced to 18 years imprisonment on this count.

2. The trial judge ordered the said three sentences to run concurrently.

3. The appellant appeals only against the sentences on the ground that the sentences were harsh and excessive in the circumstances of this case.

4. The facts of the case are fairly straight forward. On the night of the 22nd October 2008 thugs broke into the home of KH at Kyengeza village. They assaulted KH with an iron bar, demanding money from her. The appellant had a torch which was flashing around. KH failed to produce the money. The appellant raped her. Then Matsiko Gideon too raped her. Both assailants were known to KH as they were from the same village.

5. The appellant proceeded to have sexual intercourse with NJ, a girl under 18 years of age. She was 16 years at the time of the commission of the offence.

6. The appellant and his co accused then robbed from KH UGX 100,000.00; a panga; 4 hoes; a flask, 18 plates, a mattress, a shirt, a trouser and 2 hurricane lamps.

7. It is against the three sentences that the appellant now appeals to this court.

Counsel's Submissions

8. Mr Mark Bwengye, learned counsel for the appellant submitted that the 3 sentences of 18 years each were harsh in the circumstances of this case given the age of the appellant and other mitigating factors. The appellant was only 29 years old at the time of sentencing. He had a family to look after including an old grandmother, 70 years old, to take care of. The appellant was a first offender and he was remorseful. He referred to the case of **Kalibobo Jackson v Uganda Criminal Appeal No. 45 of 2001**

in which the Court of Appeal had found a sentence of 17 years for a charge of rape to be out of range with sentences for rape. The trial judge in this case failed to consider the question of uniformity of sentences.

9. Mr Bwengye further attacked the decision of the trial court on the ground that it was vague in so far as it did not comply with **Kizito Senkula v Uganda Criminal Appeal No. 24 of 2001**. The trial court sentenced the appellant to 18 years imprisonment and then ordered that the period spent on remand be subtracted therefrom.

10. Ms Rose Tumuhaise, learned Principal State Attorney, appearing for the State, opposed the appeal. She submitted that the sentences were not harsh or excessive in anyway. All the offences of which the appellant was convicted, had a maximum sentence of the death penalty. Secondly the trial judge had ordered that the period spent on remand be deducted from the 18 year sentence. The sentences therefore were neither harsh nor excessive. The fact that the appellant had in fact been convicted of 3 offences was itself an aggravating factor that distinguished this case from the case of **Kalibobo Jackson v Uganda**. She prayed that this court should not interfere with the sentence of 18 years imprisonment.

Analysis

11. 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.'

12. The foregoing principles are equally applicable in the instant case.

13. The sentencing order of the trial judge states,

'Court has had the submissions of both counsel in respect of sentence in this case. A1 and A2 undoubtedly committed very serious offences of rape and defilement and aggravated robbery. The maximum sentence for most of these offences i.e. rape and aggravated robbery is death. However in sentencing accused persons court will also consider the following:
(a) A1 and A2 are 1st offenders; and
(b) both have been on remand for a long time.
Considering all therefore court will sentence them as follows:
……
A2 – in respect of Count 2 - 18 years
--in respect of count 3 - 18 years
--in respect of count 4 - 18 years.
All sentences to run concurrently and the time spent on remand to be deducted.'
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14. The learned trial judge did not comply with Article 23(8) of the Constitution of Uganda. The learned judge did not take into account the period spent on remand by the appellant. He left this obligation to the Prison Authorities. This was erroneous. Article 23(8) provides,

'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**.'

15. In our view the foregoing provision imposes an obligation on the trial court to take into account the period an accused has spent on remand in

the determination of the appropriate sentence. Failure to comply with the foregoing constitutional provision renders the subsequent sentence a nullity. See **Kwamusi Jacob v Uganda COA Criminal Appeal No. 203 of 2009** [unreported].

16. 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.

17. We take it that the learned trial judge had in mind a sentence of 18 years on each count less the 2 years spent on remand which would set the actual sentence in this case to 16 years imprisonment on each count rather than the stated 18 years.

Sentence on Rape

18. In the case of **Kalibobo Jackson v Uganda Criminal Appeal No. 45 of 2001** the appellant, 25 years old, raped a 70 year old lady. He was sentenced to 17 years imprisonment. The Court of Appeal allowed the appeal against sentence for being harsh and excessive and reduced it to 7 years imprisonment. The court opined thus,

> 'We think if the trial judge considered the need to maintain uniformity of sentences she would certainly not have imposed that sentence. The appellant raped an old lady. That was bad. However, considering all the circumstances of the case, we think that a sentence of 17 years imprisonment was manifestly so excessive as to cause a miscarriage of justice. It is for that reason that we allowed the appeal and reduced the sentence from 17 years to 7 years.'

19. We are inclined to agree with counsel for the appellant that a sentence of 18 years imprisonment imposed on the appellant in respect of the offence of rape is manifestly harsh and excessive.

Sentence on Defilement

20. In the case of **Bikanga Daniel v Uganda Court of Appeal Criminal Appeal No. 38 of 2000** [unreported] the appellant had been convicted of defilement of a girl under 18 years of age. He detained the girl for 2 days in his house during which he repeatedly defiled her. He was sentenced to 21 years imprisonment. On appeal this sentence was found to be harsh and excessive. It was substituted with a sentence of 12 years. The age of the victim is not disclosed.

21. In the case of **Kabwiso Issa v Uganda Supreme Court Criminal Appeal No. 7 of 2002** [unreported] the appellant was convicted of defilement and sentenced to 15 years imprisonment. On appeal to the Court of Appeal it was confirmed. On further appeal to the Supreme Court, the Court found that the trial judge had not taken into account the period the appellant had spent on remand and reduced the sentence to 10 years imprisonment.

22. In the case of **Leo Byaruhanga v Uganda SC Criminal Appeal No. 29 of 1994** the appellant had been convicted of the defilement of an 8 year old girl. He was sentenced to 10 years imprisonment. The trial court set out to impose a deterrent sentence. On appeal the Supreme Court dismissed the appeal against sentence, suggesting the appellant was lucky not to have received a higher sentence.

23. In the instant case the victim was 16 years old. A sentence of 18 years is out of range with sentences for this type of offence as evident from the cases considered above.

Sentence on Aggravated Robbery

24. Much as the learned trial judge had ordered a sentence of 18 years on this count, it appears to us that what he had in mind was a sentence of 16 years imprisonment since he had ordered that the period spent on remand be deducted from the said sentence.

25. This court has the same powers as the High Court, pursuant to Section 11 of the Judicature Act. It states,

> '**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'

26. In the instant case the appellant was a first offender. He had spent slightly over 2 years on remand prior to his trial and conviction. He was 29 years old, a relatively young man at the time of the commission of the offences. Nevertheless he committed a multiplicity of offences whose maximum sentence is the death penalty.

Decision

27. We are satisfied that a sentence of 10 years imprisonment from the date of conviction [16 December 2010] on the count of rape; 13 years imprisonment on the count of defilement; and 16 years imprisonment on the count of aggravated robbery will meet the ends of justice in this case. We so order. All the sentences shall run concurrently.

Dated, signed and delivered at Kampala this **3rd** day of **February** 2015

Remmy Kasule

Justice of Appeal

Kenneth Kakuru

Justice of Appeal

Fredrick Egonda-Ntende

Justice of Appeal