

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Mwangusya, Buteera & Egonda-Ntende, JJA*]

Criminal Appeal No. 155 of 2008

[Arising from HCT-02-CR-SC-0042 of 2002 at Gulu]

BETWEEN

OTEMA DAVID=====APPELLANT

AND

UGANDA=====RESPONDENT

*(Appeal from a decision of the High Court, [Kasule, J.], sitting at Gulu,
delivered on the 26 November 2008)*

JUDGMENT OF THE COURT

Introduction

1. The appellant was convicted by the High Court of the offence rape contrary to section 123 and 124 of the Penal Code Act and sentenced to serve a period of 13 years imprisonment from the 26 November 2008 and was ordered to pay compensation of Shs.300,000.00 within 6 months from the date of sentence. The particulars of the offence were that the accused on the 13 September 2001 at Wao Village had unlawful sexual intercourse with A M without her consent. The appellant now appeals, with the permission of this court, only against sentence on the ground that the sentence was harsh and manifestly excessive in the circumstances of this case.
2. The Respondent opposes this appeal contending that the sentence was appropriate for the offence in question.

Submissions of Counsel

3. At the hearing of this appeal Mr Andrew Ssebugwawo represented the appellant while Mr Emmanuel Muwonge, Principal State Attorney, appeared for the state.
4. Mr Ssebugwawo submitted that the appellant was not in a position to pay the compensation ordered in the time ordered given that he was in prison. He needed to be released in order to be able to pay that compensation. Mr Ssebugwawo further took the position that sentence of 13 years included the 7 years that the accused had spent on remand implying that the appellant would serve only 6 years.
5. Mr Muwonge submitted that the sentence of the trial court was not manifestly harsh or excessive and ought to be maintained. He referred this court to the case of Naturinda Tamson v Uganda Court of Appeal Criminal Appeal No. 13 of 2011 [unreported].

Analysis

6. 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.’

7. The foregoing principles are equally applicable in the instant case.
8. The main line of attack on the sentence of the trial court is that the sentence is harsh or manifestly excessive in the circumstances of this case. We note from the sentencing order of the trial court that the learned trial judge noted that the appellant had spent 7 years on remand as well as the fact that he was a first offender, together with a number of other relevant factors. He decided that a sentence of 13 years imprisonment with effect from the date of conviction was the appropriate sentence.

9. In Kalibobo Jackson v Uganda Criminal Appeal No. 45 of 2001, (unreported) a 25 year old appellant raped a 70 year old woman. He was sentenced to 17 years imprisonment. The Court of Appeal allowed the appeal against sentence for being harsh and excessive. It reduced the sentence to 7 years imprisonment. In doing so the court stated,

'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.'

10. In Naturinda Tamson v Uganda C A Criminal Appeal No.13 of 2011 [unreported] the appellant had been sentenced to 18 years imprisonment for rape. He had spent 2 years on remand. The court of appeal found this sentence manifestly harsh and excessive and out of range with similar cases. The sentence was reduced to 10 years.

11. In effect given the 7 years spent on remand the appellant was to serve a 20 year period of imprisonment or life imprisonment (in light of section 47 (7) of the Prisons Act). This is certainly out of range with sentences imposed in respect of this crime in similar cases. In light of the range of sentences for this crime which revolve around an average of 10 years imprisonment a sentence of 13 years on top of 7 years spent in pre trial custody is manifestly excessive in the circumstances of this case.

12. This court has the same powers as the High Court, pursuant to Section 11 of the Judicature Ac. 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'

13. In the instant case the appellant was a first offender. He had spent 7 years on remand prior to his trial and conviction. This was an inordinate delay

in determining his fate. He was 36 years old at the time of the commission of offence. He committed a very serious offence whose maximum punishment is death. Nevertheless as a first offender he would not ordinarily face the maximum punishment of death.

Decision

14.We are satisfied that a sentence of 7 years imprisonment from the date of conviction [26 November 2008] will meet the ends of justice in this case. We so order.

Order for Compensation

15.Before we take leave of this matter we need to comment on the order for compensation that the trial court ordered. The learned trial judge stated,

‘The victim, Adoch Mary, suffered harm physically and psychologically. A lot of force was exerted on her. She had to incur medical and other expenses for her treatment, medical examination and travel.

Court therefore order that under section 129B of the Penal Code Amendment and another section 126 of the 8/07 of the Trial Indictments Act accused to pay Adoch Mary, Shs.300,000.00 (three hundred thousand only) compensation. Accused to pay this sum within a period of 6 months from the date of this order; otherwise the amount is to be recovered as a civil debt from him.’

16.Section 129B of the Penal Code Amendment Act, Act 08 of 2007, states,

‘Payment of compensation to victims of defilement.

129B. (1) Where a person is convicted of defilement or aggravated defilement under section 129, the court may, in addition to any sentence imposed on the offender, order that the victim of the offence be paid compensation by the offender for any physical, sexual and psychological harm caused to the victim by the offence.

(2) The amount of compensation shall be determined by the court and the court shall take into account the extent of harm suffered by the victim of the offence, the degree of force used by the offender and medical and other expenses incurred by the victim as a result of the offence”.

17. The instant case involved a charge of rape and not defilement. Clearly referring to the section 129B of the Penal Code Amendment Act was an error as it is inapplicable much as there might be similarities in the nature of defilement and rape. This provision authorises courts to order compensation in respect of cases of defilement and not rape.
18. Secondly we are puzzled at the reference by the learned trial judge to ‘another section 126 of 8/07 of the Trial Indictment Act.’ Act 8 of 2007 is the Penal Code Amendment Act and not the Trial on Indictments Act. Maybe this was a reference to section 126 of the Trial on Indictments Act and the words ‘Act 8 of 2007’ are simply in the wrong place, having been intended to refer to section 129B which was brought into effect by Act 8 of 2007, the Penal Code Amendment Act. Viewed that way it makes sense and would mean that the learned trial judge relied, and rightly so in our view, on section 126 of the Trial on Indictments Act which provides,

‘126. Compensation.

- (1) When any accused person is convicted by the High Court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable.
- (2) When any person is convicted of any offence under Chapters XXV to XXX, both inclusive, of the Penal Code Act, the power conferred by subsection (1) shall be deemed to include a power to award compensation to any bona fide purchaser of any property in relation to which the offence was committed for the loss of the property if the property is restored to the possession of the person entitled to it.
- (3) At the time of awarding any compensation in any subsequent civil suit relating to the same matter, the court hearing the civil suit shall take into account any sum paid or recovered as compensation under this section.
- (4) An appeal shall lie to the Court of Appeal against any order awarding compensation under this section.’

19. We agree that the trial court had the authority to order compensation in the circumstances of this case but express our reservation in relation to the order that this money must be paid within six months. The accused or convict had been on remand for 7 years prior to sentence. No inquiry was made in relation to his circumstances to establish ability to pay the said sum in 6 months. The better approach in our view is to make the order for compensation and leave it to the court that may be called upon to order distress in respect of the same to consider all the necessary matters including the provisions of section 116 of the Trial on Indictments Act.

Dated, signed and delivered at Kampala this 15th day of June 2015

Eldad Mwangusya
Justice of Appeal

Richard Buteera
Justice of Appeal

Fredrick Egonda-Ntende
Justice of Appeal