

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT ARUA

CRIMINAL APPEAL NO. 303 OF 2009

*Arising from Criminal Session Case No. 0099 of 2008 before Hon. Justice John Wilson
Kwesiga at Arua.*

YEBUGA MAJID:.....APPELLANT

VS

UGANDA :..... RESPONDENT

Coram: Hon. Justice Remmy Kasule, JA

Hon. Lady Justice Hellen Obura, JA

Hon. Justice Simon Byabakama Mugenyi, JA

JUDGMENT OF THE COURT

The appellant was tried by the High Court sitting at Adjumani on an indictment for rape contrary to **Sections 123 and 124 of the Penal Code Act**. He was convicted and sentenced to 15 (fifteen) years' imprisonment. He has appealed to this Court against both conviction and sentence.

Briefly, the facts as accepted by the trial Judge, were that on the night of 18-2-2008, the victim Asina Drica was asleep in her house when she awoke to someone having sexual intercourse with her. She made an alarm, extricated herself and ran outside. She identified the assailant as the appellant with the help of moonlight when he came outside after her. The two are known to each other as village mates. The appellant was arrested in the morning and escorted to the chairman LCI where he admitted having sex with the victim. He also confessed to the police under a charge and caution statement.

At trial, the appellant denied the charge and his defence was to the effect that the victim owed him shs. 10,000/- for cassava he sold to her. She made an undertaking to pay him later but when he pressed her for the balance she threatened to put him in trouble. He was subsequently arrested and charged.

The Appeal is premised on two grounds, to wit;

- 1. The learned trial Judge erred both in law and fact when he failed to properly evaluate the evidence on record especially on the ingredients of the offence of rape and erroneously convicted the appellant.***

2. In the alternative and without prejudice to the above, the learned trial Judge erred in law and fact when he sentenced the appellant to 15 (fifteen) years imprisonment which is harsh and excessive given the circumstances of the case.

The appellant was represented by Mr. Komakech Denis Atine while Ms. Khisa Betty, Assistant Director of Public Prosecutions, appeared for the respondent.

Arguing the first ground, learned counsel for the appellant conceded that the ingredients of sexual intercourse and lack of consent were correctly found by the trial Judge to have been proved.

The bone of contention was on participation. Counsel argued that the victim's evidence on identification of the appellant required corroboration, since she was a single identifying witness, and, the incident occurred at night when there was no light in the house.

Counsel contended further that, the learned trial Judge did not warn himself of the dangers of acting on the uncorroborated testimony of a single identifying witness, thereby arriving at an incorrect finding that the appellant was the assailant.

Ms. Khisa Betty, for the respondent, opposed the appeal. She argued that, while the learned trial Judge did not specifically warn himself of the need for corroboration of the victim's evidence, he did find there was corroboration.

Counsel referred to the victim's evidence to the effect that she identified the appellant outside the house with the help of moonlight. She contended that the victim's evidence was corroborated by the appellant's admission before the chairman L.C.I as well as the charge and caution statement to the police.

We agree with the submissions of both counsel that the trial Judge ought to have warned himself and the assessors of the need for caution before acting on the evidence of the victim. This was necessitated by two factors.

Firstly, the attack having occurred at night and the victim being a single identifying witness, there was need to test with the greatest care her evidence, so as to rule out the possibility of mistaken identification-

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see **Abdala Nabulere and another vs Uganda [1979] HCB 77; George William Kalyesubula vs Uganda Cr. Appeal No. 16 of 1997 and in Bogere Moses and another vs Uganda Cr. Appeal No. 1**

of 1997.

Secondly, in cases of a sexual nature, the Court had to warn itself of the danger of acting on uncorroborated testimony of a complainant but having done so, it could convict in the absence of corroboration if it was satisfied that the complainant's evidence was truthful –

see **Kasoma vs Uganda, Cr. Appeal No. 10f 1994 (SC); Kibale vs Uganda [1999] IBA 148 (SC) and Mugoya Vs Uganda [1999] IBA 201 (SC).**

Although he did not expressly direct himself or the assessors in the above, we are satisfied the learned trial Judge in the instant case was alive to the need for corroboration when in the judgment, he stated:

“The charge and caution statement, his admission before the LCI chairman in the presence of the victim’s husband corroborated with victim’s identification of the accused

Be that as it may, being a first appellate Court, it is our duty to review and re-evaluate the evidence before the trial court, by subjecting it to fresh scrutiny, draw inferences and reach our own conclusion bearing in mind that this Court did not have the opportunity to hear and observe the witnesses testify as the learned trial Judge did-

see **Rule 30(1) (a) of The Judicature (Court of Appeal Rules) Directions; Begumisa and others Vs Tibebaga, SCCA NO. 17 of 2002 and Mbazira Siragi and another vs Uganda, Cr. Appeal NO. 7 of 2004.**

From the evidence of the victim, there is no doubt she did not identify her assailant during the attack inside the house. She only managed to do so outside. She described what transpired when she moved outside the house as follows:

“I left him inside the house and I came out.... I realised it was Majid when he came out of the house. There was moonlight so I saw his face properly. I know Majid very well. He is somebody from my home”.

During cross examination she stated:

“I did not see/recognise him while he was having sexual intercourse with me. I saw him when he was running away.”

The appellant confirmed he was known to the victim. It was also the victim's evidence that she stood outside about 6 metres from her door way. The appellant emerged from the said doorway. It was not suggested or put to her by the defence that the moon light was inadequate for her to have positively identified the appellant.

We thus have no basis for doubting the sufficiency of the moonlight in affording the victim unmistakened

identification of the appellant.

There is also the evidence of Ayile Majid (PW3) the chairman LCI, to the effect that the appellant admitted before him that he had sexual intercourse with the victim.

The offence of rape is complete when the sexual intercourse is accompanied by lack of consent of the victim. We note that the appellant did not admit to PW3 that he had sex with the victim against her will. A confession connotes an unequivocal admission of having committed an act which in law amounts to a crime - see **R vs Kifungu S/O Nurupia(1941)8 E.A.C.A 89**. A confession must either admit the terms in the offence or at any rate substantially all the facts which constitute the offence.

See **R vs Kituyan S/o Swandetti (1941)8 E.A.C.A 56**.

Although the appellant's admission before PW3 did not amount to a confession to the offence of rape, it was an admission of a material fact (sexual intercourse) and, by that admission, he placed himself at the scene, thereby furnishing corroboration of the victim's identification evidence.

There is also the confession statement which the appellant made to the police under charge and caution. It was admitted in evidence after a trial within a trial.

Our finding is that the said confession statement was corroborated in several material aspects.

Firstly, in the statement the appellant told police that:

“I found the woman Asina Drica lying on a mattress on the floor. She was lying putting on her petticoat so I jumped on her and opened her legs...”

This tallies with the evidence of Asina Drica (PW3) to the effect that she was dressed in only a petticoat at the time of the attack.

The second aspect relates to the panga. The appellant told the police that he had a panga at the scene. The victim’s evidence was that the assailant placed a panga on her neck as he raped her. She tried to hold the panga but it cut her. Indeed, the medical report on PF3 (PEI) confirmed she had a cut wound on the 2nd left finger.

To our analysis, the confession statement was amply corroborated in material particulars.

The appellant’s defence was an alibi to the effect that, on the said day, he was at a video hall between 8:00pm and 11:00pm. He returned home, had supper and retired to bed. He attributed the origin of the case against him to money (shs. 10,000/) that the victim owed him after he sold her cassava with an undertaking to pay him later. When he pressed her for the money, she threatened to put him in trouble. He was arrested three days after those threats.

We observe that none of the above defences was put to the victim during her cross-examination. A belated alibi undermines its credibility and smacks of an afterthought. The same applies to a grudge. In our considered view, the learned trial Judge rightly dismissed them as lies and an afterthought.

Having subjected the evidence to fresh scrutiny, we are satisfied the victim’s evidence regarding participation was sufficiently corroborated to justify the finding of the learned trial Judge that the appellant was the assailant.

Ground 1 accordingly fails.

On ground 2, counsel for the respondent contended that the sentence of 15 years imprisonment was harsh and excessive. He also argued that, the learned trial Judge did not consider the fact that the appellant was a first offender with heavy family responsibilities. Counsel was of the view that 10 years would have been appropriate and implored the Court to reduce the sentence accordingly.

Counsel for the appellant supported the sentence, arguing that the learned trial Judge had taken into account the period spent on remand by the appellant, that the victim was

married to the appellant's nephew and that he had a panga when he raped the victim. Counsel invited Court to find that the sentence was neither harsh nor excessive.

This Court can only interfere with the sentence of a lower Court where, in the exercise of its discretion, the Court imposes a sentence which is excessive or so low as to amount to a miscarriage of justice or where the Court

ignores to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in principle –

see **Kiwalabye Bernard vs Uganda, Cr. Appeal No. 143 of 2001 (SC); Semakika Yosam vs Uganda, Cr. Appeal No.**

332 of 2009 (COA); and Semanda Christopher and another vs Uganda Cr. Appeal No. 77 of 2010 (COA).

While sentencing the appellant in the instant case, the trial Judge stated:

"The accused has been on remand slightly over 1

year. He committed the offence with brutality, he threatened the victim with a deadly weapon. He cut her finger. He was violent, he cut the door of the house. He raped a wife of his own nephew for which he does not seem to regret. He shows no remorse at all, all he wants is lenience. Maximum sentence for this offence is death sentence, I will discount this and I sentence the accused to 15 (fifteen) years sentence

We note, from the above passage, that the trial Judge only considered the aggravating factors whereas mitigating factors were also pleaded. In so doing he clearly overlooked some material factor.

It was pleaded in mitigation that the appellant was a first offender and a single parent, his wife having passed away leaving him with young children. He was also 30 years of age at the time of conviction. He was therefore still young and capable of reforming.

However, we take note of the gravity of the offence and the circumstances of the commission of the same. We agree with the views of the learned Judge that the appellant's conduct was brutal and extremely insensitive given that the victim was a wife to his nephew. In our opinion, the use of a panga to subdue the victim was the highlight of his devious intent.

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We are of the strong view, that even with due consideration of the mitigating factors, the sentence of 15 years imprisonment befitted the circumstances of this case. We are therefore not persuaded that we should reduce the sentence.

In the final analysis, this appeal fails and we accordingly dismiss it.

We uphold the conviction and sentence of 15 years imprisonment.

We so order.

Dated at Arua this 6th day of June 2016

Hon. Justice Remmy Kasule

JUSTICE OF APPEAL

Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL

Hon. Justice Simon Byabakama Mugenyi

JUSTICE OF APPEAL