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**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT GULU
CRIMINAL APPEAL NO. 0622 OF 2014**

OKOT DAVID:.....APPELLANT

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VERSUS

UGANDA:.....RESPONDENT

(Arising from the decision of the High Court in Criminal Session Case No. 184 of 2012 at Gulu delivered on 18/06/2013 by His Lordship Hon. Justice Alfonse Owiny Dollo)

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(Coram: Kenneth Kakuru JA, F.M.S Egonda-Ntende JA, Hellen Obura, JA.)

JUDGMENT OF THE COURT

This appeal arises from the decision of Hon. Alfonse Owiny-Dollo, J (as he then was) sitting at Gulu delivered on 18th June, 2013 in which the appellant was indicted and convicted, on his own plea of guilt, of the offence of rape contrary to sections 123 and 124 of the Penal Code Act. He was sentenced to 20 years imprisonment and he now appeals against sentence only.

Background to the appeal

The facts giving rise to this appeal as far as we could ascertain from the record are that on 19/04/2012 at around midnight the appellant went to the home of the victim, Yacinta Ladu an 87 year old woman and forcefully had sexual intercourse with her while squeezing her neck. When the victim raised an alarm, the neighbors responded to it but the appellant escaped. He

5 was chased and arrested immediately. The medical examination report
indicated that the victim had bruises on her neck. Subsequently, the
appellant was indicted and he pleaded guilty to the offence of rape contrary
to sections 123 and 124 of the Penal Code Act. He was convicted of that
offence on his own plea of guilty and sentenced to 20 years imprisonment.

10 Being dissatisfied with the decision of the trial Judge, the appellant appealed
to this Court against sentence only. The two grounds of appeal are set out
as follows;

*"1. That the learned trial Judge erred in law and fact when he failed to
comply with article 23 (8) of the Constitution of the Republic of Uganda.*

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*2. Alternatively, that the learned trial Judge erred in law and fact when
he passed a manifestly harsh and excessive sentence of 20 years
against the appellant."*

Representations

20 At the hearing of this appeal, learned counsel Ms. Akello Alice Latigo
represented the appellant on state brief while Ms. Rose Tumuhaise learned
Principle State Attorney from the Office of the Director Public Prosecutions
represented the respondent.

Case for the appellant

25 The appellant was granted leave to appeal out of time and the notice of
appeal that was filed out of time was regularized. He was also granted leave
to appeal against sentence alone.

5 On ground 1, counsel submitted that the learned trial Judge did not comply
with Article 23 (8) of the Constitution while passing the sentence of 20 years
against the appellant, because he did not deduct from the sentence the
period of 1 year and 2 months the appellant had spent on remand. She cited
the Supreme Court decision in ***Rwabugande Moses vs Uganda, SCCA No.***
10 ***25 of 2014*** at page 16 where it was held that:

*“...consideration of the remand period should therefore necessarily mean
reducing or subtracting that period from the final sentence...”*

She urged this Court to find the sentence a nullity. She proposed that an
appropriate sentence of 10 years be imposed. She further prayed that the
15 period of 1 year and 2 months spent on remand be deducted from the 10
years so that the appellant now serves a period of 8 years and 10 months in
prison.

The respondent's reply

Counsel for the respondent conceded that the sentence having been passed
20 in contravention of Article 23 (8) of the Constitution is a nullity. He asked this
Court to invoke section 11 of the Judicature Act which permits this Court to
exercise the power of the trial court to impose a sentence of its own. He
proposed a sentence of 10 years imprisonment, considering that the
appellant had pleaded guilty to the offence. She further prayed that the
25 period of 1 year and 2 months the appellant had spent on remand be
deducted from the sentence of 10 years imprisonment.

5 **Court's consideration**

It is common ground that the learned trial Judge did not, while passing the sentence take into account the provision of Article 23 (8) of the Constitution. The Article provides as follows;

10 *“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.”*

We have carefully studied the court record and considered the submissions and authorities of both counsel. We note that while sentencing the appellant,
15 the trial Judge stated as follows:

20 *“The convict, in his late teens, committed the offence of rape against an old woman of 87 years. I find this as repugnant as having sex with a child of less than ten years. He should have instead given the poor old woman, who is by all account his grandmother due respect and protection instead of subjecting her to the savages of sexual intercourse which she naturally had retired from ages before this dastardly act. He has brought great shame and indignity to the lady. She will go to her grave with this shameful deed imprinted on her mind.*

25 *However, the convict has consistently owned up to the culpable deed right from the arrest to the moment of taking plea. I noticed that he has shown genuine remorse for his actions. I therefore spare him of the death sentence and instead sentence him to 20 (twenty) years in prison. This I believe will enable him reflect on his role in society, and*

5 *come out a better person both to himself and society at large. Right of appeal against sentence explained.*”

It is clear that the trial Judge did not consider the period the appellant had spent on remand. This contravened Article 23 (8) of the Constitution and according to the Supreme Court decision in ***Rwabugande vs Uganda*** 10 ***(supra)***, such a sentence is illegal for failure to comply with a mandatory constitutional provision. We therefore set it aside and invoke ***section 11 of the Judicature Act*** which gives this Court the powers, authority and jurisdiction as that of the trial court to impose an appropriate sentence of its own.

15 We have also taken into consideration the gravity of the offence, the fact that the victim was a very old woman aged 87 years. The offence was committed violently with brutal force. There are however, some mitigating factors in favor of the appellant that, he is a first offender and readily pleaded guilty to the offence saving court’s time and resources, he is also remorseful and he 20 started right from police. We further take into consideration the prayers of both counsel that this Court imposes a sentence of 10 years imprisonment and the period the appellant spent on remand of 1 year and 2 months be deducted from it.

In ***Lugi Sairus vs Uganda, CACA No. 50 of 2000***, the appellant who raped 25 his neighbor was convicted of the offence of rape and sentenced to 13 years imprisonment. On appeal, that sentence was reduced to 10 years on the ground that it was so manifestly excessive as to cause a miscarriage of justice.

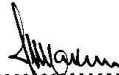
5 In ***Boona Peter vs Uganda, CACA No. 16 of 1997***, the appellant was
convicted by the High Court of rape and was sentenced to 10 years
imprisonment. His appeal against sentence on ground of its being manifestly
excessive was rejected by this Court which confirmed the sentence.

10 In ***Kalibobo Jackson vs Uganda, CACA No. 45 of 2001***, the appellant
aged 25 years raped a 70 year old widow and was convicted of the offence
of rape. He was sentenced to 17 years imprisonment and on appeal, this
Court reduced the sentence to 7 years imprisonment.

15 We have taken into account both the aggravating and mitigating factors set
out above and the range of sentences for the offence of rape in the above
cited authorities and others that we have not cited. We find a sentence of 10
years imprisonment appropriate in the circumstances of this case. However,
as required by Article 23 (8) of the Constitution, we deduct the period of 1
year and 2 months the appellant had spent on remand and sentence him to
20 7 years and 10 months to be served from the date of his conviction, which is
18/06/2013.

We so order.

Dated at Gulu this 7th day of November 2017

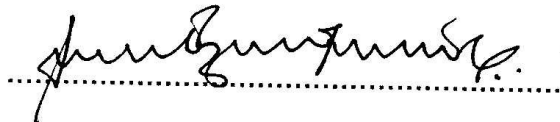


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Hon. Mr. Justice Kenneth Kakuru

JUSTICE OF APPEAL

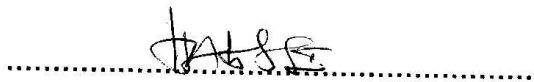
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Hon. Mr. Justice F.M.S Egonda-Ntende

JUSTICE OF APPEAL

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A handwritten signature in black ink, appearing to read 'Hellen Obura', is written above a horizontal dotted line.

Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL