THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

CRIMINAL APPEAL NO 287 OF 2010

(Coram: Egonda – Ntende, Obura & Madrama, JJA)

SEBANDEKE ABDU}..... APPELLANT

VERSUS

UGANDA}..... RESPONDENT

(Appeal from the judgment of the High Court of Uganda at Kampala (Katutsi, J) delivered on 11th October, 2010)

JUDGMENT OF THE COURT

The appellant was charged, tried and convicted of the offence of Rape contrary to sections 123 and 124 of the Penal Code Act, Cap 120 and sentenced to 20 years imprisonment. The facts were that the appellant on 1st May, 2008 at Bubare Village in Kamwenge District had unlawful carnal knowledge of one NS a woman over 80 years of age without her consent. The appellant being aggrieved with the sentence of the High Court and with the leave of court appealed to this court on one ground of appeal set out in the Memorandum of Appeal as follows:-

> "That the learned trial judge erred in law in sentencing the appellant to an illegal, harsh and manifestly excessive sentence of 20 years in the circumstances."

Representation

At the hearing of the appeal, the appellant was represented by learned counsel Mr Cosmas Kateeba assisted by learned counsel Mr Claude

Arinaitwe while the respondent was represented by learned Senior Assistant Director of Public Prosecutions Mr David Ndamurani Ateenyi.

Submissions of the appellant

The appellant's counsel relied on written submissions which had been filed on record while the respondent's counsel addressed the court orally. Learned counsel for the appellant demonstrated in submissions that the learned trial judge while sentencing the appellant did not take into account the period of remand of two years and seven months that the appellant spent in lawful custody before his conviction and sentence. He submitted that this contravened Article 23 (8) of the Constitution of the Republic of Uganda as interpreted in the case of **Rwabugande Moses v Uganda; Supreme Court Criminal Appeal No. 25 of 2014.** The gist of this submission is that the period in lawful custody prior to conviction and sentence has to be taken into account and applied to the credit of the convict by deducting it from the sentence imposed by the trial court. He invited the court to set aside the sentence imposed and invoke its powers under section 11 of the Judicature Act Cap 13 laws of Uganda 2000, to sentence the appellant to an appropriate sentence.

On the second limb of the sole ground of appeal, Mr. Kateeba submitted that the sentence of 20 years imprisonment is harsh and excessive in the circumstances of the case. He submitted that in deciding on an appropriate sentence, the court must for reason of parity of sentences consider previous sentences imposed in similar cases bearing in mind that no two cases are alike. The appellant's counsel relied on the case of **Otema David v Uganda; Court of Appeal Criminal Appeal No 155 of 2008**. In that case the appellant was a first offender aged 36 years at the time of commission of the offence and had been on remand for seven years. He had been sentenced to 13 years imprisonment by the High Court. On appeal, the Court of Appeal found that the 13 years' sentence of imprisonment was

harsh and excessive, set it aside and substituted it with a sentence of seven years imprisonment effective from the date of conviction. Secondly, in **Naturinda Tamson v Uganda; Court of Appeal Criminal Appeal No 13 of 2011,** the appellant had spent two years on remand and had been convicted of rape and sentenced to 18 years imprisonment. This court found this to be manifestly harsh and excessive and out of range with similar cases and reduced the sentence accordingly to 10 years imprisonment. Mr Kateeba submitted that a sentence of 20 years imprisonment imposed on the appellant is manifestly harsh and excessive and invited the court to set it aside. He submitted that the appellant was a young man aged 20 years at the time of commission of the offence, was a first offender and would ordinarily not deserve a stiff sentence. He prayed that a sentence of 9 years imprisonment should be considered as appropriate in the circumstances of the case and prayed that the court takes into account and deducts therefrom the three years of pre-conviction remand and sentences the appellant to six years imprisonment effective from the date of conviction.

Lastly, the appellant's counsel submitted that this court in **German Benjamin v Uganda; Court of Appeal Criminal Appeal No 142 of 2010** held that courts should not lean more on the punitive side of sentencing and lose out on the most crucial element of sentencing which is the rehabilitation of the offender. A long custodial sentence would militate against rehabilitation and reform of the offender. He invited the court to be pleased to allow the appeal and set aside the 20 years imprisonment imposed on the appellant and substitute it with a sentence of 9 years imprisonment effective from the date of conviction.

Submissions of the respondent

In reply the learned Senior Assistant and Director of Public Prosecutions Mr David Ndamurani Ateenyi conceded to the first limb of the submissions of

the appellant's counsel that the sentence imposed as a matter of fact did not take into account the period the appellant spent in lawful custody prior to his conviction and this contravened the provisions of Article 23 (8) of the Constitution of the Republic of Uganda. Consequently, the sentence was illegal. On the second limb of the ground of appeal, he submitted that the sentence was not harsh or excessive. While he agreed that the court should exercise its powers under section 11 of the Judicature Act to mete out a sentence that was lawful, he prayed for a deterrent sentence on the ground that the appellant had ravished an elderly lady of 80 years of age. This aggravated the offence. He proposed a sentence of 25 years imprisonment from which the period of two years and seven months that the appellant had spent in lawful custody prior to his conviction can be deducted.

Consideration of the appeal

We have considered the submissions of counsel, the precedents cited as well as the applicable law generally. This is a first appeal and our duty ordinarily is to retry matters of fact by subjecting the evidence on record to fresh scrutiny and to reach our own conclusions on any factual controversies for resolution. In this appeal we are required to consider the aggravating and mitigating facts to determine what an appropriate sentence ought to be. There is no controversy of fact for consideration and determination. The general duty of this court is stipulated by **Rule 30 (1) (a)** of Rules of this Court and is to re-appraise the evidence and draw inferences of fact. In the exercise of that duty we should be aware that we do not have the advantage of having seen nor heard the witnesses testify and should made due allowance in that regard (see **Pandya v R [1957] EA 336, Selle and Another v Associated Motor Boat Company [1968] EA 123**), **Kifamunte Henry v Uganda; SCCA No. 10 of 1997**and **Bogere Moses and Another v Uganda, Supreme Court Criminal Appeal No. 1 of 1997)**.

On the first limb of the ground of appeal which is to the import that sentence is illegal, we agree that the law and judicial precedents relied on by the appellant's counsel reflects the law and interpretation of the courts. Article 23 (8) of the Constitution of the Republic of Uganda expressly stipulates that:

> "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."

Without detracting from the judicial precedents such as in **Abelle Asuman v Uganda; Supreme Court Criminal Appeal No of 20** where Article 23 (8) of the constitution of the Republic of Uganda was considered, we would like to highlight the article itself. It is very clear in its wording that any period a convict spent 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. So the period spent in lawful custody in respect of the offence before completion of the trial shall be taken into account in imposing the term of imprisonment. It is the duty of the judicial officer imposing the term of imprisonment who should compute that period for purposes of taking it into account in imposing a term of imprisonment.

In this case as a matter of fact the learned trial judge held as follows:

> "The convict sexually abused an old woman fit to be his grandmother. He is a real criminal for I cannot imagine what he was looking for in a woman who is over 80 years. He is a danger to the community and deserved to be kept away from the community. I deem a sentence of 20 years to be on the lenient side."

The express words "I deem a sentence of 20 years to be on the lenient side" do not explicitly impose any sentence of imprisonment. We agree with the criticism levelled on that sentence by the learned counsel for the appellant

that the wording leaves a lot to be desired. Nonetheless, it was interpreted to have imposed a period of 20 years imprisonment on the appellant without taking into account the period of two years and seven months that the appellant had spent in lawful custody prior to his conviction and sentence. We agree with the law that such a sentence is in contravention of Article 23 (8) of the Constitution the Republic of Uganda and we accordingly set aside the sentence of 20 years imprisonment and would consider an appropriate sentence under our jurisdiction found in section 11 of the Judicature Act to exercise any powers of the High Court.

Because the sentence is illegal and has been set aside, we will move straight away to consider what an appropriate sentence ought to be.

Was the sentence disproportionate to that in previous precedents of the Court of Appeal and Supreme Court in rape cases? We note that the appellant is a first offender with no previous record. Further, the appellant was about 20 years of age and this was not taken into account in imposing the appropriate sentence. There are several judicial precedents on sentencing in cases of rape and we have considered a few for guidance and consistency. We agree with the appellant's counsel that there should be consistency in sentencing which in many respects is founded on the doctrine of equality before and under the law in terms of Article 21 (1) of the Constitution of the Republic of Uganda provides that:

> "21. Equality and freedom from discrimination.
>
> (1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

Equality before and under the law as well as equal protection of law is the grand norm on which to place the precedents which hold that similar offences committed under similar circumstances should attract similar

sentences and variation should only be accounted for or explained by the peculiar mitigating or aggravating circumstances of each case.

In the case of **Kajungu Emmanuel v Uganda; Court of Appeal Criminal Appeal No 625 of 2014** the Court of Appeal held that one of the principles of appropriate sentencing is the need to maintain uniformity of sentences.

As far as the appellant's age is concerned, we have considered the fact that at 20 years of age when he committed the offence; he was relatively young and deserved rehabilitation and reintegration in society. In **Kabatera Steven v Uganda; Court of Appeal Criminal Appeal No. 123 of 2001** this court held that the age of an accused person is always a material factor that ought to be taken into account before a sentence is imposed and held that:

> "...the learned trial Judge should have considered the age of the appellant at the time he committed the offence before passing sentence. He was a young offender and a long period of imprisonment would not reform him. "

Regarding consistency in sentencing, we have considered the precedents. In **Okot David v Uganda; Court of Appeal Criminal Appeal No 0622 of 2014,** the appellant had been indicted and convicted on his own plea of guilt for the offence of rape contrary to sections 123 and 124 of the Penal Code Act and sentenced to 20 years imprisonment by the High Court. On appeal against sentence, this court reviewed similar cases on sentences and reduced the sentence to 10 years imprisonment. In **Otema David v Uganda; Court of Appeal Criminal Appeal No 155 of 2008,** the appellant was convicted by the High Court of the offence of rape contrary to sections 123 and 124 of the Penal Code Act and sentenced to 13 years imprisonment as well as ordered to pay compensation of Uganda shillings 300,000/= within six months from the date of sentence. On his appeal

against sentence to the Court of Appeal on the ground that the sentence imposed was harsh and manifestly excessive, this court held that:

> "He had spent seven years on remand prior to his trial and conviction. This was done in ordinate delay in determining his fate. He was 36 years old at the time of the commission of the offence. He committed a very serious offence whose maximum punishment is death. Nevertheless, as a first offender, he would not ordinarily face a maximum punishment of death.
>
> We are satisfied that the sentence of 7 years imprisonment from the date of conviction (26th November, 2008) will meet the ends of justice in this case."

In **Kalibobo Jackson v Uganda; Criminal Appeal No 45 of 2001**, a 25 year old appellant raped a 70 year old woman and was sentenced to 17 years imprisonment by the High Court. On appeal, this court reduced sentence to 7 years imprisonment on the ground that 17 years imprisonment is harsh and excessive. In **Naturinda Tamson v Uganda; Court of Appeal Criminal Appeal No 13 of 2011**, the appellant was convicted and sentenced to 18 years imprisonment for the offence of rape by the High Court. The appellant had spent two years in lawful custody before his conviction and sentence by the High Court. On appeal, to this court, it held that the sentence of 18 years imprisonment was manifestly harsh and excessive and reduced it to 10 years imprisonment.

The judicial precedents demonstrate a range of sentences of between 15 years on the higher end and about 10 years on the lower end of terms of imprisonment.

Considering the fact that the appellant was about 20 years old at the time of commission of the offence he deserves a term of imprisonment that factors in his rehabilitation and reintegration into society to start his life afresh. We are mindful of the fact that the appellant committed a serious offence aggravated by the fact that he ravished an old woman of over 80 years of age.

We accordingly allow the appeal and having set aside the sentence of the High Court as an illegality, we exercise the powers of the High Court under section 11 of the Judicature Act and the powers of this court under section 34 (2) (b) and (c) of the Criminal Procedure Code Act, and would impose a sentence of 15 years imprisonment as appropriate in the circumstances. From this we deduct the period of 2 years and 7 months that the appellant spent in lawful custody. We accordingly sentence him to 12 years and 5 months imprisonment which sentence shall run from the date of conviction on 15th October 2010.

Dated at Fort Portal the 20th day of June 2019

Frederick Egonda – Ntende

Justice of Appeal

Hellen Obura

Justice of Appeal

Christopher Madrama

Justice of Appeal