THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MASAKA
CRIMINAL APPEAL No. 0616 OF 2014
(Arising from High Court of Uganda at Masaka Criminal Session Case No. 0004/2013)

KANSIIME BERNARD :::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :::::::::::::::::::::::::::::::: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Masaka before Oguli-Oumo, J. delivered on 22nd April, 2013 in Criminal Session Case No. 0004 of 2013)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA
HON. MR. JUSTICE REMMY KASULE, AG. JA

JUDGMENT OF THE COURT

Brief Background

The appellant was convicted of the offence of Rape contrary to sections 123 and 124 of the Penal Code Act, Cap. 120 on his own plea of guilty and was sentenced to serve a term of imprisonment of 19 years by the trial Court. The facts to which the appellant pleaded guilty as read to him by the prosecution are reproduced verbatim below and were that:

> **"On 7th June, 2011, the victim's husband fell sick and was admitted at a private clinic in Katovu Trading Centre. On the same day at around 8.00 p.m, the appellant went to the victim's home claiming that he was a boda boda rider who had been sent to take beddings to the clinic where the victim's husband was admitted. The victim accordingly arranged the beddings where after the appellant requested the victim to escort him to where he had parked his boda boda motorcycle.**
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> **When they had moved a distance from the victim's house, the appellant said his motorcycle had been stolen and requested the victim to help him search in the bushes around. Upon embarking on the search, the**

appellant instead pushed the victim down, pulled out a knife and forced her to do sexual intercourse. During this time the victim alarmed for help. Due to the alarm, the appellant first ran some distance but later came back and continued to beat up the victim with a view (sic) of threatening her. The appellant cut off the victim's fingers in the process.

When the appellant heard people come to rescue the victim, he ran around until he was arrested on 22nd January, 2012 over one year later. The victim was examined on Police Form 3 and found to be 20 years old. There were signs of penetration of her private parts. She had sustained prick wounds around her neck. There were cuts on her index finger, and middle finger. The appellant was examined on Police Form 24. He was found to be 33 years old and of normal mental status. He was charged with rape."

When the above facts were put to him, the appellant confirmed the same to be correct. He was thereafter duly convicted and sentenced as indicated above. The appellant was dissatisfied with the sentence imposed on him and preferred the present appeal against sentence only on the sole ground that:

> **"The learned trial Judge erred in law and fact by sentencing the appellant to 19 years imprisonment which was manifestly harsh and excessive."**

Representation

At the hearing of the appeal, Mr. Tusingwire Andrew, learned Counsel represented the appellant on State Brief, while, Mr. Nkwasibwe Ivan, learned Senior State Attorney from the Office of the Director of Public Prosecutions, represented the respondent. Counsel for each side made oral submissions which this Court considered in determining the present appeal.

Appellant's Case

In his submissions, counsel for the appellant, after rightly recognizing that the appellant could appeal against the trial Court's sentence alone in this Court, after obtaining leave of this Court, proceeded to make an application for leave to appeal against sentence only. The said Application was brought under **Section 132 (1) (b)** of the **Trial on Indictments Act, Cap. 23**

and **Rule 43 (3) (a)** of the **Judicature (Court of Appeal Rules) Directions S.I 13-10.** Court granted Counsel for the Appellant leave to Appeal against sentence only.

In his submissions, Counsel for the appellant conceded that the relevant mitigating and aggravating factors were taken into account prior to imposing the relevant sentence on the appellant by the learned trial Judge. He also conceded that the relevant sentence was legal as the period the appellant had spent on remand while attending trial was also taken into account. Counsel's only prayer was that this Court should invoke **Section 11** of the **Judicature Act, Cap. 13** to reduce the sentence of 19 years imprisonment which was imposed on the appellant to a more lenient sentence. Counsel promised to furnish this Court with an authority to show that 19 years imprisonment in cases of rape is harsh and excessive but he failed to do so. Therefore, the gist of the Appellant's appeal was that he deserved a more lenient sentence than the sentence of 19 years imprisonment which was imposed by the learned trial Judge.

Respondent's case

Mr. Nkwasibwe for the respondent, opposed the appeal and submitted that the learned trial Judge rightly sentenced the appellant to 19 years imprisonment. In support of the foregoing submission, counsel pointed out that the offence of rape for which the appellant was convicted was grave in nature and attracted the maximum sentence of death. Further, that the learned trial Judge had carefully considered both the mitigating and aggravating factors and thereafter she had deemed the relevant sentence appropriate.

Counsel then furnished Court with several precedents of this Court where it was decided that the sentencing range for convicts of rape was between 15 years to 17 years imprisonment. Counsel referred to the decision of this Court in **Yebuga Majid vs Uganda, Criminal Appeal No. 0303 of 2009**, where the Court upheld a sentence of 15 years imprisonment which had been imposed by the trial Court for the offence of rape. Further in **Mubogi**

Twairu Siraji vs. Uganda, Court of Appeal Criminal Appeal No. 20 of 2006, the Court imposed a sentence of 17 years imprisonment for rape after it had set aside the sentence of 15 Years imprisonment passed by the trial Court which it had deemed to be illegal. He submitted that the sentence of 19 years imprisonment which was imposed by the learned trial Judge was appropriate and not excessive in light of the above mentioned authorities. He then humbly prayed that this Court finds no merit in this appeal, dismisses the same and upholds the sentence of 19 years imprisonment imposed by the trial Court.

Resolution of the Appeal

We have carefully considered the submissions of counsel for each side, the court record as well as the law and authorities cited, and those not cited, which are relevant in the determination of the present appeal. This is a first appeal and we are alive to the duty of this Court as a first appellate court to reappraise the evidence and come up with its own inferences. **See: Rule 30 (1) of the Rules of this Court and Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997.**

We must emphasize that the above stated duty is not diminished in appeals concerning sentence alone, like the present appeal. Even in such cases, the first appellate Court must reappraise the evidence, and make up its mind on whether the sentence imposed by the trial Court may be sustained.

It is established by law that:

> **"...an accused person may, with leave of the Court of Appeal, appeal to the Court of Appeal against the sentence alone imposed by the High Court, other than a sentence fixed by law and on any such appeal, the Court of Appeal may confirm or vary the sentence."** See: Section 132 (1) (b) & (e) of the Trial on Indictments Act, Cap. 23.

The powers of an appellate Court in appeals against sentences alone have been re-stated in several decided cases. The most oft-cited passage on the subject appeared in the reported decision of the historical East African Court of Appeal of **Ogalo s/o Owoura v. R (1954) 21 E.A.C.A. 270** as follows:

> **"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."**

The above passage was cited with approval by the Supreme Court in **Livingstone Kakooza vs Uganda, Criminal Appeal No. 17 of 1993** and in many other cases since. The legal position which is discernible from the above passage is that the powers of the appellate Court to alter a sentence imposed by the trial Court may only be invoked in narrow and limited circumstances where; one, the trial Court acted on wrong material or overlooked some material factor prior to imposing the relevant sentence, or two, where the sentence imposed was harsh and excessive in light of sentences imposed in previous cases of a similar nature.

The jurisprudence of the Supreme Court further establishes the principle that passing an appropriate sentence is the discretion of the trial Court which should not be interfered with lightly. In **Kyalimpa Edward vs Uganda, Supreme Court Criminal Appeal No. 10 of 1995** it was held thus:

> **"An appropriate sentence is a matter for the discretion of a sentencing Judge. It is the practice that as appellate court, this court will not normally interfere with the discretion of sentencing unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly excessive as to amount to an injustice."**

In **Aharikundira Yusitina vs. Uganda Criminal Appeal No. 0027 of 2015**, the Supreme Court expanded the principles on altering a sentence imposed by the trial Court observing that the Supreme Court (or any other appellate Court) should not serve merely to rubberstamp the sentences imposed by the trial Court but should examine them for their propriety. The Supreme Court further suggested that the propriety of a sentence imposed by the trial Court could be assessed on whether, prior to passing the relevant sentence, the trial Court applied the consistency principle. The Court stated that:

> **"It is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation."**

However, in the subsequent case of **Kaddu Kavulu Lawrence vs Uganda, Supreme Court Criminal Appeal No. 72 of 2018** delivered on 22nd August, 2019, the Supreme Court appeared to cast doubt on the application of the consistency principle when it ignored arguments about reliance on precedents in sentencing. The said decision would imply that where the lower court has taken into account the relevant aggravating and mitigating factors prior to passing a sentence, its decision should not be altered merely on grounds that the sentences imposed therein appeared harsher than those imposed in the relevant precedents. It was observed that:

> **"Counsel for the appellants presented to court related cases where the appellants were sentenced to lesser prison terms and in his view the Court of Appeal ought to have taken those into consideration and given the appellant a somewhat similar sentence. It is our view that an appropriate sentence is the matter for the discretion of a sentencing court. Each case presents its own facts upon which a Court exercises its discretion. The offence of murder attracts a maximum sentence of death and the appellant was given a sentence of life imprisonment which is a legal sentence. We find no reason to disturb the sentence and uphold the same."**

The Kaddu case (supra) casts doubt on the consistency principle which was articulated in Aharikundira (supra). However, the consistency principle has not explicitly been declared to be bad law by the Supreme Court. As such, we believe that it may still be followed.

Back to the present appeal, counsel for the appellant asked this Court to alter the sentence of the trial Court only on grounds that there was a possibility that the appellant would have been sentenced to a more lenient sentence. The appellant appeared to ask this Court to depart from the well-established principles as articulated in **Ogalo s/o Owuora (supra)** that:

> **"The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge as was said in JAMES v REPUBLIC 1950 18 EACA 147 unless It is evident that the judge has acted upon some wrong principle or overlooked some material factors. To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case."**

We shall refrain from altering the relevant sentence since it was conceded for the appellant that the learned trial Judge took into account all the relevant mitigating and aggravating factors before imposing the relevant sentence. Given that the offence of rape would attract the maximum death sentence, the learned trial Judge was well within the accepted range of sentences when she imposed the relevant sentence of 19 years imprisonment.

Moreover, it was not demonstrated by counsel for the appellant, that the sentence imposed by the trial Judge was out of the sentencing range established by the precedents in this Court relative to the offence of rape. On the contrary, counsel for the respondent cited two authorities wherein it was stated that sentences of between 15 years to 17 years imprisonment have been confirmed by this Court in earlier precedents. The said authorities would suggest that a sentence of 19 years imprisonment is not excessive. As stated earlier, such precedents are relevant in assisting an appellate Court to reach a decision whether or not to alter the sentence imposed by the trial Court on the basis of the consistency principle.

All in all, in view of the above analysis, we find no reason to disturb the sentence imposed by the learned trial Judge and we maintain it. This Appeal, therefore, fails and is hereby dismissed.

We so order.

Dated at Masaka this 9th day of Dec 2019.

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Elizabeth Musoke

Justice of Appeal

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Ezekiel Muhanguzi

Justice of Appeal

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Remmy Kasule

Ag. Justice of Appeal