THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT MBALE

(Coram: Egonda-Ntende, Cheborion Barishaki, Muzamiru Kibeedi, JJA)

CRIMINAL APPEAL NO.268 OF 2017

KARIBASENYI ERISA :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

[Arising from the decision of the High Court sitting at Iganga (Hon. Lady Justice Alividza Elizabeth Jane) dated 1/4/2014 in Criminal Session Case No.199 of 2011]

JUDGMENT OF THE COURT

The appellant was indicted and convicted of the offence of Rape contrary to Sections 123 and 124 of the Penal Code Act, Cap 120 and sentenced to 27 years' imprisonment. The particulars of the offence were that on the 3rd day of April 2011 at Nawaka "B" Village, Ikumbya sub-county in Luuka District, the appellant had unlawful carnal knowledge with Naigaga Joy without her consent.

Background Facts

The background to the case as established by the trial court was that on 03.04.2011 while the victim, Naigaga Joy, was digging up potatoes in the garden, the appellant attacked her and had sexual intercourse with her without her consent. She went back home and informed her husband, Bafirawala Godfrey. The matter was reported to the police. The Police

Officer, PC Okiring Emmanuel, visited the scene of the crime and noted signs of scuffle. He made a Sketch Plan which he tendered in Court. The victim was examined by a Medical Doctor, Dr. Bamudaziza, who testified that she had bruises and injuries consistent with use of force and resistance during the sexual act. The Medical Report PF3 was also tendered in evidence.

The appellant denied the offence and stated that he never raped the victim and that the charge was as a result of a grudge the victim's husband, Bafirawala Godfrey, had against him for taking his wife.

After a full trial, court convicted the appellant of rape and sentenced him to 27 years' imprisonment.

Being dissatisfied with the sentence, the appellant appeals against sentence only on one ground namely:

1. **That the Learned Trial Judge erred in law and/or fact when she sentenced the Appellant to a harsh and/or excessive sentence of 27 years.**

Representations

At the hearing of the appeal, the appellant was represented by Ms. Kanyago Agnes and the respondent represented by Mr. Ojok Alex Michael, an Assistant Director of Public Prosecutions from the Office of the Director of Public Prosecutions.

Both parties filed written submissions which they adopted when the appeal came up for hearing.

Appellant's Submissions

Counsel submitted that the sentence of 27-years' imprisonment was a harsh and/or excessive sentence.

Counsel submitted that the mitigating factors advanced by the appellant and the circumstances of the case warranted the sentencing Judge to exercise her sentencing discretion by handing the appellant a lenient sentence and not the 27 years as she did. The mitigating factors not considered by the trial judge were that the appellant was a first time offender, was aged 20 years, was a bread winner for his family and grandfather, was remorseful and had indeed reformed by the time of conviction and sentence.

Counsel also premised her argument on **paragraph 6(c) of the Sentencing Guidelines** which states that "**... every Court shall when sentencing an offender take into account the need for consistency with appropriate sentencing level...**". *She* submitted that had the sentencing Judge taken into account earlier decisions of similar facts, then she would have handed the appellant a more lenient sentence but not the 27-year imprisonment term which was harsh and excessive. She relied on the case of Tukamuhebwa David Junior & Anor Vs Uganda SCCA No.59 of 2016 where the Supreme Court handed the appellants a 10 years imprisonment term for the offence of rape.

Counsel prayed that this Honourable Court exercises its jurisdiction under **Section 11 of the Judicature Act, Cap.13** to quash the 27- year imprisonment term and substitute the same with a 10- year imprisonment term and that the appeal succeeds.

Respondent's Submissions.

Counsel for the respondent opposed the appeal and argued that an appropriate sentence is a matter for the discretion of the sentencing Judge. He relied on the case of Karisa Moses Vs Uganda SCCA No.23 of 2016.

Counsel also submitted that it is the practice that as an appellate court, this court will normally not interfere with the discretion of the sentencing Judge unless the sentence passed is illegal or unless court is satisfied that the sentence imposed by the trial Judge was manifestly so excessive so as to amount to an injustice. He relied on the cases of Ogalo s/o Owoura V R (1954) EACA 270, R v Mohamedah Jamal 1948 1 EACA 126 and Kiwalabye Bernard Vs Uganda Criminal Appeal No. 143 of 2001.

Counsel submitted that a sentence of 27 years was appropriate in the circumstances and prayed that the appeal be dismissed.

Consideration of the appeal by Court

For this court, as a first appellate court, to interfere with the sentence imposed by the trial court, it must be shown that the sentence is illegal, or founded upon a wrong principle of the law, or that the trial court failed to take into account an important matter or circumstance, or made an error in principle, or imposed a sentence which is harsh and manifestly excessive in the circumstances. (See Kamya Johnson Wavamuno Vs Uganda, Supreme Court Criminal Appeal No. 16 of 2000 (Unreported); Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001 (unreported); Wamutabanewe Jamiru Vs Uganda, Supreme Court Criminal

Appeal No. 74 of 2007 and Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014).

The complaint of the appellant under this appeal is that the sentence of 27 years' imprisonment was harsh and excessive

The respondent's counsel disagreed.

In sentencing the Appellant to 27 years' imprisonment, the trial judge stated thus:

> *"The convict has been on remand for 3 years thus reducing the sentence to 32 years. The accused is a first offender and is young. I also reduce 5 years from his remaining 32 years, leaving 27 years imprisonment. I find that this appropriate sentence will serve as a deterrent sentence to other would be rapists."*

From the above, it is apparent that the trial judge took into consideration most of the mitigating factors being complained about by the appellant.

However, there is no indication that the Trial judge considered any decided cases of a similar nature while sentencing the appellant as required by the Sentencing Principle No.6(c) of the Constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions, 2013 – Legal Notice No.8 of 2013 which provides that:

> *"Every court shall when sentencing an offender take into account ... the need for consistence with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances."*

In the case of Aharikundira Yustina Vs Uganda, Supreme Court Criminal Appeal No. 27 of 2015, the Supreme Court had this to say about consistency of sentences:

"...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."

This court in Atukwasa Jonan & 6 others vs Uganda, Court of Appeal Criminal Appeal No. 168 of 2018, likewise observed thus:

"We also note that there is need for parity in sentencing. Therefore, we have to take into consideration the sentences the Supreme Court and this court have imposed on offenders in similar circumstances. Objective 3 (e) of the Constitution (Sentencing Guidelines for Court of Judicature) (Practice) Directions, 2013 provides that guidelines should enhance a mechanism that will promote uniformity, consistency and transparency in sentencing. The ultimate responsibility to determine appropriate sentences lies with the Court by weighing all relevant facts and then exercising its discretion judiciously."

In Umar Sebidde Vs Uganda, Supreme Court Criminal Appeal No.23 of 2002, the appellant was tried, convicted and sentenced to 11 years for rape. On appeal the sentence was reduced to 8 years' imprisonment.

In Kizito Nuhu Wasswa Vs Uganda, Court of Appeal Criminal Appeal No.89 of2013,the appellant was convicted by the trial court of rape of a woman of 24 years and sentenced to 12 years. On appeal the sentence was reduced to 8 years and 3 months.

1n Lugi Sairus v Uganda, CA Criminal Appeal No.50 OF 2000, (unreported) the appellant who raped his neighbour was convicted of the offence of rape and sentenced to 15 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.

1n Boona Peter v Uganda. CA Criminal Appeal No. 18 Of 1997, (unreported) the appellant was convicted by the High Court of rape and

was sentenced to 10 years imprisonment. His appeal against sentence on the ground that the sentence was manifestly excessive was rejected and the sentence was confirmed.

1n the case of Otema Vs Uganda, CA Criminal Appeal No. 155 of 2008, (unreported) the appellant was convicted by the High Court for the offence of rape and was sentenced to 13 years of imprisonment. On appeal, the sentence was reduced to 7 years' imprisonment

In light of the above comparative decisions, the failure of the trial judge to consider the principle of consistency in sentencing of the Appellant occasioned injustice leading to a harsh and manifestly excessive sentence being imposed upon the appellant. This would entitle this court to interfere with the sentence of 27 years' imprisonment.

Decision.

1. Having taken into account both the aggravating and mitigating factors presented before the trial court and the principle of parity in sentencing, we consider that a term of 10 years imprisonment would meet the ends of justice in the circumstances of this case.

2. From that sentence we deduct the period of 3 years the appellant spent on pre-trial detention.

3. We therefore sentence the appellant to a term of 7 years' imprisonment to be served from 1st of April, 2014, the date of conviction.

We so order

Signed, dated and delivered this ..15th.....day of September.....2020.

FREDRICK EGONDA-NTENDE

Justice of Appeal

CHEBORION BARISHAKI

Justice of Appeal

MUZAMIRU KIBEEDI

Justice of Appeal