THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT LIRA

CONSOLIDATED CRIMINAL APPEALS NO. 635 OF 2014 & NO. 757 OF 2015

(Elizabeth Musoke, Hellen Obura, Remmy Kasule, JJA)

ADIGA ADINANI :: **APPELLANT**

VERSUS

UGANDA :: **RESPONDENT**

(Appeal from the decision of the High Court of Uganda at Arua, before Hon. Justice Okwanga T. Vincent in Criminal Session Case No. 052 of 2012, dated 14/01/2014).

JUDGMENT OF THE COURT

Introduction

This is an appeal against both conviction and sentence arising from the decision of Hon. Justice Okwanga T. Vincent, whereby he convicted the appellant on a charge of rape contrary to sections 123 and 124 of the Penal Code Act. The appellant was then sentenced to 36 1/2 years imprisonment upon conviction.

Background to the Appeal

The facts giving rise to this appeal as found by the learned trial Judge were that on 24th April 2011, at Okubani Village in Yumbe District, the appellant had unlawful sexual intercourse with Maneno Samira, the victim without her consent.

The appellant denied the offence. In his unsworn testimony in Court, he admitted having assaulted the said Maneno Samira for allegedly committing adultery with another man in his house.

The trial Judge believed the prosecution evidence, convicted the appellant and sentenced him to 36 1/2 years imprisonment. Being dissatisfied with the decision, the appellant appealed to this Court against both conviction and sentence.

Grounds of Appeal

1. *The Learned trial Judge erred when he ignored and failed to take into consideration medical evidence in PF3, its appendix and the evidence on record, thereby occasioning a miscarriage of justice;*

2. *The trial Judge ignored the contradictions and inconsistencies in the prosecution evidence, thus occasioning a miscarriage of justice;*

3. *The trial Judge passed an excessive sentence against the appellant, thus occasioning a miscarriage of justice.*

Representation

At the hearing of the appeal, the appellant was represented by Counsel Odongo Daniel on State Brief while Counsel Joanita Tumwikyirize a State Attorney appeared for the respondent.

Either party filed written submissions in support of and in reply to the appeal respectively. We shall address grounds 1 and 2 concurrently and conclude with ground 3 of the appeal.

Appellant's case

On ground 1 of the appeal, counsel for the appellant submitted that at trial, the appellant denied having raped the victim but admitted that he had beaten her because she had taken another man to his home. The medical evidence on record (PEXH 1) indicated that the victim suffered multiple bruises on the face, foot, along the back and that the bruises were classified as harm. Counsel pointed out that PW1 who was the medical doctor had testified that the injuries suffered by the victim were not consistent with force having been used sexually

Counsel further submitted that the medical Form (PEXH 1) stated that there were no injuries and inflammations around the private parts of the victim, which should have been a pointer to the learned trial Judge that this was not a case of rape. In counsel's view, the appellant's admission of assaulting the victim was consistent with the medical evidence but this was ignored by the learned trial Judge.

Counsel further submitted that the fact that the offence was allegedly committed on 24th April, 2011 but the victim was medically examined on 1st May 2011 was relevant to this case. This raised an issue on how the medical officer could determine the ingredient as to penetration of the victim of rape yet her hymen had ruptured a long time ago.

It was counsel's submission that had the learned trial Judge addressed his mind to the medical evidence and the inconsistencies created therein, he would have come to a different conclusion and agreed that indeed the appellant merely assaulted the victim.

On ground 2 of the appeal, counsel for the appellant submitted that during her testimony in Court, the victim had testified that when the appellant arrived at her house, she had a dream that someone was sitting near her, upon which she woke up and found the appellant sitting on her bed. However, during cross examination, she stated that she heard the appellant tell his wife that he was sexually aroused and was going to have sex with a *'Malaya'*. In counsel's view, it was a wonder how the victim who was asleep could have heard the appellant telling his wife the said words in his house that was about 200 meters away from her own house.

In regard to exhibits, counsel submitted that there was no proof that the blood on the torn black under pants and light blue night dress (PEXH 4 and 3) belonged to the victim. Further, that the said exhibits were taken to Police by the victim herself and not found at the scene of crime. In counsel's view, this broke the chain of evidence.

Counsel made reference to the learned trial Judge's finding that it was the appellant's actions that caused the victim to have a premature delivery of her child. However, that this was impossible because the victim delivered the child when it was due for delivery.

It was counsel's further submission that the contradictions and inconsistencies in the prosecution case needed to be corroborated with other evidence, which was not the case herein. Counsel submitted that the best the learned trial Judge could have done was to conclude that the appellant had attempted to rape the victim but not actually raped her.

On ground 3 of the appeal, counsel for the appellant submitted that the learned trial Judge passed a term of imprisonment of 36 1/2 years against the appellant, taking into account the 2 years and 9 months the appellant had spent on remand. In essence, the appellant would have to spend 39 years and 3 months in prison.

It was counsel's submission that the trial Judge failed to follow the sentencing guidelines, thereby unfairly imposing on the appellant an imprisonment sentence term of 36 1/2 years.

Counsel prayed for this Court to reduce the sentence of 36.5 years imprisonment.

Respondent's submissions

Counsel for the respondent opposed the appeal. He submitted that the offence of rape was not merely about penetration, considering that the victim was even pregnant at the time. The offence was more inclined to consent. Therefore, that the appellant's argument that medical examination could not prove penetration since the victim's hymen had ruptured way back and medical examination was done a week after the alleged rape, was misplaced.

Counsel conceded that the Medical Report (PEXH 1) captured the bruises on the face and multiple injuries along the back and on the foot. He made reference to the victim's evidence on how she had tried to fight and struggle with the appellant but incurred bruises and injuries

in turn. Counsel submitted that there was no consent and the appellant became violent when the victim attempted to expose him.

Counsel further submitted that the exhibits tendered in evidence (PEXH 3 and 4) infer that the violence was sexual. The victim's Underpants (PEXH 4) were torn and her night dress (PEXH 3) had blood stains.

On ground 2 of the appeal, counsel for the respondent submitted that the exhibits were received by Court from Cpl Draliko Jimmy who picked them from the scene of crime. Therefore, it was not true that the exhibits were taken to Police by the victim.

Counsel further submitted that the inconsistencies in the prosecution evidence were minor and thus should be ignored by this Court. He relied on ***Tinkamalirwe vs Uganda, SCCA No. 27 of 1989***, on the law relating to contradictions and inconsistencies in evidence.

On ground 3 of the appeal, counsel for respondent submitted that the sentence passed by the learned trial Court was appropriate considering that the appellant was an uncle to the victim. Further, that the damage caused to the victim's unborn child left an impact on her to date since the child failed to walk.

Counsel prayed for this Court not to interfere with the sentence passed by the learned trial Judge.

Decision by the Court:

We have considered the submissions of learned Counsel on either side and carefully perused the court record and the judgment of the trial Court. We are alive to the duty of this Court as a 1st appellate court being to re-appraise the evidence adduced at trial and draw inferences there from, bearing in mind that we did not have the opportunity to observe the demeanor of witnesses at the trial. (***See Rule 30(1)(a) of the Judicature (Court of Appeal Rules)***

Directions, Kifamunte Henry vs Uganda, SCCA No.10 of 1997, Bogere Moses vs Uganda, SCCA No.1 of 1997).

The burden of proof was upon the respondent to prove the allegations against the appellant beyond reasonable doubt.

In addressing the matter before him, the learned trial Judge rightly stated the ingredients of the offence of rape as follows:

1. That the act of sexual intercourse took place;
2. The sexual act was done without the victim's consent;
3. Participation of the accused in the alleged offence.

Prosecution relied on five witnesses to prove the above ingredients against the appellant.

According to Maneno Samira (PW3), who was the victim in this case, the appellant was a brother to her mother. On 14/04/2011, at around midnight, when she was sleeping with her 2 year old child, the appellant opened the door and entered her house. She dreamt that someone was sitting near her, then woke up and found the appellant sitting on her bed. Upon the victim questioning who it was, the appellant started imitating the victim's husband called Fred. Thereupon, the appellant grabbed and squeezed the victim's neck while also pulling off her underpants. The victim was four months pregnant then. The appellant overpowered the victim and raped her. Thereafter when the appellant attempted to escape, the victim held him by his shirt and told him that "You are my uncle responsible for my dowry, yet you now come to have sex with me".

The victim dragged the appellant to the home of a one Abale Abubakari (PW4) who came out of his house and she told him what had happened. Upon PW4 questioning the appellant, the appellant kicked the victim in the stomach and started beating her until she started bleeding. PW4 rushed to the Local Council Authorities and upon arrival, the Local Council 1

Chairperson told the appellant to leave the victim. That night, the victim slept at a neighbor's home called Maama Gabina. Police went to the victim's home the next day and took her to hospital for medical examination.

PW4 Abale Abubakari testified that on 24/04/2011 at around midnight, the victim went to his house holding the appellant by the shirt. The victim then told PW4 that the appellant had raped her. Upon PW4 questioning the appellant as to why he could have sexual intercourse with the victim yet he was her uncle, the appellant stated that the victim had raised false accusations against him and that he wanted to kill her. The appellant then started beating the victim saying that he wanted to kill her like a dog. Further, that at PW4's doorstep there were a pair of torn blood stained black underpants and a night dress which the victim had come with. PW4 asked the appellant to stop beating the victim but he refused. PW4 then called the Chairman LC1 and Secretary for Security and they found when the appellant had gone to a bar.

PW5 No. 41713 Dp/c Eraman Cezeron, a police officer at Elepu Police Station testified that on 27/04/2011, he was called by Cp Jimmy Draliko to receive some exhibits which had been taken from the scene of crime. PW5 then received a black polythene bag which contained a pair of torn black underpants and a blue night dress with blood stains. The exhibits were marked and kept away in the store. PW5 then escorted the victim to Yumbe Hospital for medical examination. He indicated that the victim had swollen legs and bruises on the face, and that she told him that she was pregnant.

PW1 Olimani Remmy, Senior Clinical Officer at Yumbe Hospital, testified that the victim was examined on 1/05/2011. He indicated that there were signs of penetration, the victim's hymen had been ruptured long ago. The victim had bruises on the face, multiple serious injuries along the back and bruises on the foot. It was his testimony that the above findings were

consistent with the victim having put up resistance. The Medical Report (PEXH 1) was admitted under the memorandum of agreed facts.

On his part, the appellant denied the allegations that he had raped the victim and chose to give unsworn testimony.

He testified that the victim was his niece and got married to a Lango man called Fred. The victim and her husband stayed with the appellant for two weeks, then her husband left her to stay with the appellant for two months so that she could get acquainted with her relatives. In September 2010, upon the two months lapsing, the appellant reminded the victim to go back to her husband. The victim's husband sent UGX 130,000/= to the appellant as transport for the victim to travel back to her husband's home in Lira, which the appellant passed on to the victim. Thereupon, the appellant traveled to Koboko and returned to his home after 5 days. Upon finding the victim still at his home, he questioned why she had not yet travelled back to her husband's home. The next day on 12/10/2010, the appellant travelled with the victim and her 4 children to Arua and paid their bus fare. After 4 days, the victim's children were returned to the appellant.

On 24/04/2011, the appellant was surprised when Police men arrested him on allegations that he had a case to answer. He informed Police that he did not know anything about the accusations and that he was not going to record a statement until he saw the victim.

The appellant further testified that he did not rape the victim but he beat her because on 23/04/2011 at around 8:00 pm, she had taken another husband to his house. Further, that after beating her, the appellant took the victim to PW4's house and the Local Authorities promised that they would resolve the issue the next morning. Upon being arrested, he found the victim and PW4 at Police.

In our opinion, ground 1 of the appeal mainly related to the alleged failure by the prosecution to prove the first two ingredients of the offence of rape, being that the act of sexual intercourse took place and that the sexual act was done without the victim's consent.

Sexual intercourse means that there has to be penetration of the vagina, however slight, by a sexual organ. In ***Bassita Hussein vs Uganda, SCCA No. 35 of 1995***, the Court indicated that the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence.

In the present case, the prosecution sought to prove the aspect of sexual intercourse by the evidence of the victim and the medical examination report (PEXH 1).

According to the medical examination Report, the victim had multiple injuries on the face, along the back and on the foot. Her hymen had been ruptured long time ago and she did not have any inflammations or injuries around her private parts. While the alleged rape had happened on 24/04/2011, the medical examination report was dated 01/05/2011.

We note that considering the time taken between the alleged rape and the medical examination of the victim, it was hard to determine the act of sexual intercourse medically. This is also considering that the victim had been married with a number of children and was pregnant with another child. Therefore, it was obviously expected that her hymen had ruptured way before the alleged rape. In essence, the Medical Report in this case was not relevant in proving the act of sexual intercourse.

The major evidence available in proving the act of sexual intercourse was that of the victim and other circumstantial evidence. As found by the trial Judge, the victim was a married woman with children and was heavily pregnant. She reported to PW4 immediately the atrocity was committed on her. Indeed, she was very well aware of what sexual intercourse meant. While the Medical Report would have been good evidence to corroborate the victim's evidence on the act of sexual intercourse, the delayed medical examination prevented this.

The Medical Report in this case could only prove that the victim did not give her consent and that force was used.

Further, the evidence of PW4 indicating that the victim had informed him that she had been raped, as well as the evidence of the torn underpants and blood stained nightdress corroborated the victim's evidence. Indeed, there is no way the victim's underpants could have been torn by mere beatings by the appellant.

In believing the testimony of the victim, the learned trial Judge who had the opportunity to observe the demeanor of the victim observed as follows:

> *"On the demeanor and strong character of the Pw.3, and the medical Report on Exhibit PE1, I find as a fact that the act of sexual intercourse has been proved beyond any reasonable doubt".*

We find that the victim's evidence and all the other circumstantial evidence surrounding the incident points to the happening of sexual intercourse. Further, basing on the above evidence and the Medical Examination Report, it is definite that the victim did not give her consent to the sexual intercourse.

Under ground 2 of the appeal, the appellant faulted the learned trial Judge for ignoring contradictions and inconsistencies in the prosecution evidence.

The law relating to contradictions and inconsistencies was stated in ***Nasolo vs Uganda, SCCA No. 14 of 2000*** as follows:

> *"The law governing inconsistencies in evidence was stated in Alfred Tajar Vs Uganda (1969) EACA Cr. Appeal No. 167 of 1969, to be that minor inconsistency unless the trial judge thinks it points to a deliberate untruthfulness does not result in evidence being rejected the same case also laid the principle that it is open to a judge to find that a witness has been substantially truthful even though he/she had lied in some particular respect".*

The first contradiction pointed out in the prosecution evidence was that the victim (PW3) had testified that when the appellant arrived at her house, she had a dream that someone was sitting near her, upon which she woke up and found the appellant sitting on her bed. However, during cross examination, she stated that she heard the appellant at his house telling his wife that he was sexually aroused and was going to a have sex with a *'malaya'*. While we find that this was a contradiction in the prosecution evidence, we are of the opinion that this did not in any material way point to untruthfulness in the prosecution evidence adduced against the appellant. The evidence of PW3 was sufficiently corroborated by that of PW4, the torn underpants (PEXH 4), blood stained night dress (PEXH 3) and evidence in the Medical Report (PEXH 1) of harm inflicted on her. As rightly observed by the learned trial Judge, it was strange for the appellant to assault the victim by kicking her in the stomach and causing injuries to her, very well aware that she was pregnant.

On the other hand, the appellant's evidence comprised of blatant lies that would be obvious to any reasonable ordinary person. He indicated that he had sent the victim to her husband's home in Lira and was surprised to be arrested on the present accusations. This raised a suggestion by the appellant that the victim was not present at the scene of crime at the time the offence is said to have happened. This was blatant untruthfulness in the appellant's testimony. It is no wonder that he later changed his testimony saying that he had beaten the appellant for allegedly taking another husband to his home. The appellant also testified that he was the one who took the victim to PW4's home on 23/04/2011 at around 8:00 pm upon her bringing another man to the house. This was another lie. The evidence of the victim and PW4 showed that it was the victim who dragged the appellant and took him to PW4's home at midnight on 24/04/2011.

It was also the appellant's complaint that there was no proof that the blood stains on the underpants (PEXH 4) and night dress (PEXH 3) belonged to the victim. Further, that the said exhibits were not collected from the scene of crime by Police but that it was the victim who

took them to Police. While it is true that the blood stains were not medically examined to prove that they belonged to the victim, the circumstantial evidence suggesting so was unequivocal. It was very clear that the appellant had assaulted the victim both sexually and physically which resulted into her bleeding, thus explaining the blood stains on the clothes she was wearing. Further, there was no evidence on record to suggest that the exhibits were taken to Police by the victim. According to the evidence of PW5 No. 41713 Dp/c Eraman Cezeron, a police officer at Elepu Police Station who was never cross examined by the defence, the exhibits were received from Cp Jimmy Draliko who picked the said exhibits from the scene of crime.

We find that the contradictions pointed out by counsel for the appellant were minor and we do not find reason to fault the learned trial Judge in ignoring them and finding the prosecution evidence credible. Therefore, ground 2 of the appeal also fails.

Under ground 3 of the appeal, the learned trial Judge was faulted for passing a harsh and excessive sentence against the appellant.

It is trite law that this Court can only interfere with the discretion exercised by the lower Court in imposing sentence where the sentence is manifestly excessive or so low as to amount to a miscarriage of justice or where the court ignores to consider an important matter or circumstances which ought to be considered while passing sentence or where the sentence imposed is wrong in principle. ***(See Kiwalabye Bernard vs Uganda, SCCA No.143 of 2001)***.

We have carefully looked at the reasons given by the trial Court in sentencing. We find that the trial Judge took into consideration and specifically mentioned all the aggravating factors raised against the appellant as well as all the mitigating factors.

We have taken into consideration that the victim was raped and harshly beaten up by the appellant. It is also true that the appellant was a young man of 33 years who was married with 4 children, a wife and had a disabled father whom he was taking care of.

We have also considered that the offence with which the appellant was convicted carries a maximum penalty of death. However, taking into consideration the appellant's mitigating factors, we find that the sentence was harsh in the circumstances and we therefore set it aside.

Section 11 of the Judicature Act gives this Court all the powers, authority and jurisdiction as that of the trial Court to impose an appropriate sentence of its own.

In ***Onaba Razaki vs Uganda, CACA No. 327 of 2009,*** this Court set aside the sentence of 15 years imprisonment for the offence of rape and substituted it with 14 years. The appellant had attacked the victim at 11:00 p.m. on her way from work and raped her in the grass.

In ***Yebuga Majid vs Uganda, CACA No. 303 of 2009***, the appellant raped the victim while in her sleep and he was convicted and sentenced to 15 years imprisonment. On appeal, this Court upheld that sentence of 15 years.

In ***Boona Peter vs Uganda, CACA No. 16 of 1997***, the appellant was convicted of rape and sentenced to 10 years imprisonment. On appeal against sentence on the ground that it was manifestly excessive, this Court dismissed the appeal and confirmed the sentence.

Upon taking 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 which is between 10-15 years imprisonment, we find a sentence of 18 years imprisonment appropriate in the circumstances of this case. However, we are enjoined under Article 23 (8) of the Constitution to take into account the period of 2 years and 9 months the appellant spent on remand, which we therefore deduct from the 18 years imprisonment. As a result we sentence the appellant to 15 years and 3 months imprisonment to be served from the date of his conviction, which is 16/01/2014.

Consequently, this appeal is partially allowed.

We so order.

Dated at **Lira** this 30th day of March 2021

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Elizabeth Musoke

JUSTICE OF APPEAL

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Hellen Obura

JUSTICE OF APPEAL

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Remmy Kasule

JUSTICE OF APPEAL