THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

Coram; Buteera DCJ, Mulyagonja & Luswata, JJA

CRIMINAL APPEAL NO. 0141 OF 2010

ASIIMWE MALIBORO MOSES :::::::::::::::::::::::::::::::: APPELLANT

AND

UGANDA :: RESPONDENT

(Appeal from the decision of Akiiki Kiiza, J., delivered on 5th July, 2010 in Fort Portal High Court Criminal Session Case No. 84 of 2006)

JUDGEMENT OF THE COURT

Introduction

This is an appeal from the decision of the High Court of Uganda sitting at Fort Portal in which the trial judge convicted the appellant of the offence of rape, contrary to Sections 123 and 124 of the Penal Code Act and sentenced him to 18 years' imprisonment.

Background

The facts as we established them from the record are that on 14th February 2006, the victim who was then 18 years old met the appellant while walking along a road. That the appellant, a man she did not know before, got hold of her hand, tripped her and forcefully had sexual intercourse

with her. One Isingoma who was passing by saw what was happening and made an alarm. The appellant ran away and went into hiding but he was subsequently arrested, indicted and prosecuted.

The appellant pleaded not guilty and offered a defence of alibi but the trial judge found that sufficient evidence was adduced against him and convicted him of rape and sentenced him as we stated above. The appellant was dissatisfied with the decision and brings this appeal to this court based on two grounds as follows:

1. The learned trial Judge erred in law and in fact when he convicted the appellant based on evidence marred with inconsistencies and contradictions hence occasioning a miscarriage of justice to the appellant.
2. The learned trial judge erred in law and fact when he passed a manifestly harsh and excessive sentence without due consideration of both period spent on remand and mitigating factors.

Representation

At the hearing of the Appeal on 5th September, 2022, Mr. Chan Geoffrey Masereka, learned counsel, represented the appellant on State Brief. The respondent was represented by Ms. Carolyn Hope Nabaasa, a Principal Assistant Deputy Director of Public Prosecutions (A/DPP).

The parties filed written arguments as directed by court before the hearing of the appeal. The appellant's submissions were filed on 29th August, 2022 while the submissions for the respondent were filed on 2nd September, 2022. The appellant did not file a rejoinder. Counsel for both parties prayed that the court adopts their written arguments as their submissions

in the appeal and their prayers were granted. This appeal has therefore been disposed of on the basis of written submissions only.

Determination of the Appeal

The duty of this court as a first appellate court is stated in rule 30 (1) of the Court of Appeal Rules. It is to reappraise the whole of the evidence before the trial court and draw from it inferences of fact. The court then comes to its own decision on the facts and the law but must be cautious of the fact that it did not observe the witnesses testify. (See **Bogere Moses & Another v Uganda, Supreme Court Criminal Appeal No. 1 of 1997**)

In resolving this appeal, we considered the submissions of both counsel and the authorities cited and those not cited that are relevant to the appeal. We reviewed the submissions in respect of each of the grounds immediately before we disposed of each of them.

Ground 1

Submissions of Counsel

In this regard, counsel for the appellant submitted that the trial judge erred in law and fact when he convicted the appellant on the basis of evidence that was marred with inconsistencies and contradictions and so occasioned a miscarriage of justice. He referred us to the decision in **Obwalutum Francis v Uganda, Supreme Court Criminal Appeal No. 30 of 2015,** where the court re-stated the law relating to inconsistencies and contradictions. He asserted that the inconsistencies and contradictions in this case went to the root of the evidence and so court should not rely on it.

Counsel pointed out that there was an inconsistency in the testimony of PW1, the Medical Officer, when he stated that the victim's hymen had been raptured two weeks before, but there were no injuries in her private parts and the injuries in the neck were about two weeks old. Counsel submitted that there was no evidence to show how he came to the conclusion that the injuries were two weeks old when he examined the victim on 20th February 2006, yet the purported rape was assumed to have taken place on 14th February 2006. He concluded that this inconsistency cast doubt on the participation of the appellant in the offence.

The appellant's counsel further pointed out that there was an inconsistency on page 9 paragraph 1 of the record where PW2 stated that she had never seen the appellant before but only knew him as the person who raped her. Further, that at page 10 paragraph 1 the victim stated that her father knew the appellant and that she too knew him before he attacked her. He went on to observe that PW2 further stated, in contradiction of her previous statement, that her father was not present at the time she was raped and that the people who came to her rescue, including Isingoma, told the Police that it was the appellant who raped her.

The appellant's counsel further submitted that there was an inconsistency in the testimony of PW3 who stated that he talked to the victim and she informed her that she met a man on the road who pulled her into the bush and raped her. Counsel submitted that this casts doubt on whether it was the appellant who committed the offence. He noted that PW3's whole testimony relied on what he was told by one Isingoma and that there is no evidence on record of Isingoma's knowledge of the appellant. He concluded that the trial judge should have put those factors into consideration before

convicting the appellant. And that had the trial judge addressed his mind to the inconsistencies and contradictions in the prosecution case, he would have found that the prosecution did not prove its case beyond reasonable doubt and so acquitted the appellant. He implored this court to reach an independent decision that the appellant is not guilty of the offence for which he was convicted.

In reply, counsel for the respondent submitted that counsel for the appellant did not point out the gravity of what he referred to as inconsistencies and how they went to the root of the case for the prosecution. In regard to the first inconsistency pointed out, she submitted that according to **ExhP1,** the victim was examined on 20th February 2006 and found to have a raptured hymen and injuries on her neck estimated to have been inflicted about two weeks before. She asserted that there was no inconsistency in the testimony of PW1. She specifically referred us to the use of the word *"about"* by the witness and submitted that what was stated was in the estimation of the witness and that an injury inflicted six days before the examination was within the range of the doctor's approximation of the time. Counsel implored court to reject the submissions of the appellant's advocate in this regard.

With regard to the contradictions attributed to PW2, the victim, that her father knew the appellant yet she had earlier stated that he did not, counsel for the respondent stated that there was no such contradiction on the record and that the argument advanced by counsel for the appellant had no merit. It was also her submission that the contentions of the appellant's counsel did not point to any contradiction other than complaining about information received from the victim and one Isingoma. She asserted that the evidence that the victim was raped was adduced in

the medical report while the participation of the appellant was proved by the victim in her testimony. That she properly recognised the appellant since the offence was committed in broad day light.

Counsel went further to refer us to the decision in **Anguyo Silva v Uganda, Court of Appeal Criminal Appeal No. 0038 of 2014,** where the court restated the law relating to inconsistencies and contradictions and she implored court to find that the inconsistencies, if any, were minor and should not affect the credibility of the evidence adduced by the prosecution. She concluded that ground 1 of the appeal was devoid of merit and it ought to be disallowed.

Resolution of Ground 1

The position on contradictions and inconsistencies in evidence that has been accepted by the courts was restated by this court in **Candiga Swadick v Uganda, Criminal Appeal No. 23 of 2012** as follows:

> *"The law on contradictions and inconsistencies is well settled. Major contradictions and inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained away. Minor ones, on the other hand, will only lead to rejection of the evidence if they point to deliberate untruthfulness on the part of the witness - see* ***Alfred Tajar vs Uganda E.A.C.A Cr. Appeal NO. 167 of 1969*** *(unreported);* ***Sarapio Tinkamalirwe vs. Uganda, Cr. Appeal NO. 27 of 1989 (SC)*** *and* ***Twinomugisha Alex and 2 others Vs. Uganda, Cr. Appeal No. 35 of 2002 (SC).***"

The appellant complained that there were inconsistencies in the testimony of Jackson Mugarura (PW1) the Medical Clinical Officer who presented the examination report about the victim's injuries. His testimony was at page 7 of the record of appeal and the report that was admitted in evidence as **PE1** was at page 31 thereof. We note that PW1 was not the person who

examined the victim. He produced the report because he worked with Jackson Gariyo who examined the victim. Gariyo passed away before the appellant's trial.

PW1 stated that he taught the late Jackson Gariyo at the School for Clinical Officers in Fort Portal for three years and later worked with him for nine years. He stated that **PE1** was a Police Form 3 on which the Police at Mugusu requested the examination of the victim, Kabaseveni Harriet, who complained that she was raped. He stated that the **PE1** showed that Jackson Gariyo received the victim on 20th February 2006. That she was 18 years old at the time. Further that the examination revealed that her hymen was raptured two (2) weeks before the examination but there were no injuries in her private parts. In addition, it was found that she had inflammation on the neck and that she was strong enough to put up resistance. That the injuries in the neck were also about two weeks old. He clarified that the report was confirmed by the Medical Superintendent who affixed an official stamp to it.

We observed that counsel for the appellant at the trial, Mr Bwiruka, did not cross-examine PW1 at all. We therefore critically analysed **PE1** to establish whether its contents were consistent with the testimony of PW1. We established that PW1 simply read the findings of the examining Clinical Officer to court. His testimony was on all fours with what Jackson Gariyo found when he examined the victim and put down in his report.

We note that the main contention of the appellant is that the presence of a raptured hymen is inconsistent with the absence of injuries in the private parts. It is evident from the **PE1** that the relevant question in that regard reads as follows: *"Is there any inflammations (sic) or injuries around the*

private parts? And the answer to that question by the examining clinician was *"No."*

We do not consider this an inconsistency because there was a period of almost two days (48 hours) between the time that the alleged offence occurred and the medical examination of the victim. Besides, genital injuries due to sexual assault or rape have been found by medical doctors and researchers to be varied. Cheryn M Palmer, Anna M Mcnulty, Catherine D'Este and Basil Donovan in their study *Genital injuries in women reporting sexual assault,*[1] observed that the likelihood of genital injury following sexual assault remains unclear. They observed that genital injury related to sexual assault is often an issue in court proceedings, with the expectation that injuries will be found in *'genuine'* cases. Further that conviction rates are higher when the complainant has genital injuries. However, the examination of 153 women victims of rape resulted in findings of non-genital injuries in 46% of the women examined (mostly minor) and genital injury in only 22%. They concluded that the presence of genital injury should not be required to validate an allegation of sexual assault, particularly in the absence of non-genital injuries. Lucy Bowyer and Maureen E. Dalton in their review, *Female victims of rape and their genital injuries*[2] also found that only a minority of women examined by specifically trained police doctors showed evidence of genital injury. And that therefore, the absence of genital injury does not exclude rape.

[1] Sex Health, 2004;1(1): 55-9.doi: 10.1071/sh03004.

[2] International Journal of Obstetrics & Gynaecology, https://doi.org/10.1111/j.1471 0528.1997.tb11543.x

We also observed that the medical examination report referred to internal injuries such as the complainant's hymen which was found to have been raptured two weeks prior to the examination, and inflammation on the neck which was a sign that there was force exerted on it. This was consistent with the fact that the examining health worker found that the victim was capable of putting up some resistance and that she had been subjected to force by her assailant.

The second inconsistency referred to by counsel for the appellant relates to the victim's identification of the appellant. Therefore, we must reappraise her testimony and other evidence related to the event in order to establish on our own whether there were any material inconsistencies in her testimony that would discredit her evidence. The testimony of the victim was short and we shall reproduce it here because in all cases of this nature, the testimony of the victim is the most important piece of evidence. At page 9 of the record of appeal she stated thus:

> *"I know accused as a person I did not know him before he raped me. On 14/2/2006 in the evening, I was coming from Kyezire to Kinyanende. I met a man I did not know previously. Now the accused person (accused identified). He got hold of my hand and pulled me by force and took me to the bush, he tripped me and threw me down. He then pulled his trouser downwards, then he tore my knickers then he got his penis and put it in my vagina. He injured me in my vagina and I bled. I could not make an alarm because accused was holding me by my throat, wanting to kill me. Then one Isingoma was on his own way going then he saw us and he made an alarm. When accused saw Isingoma he run away. When people came they took me to my father called Jailes Kihiika. Then I was taken to the police post at Mugusu. They gave a letter forwarding me to Buhinga hospital and I was treated, and they found that I had been raped. At Buhinga, they gave me a medical form. The letter from police to Buhinga hospital and we brought it to the Police. I did not allow accused to make love to me. I did not know him and I did not consent to him making love to me."*

When she was cross examined by Mr Bwiruka for the appellant, the victim confirmed that the appellant was arrested from a bush where he was hiding. That she was present when he was arrested at a place that was about ½ a kilometre away from the scene of the crime. That she had not seen the appellant before he raped her. That the time of the assault was 4.00 pm but the Police was called in and they responded at 8.00 pm and were present when the appellant was arrested. That she too was present and so was Isingoma who confirmed to the police that the appellant was the person who raped her. She also stated that the appellant was known to her father before the incident, though her father was not present during the rape. When she was re-examined, she stated that she recognised the appellant by his appearance during the incident though she did not know him before. That she struggled against his for about two minutes before he raped her and that the act of rape took about two minutes and it was during the day, at 4.00 pm.

We found no contradictions or inconsistencies in the testimony of the victim about the identity of the appellant. The victim clearly stated that she did not know him before he raped her but she was able to identify him at the time that he tussled her down and then raped her. That she also had another opportunity to see and identify him when he was arrested in the presence of Isingoma, who found and therefore also saw the appellant in broad daylight when he was in the act of having forceful sexual intercourse with her. The only inconsistency with the rest of the evidence on record would perhaps be that Jailes Kihika was the father to the victim, yet he was not.

However, Asaba Jailes was the 3rd witness for the prosecution. He first of all clarified that Kihika was his father but he did not use his name. He

stated that the victim was his house maid. That he knew the appellant before the incident as a resident of Kinyankende. He further testified that on 14th February 2006 at about 4.00 pm, children, including one Isingoma, went to him and told him that the victim was raped and the appellant wanted to kill her but upon raising an alarm, the appellant ran away. Further that when he saw her, he observed that the victim had bruises on her head, was bleeding and her clothes were torn. That he reported the matter to the LCI Chairman who talked to the victim. That she confirmed that she was indeed pulled off the road by an unknown man, who pulled off her knickers and raped her. That he examined her and she had injuries in her vagina and was bleeding and in pain.

PW3 further testified that he reported the matter to the police at Mugusu. That he and the Police went to the appellant's home but he was not at home. That they found him hiding in a bush. And that though he (PW3) was not present during the rape, the victim took them to the scene of the crime. That the victim was examined at Buhinga Hospital and the Form which the Police gave them for the purpose was taken back to the Police.

In cross-examination, PW3 stated that Isingoma, who told him that the victim was raped by the appellant was at the time 12 or 13 years old. That Isingoma was not present because at the time of the trial he was away in school. He clarified that the victim was his step sister, being the daughter of the same father, one Kihika, but by a different mother. That the appellant was arrested while he was hiding in a makeshift hut, not his home, because PW3 knew where his home was less than ½ a kilometre from the place where he was arrested. PW3 clarified that the appellant used to work with butchers; he used to assist them to hold meat and he

was not a married man. During re-examination he confirmed that the victim identified the appellant as her assailant during his arrest.

We note that although Isingoma did not testify, PW1 referred to him as the person who found the appellant in *flagrante delicto* and made an alarm. It was the same Isingoma who ran to PW3, her step brother, and reported that Harriet Kabaseveni was raped by the appellant and the appellant wanted to kill her. We also note from the testimony of PW3 that the appellant was known to him as a worker at the butcheries and as a resident of Kinyankende, the place where the victim was raped. PW3 thus even knew where he resided and assisted in the search to arrest him. We also observed that the report by Isingoma to PW3, and other children was made immediately after the attack on the victim, at around 4.00 pm.

PW3's testimony that he received a report about the incident from one Isingoma could be considered as hearsay evidence. However, when the victim was examined, the report that she was raped and that her assailant wanted to kill her in the process were both confirmed. Her hymen was found to have been raptured about two weeks before, which was consistent with the bleeding found in her vagina at the time she was physically examined by her step brother, PW3, immediately after the incident. The victim also had inflammation in the neck which was consistent with her own testimony that her assailant held her by the neck as he forcefully had sex with her. It was also consistent with the report that PW3 received from Isingoma that the appellant 'wanted to kill' the victim.

The victim identified her assailant two times; first when he accosted her and pulled her off the path in broad day light, and secondly, when she identified him at the time of his arrest. She testified that though she

identified him, Isingoma also identified him at the time of his arrest as the person who raped her. Therefore, save for the fact that the victim stated that she reported the rape to her father, yet PW3 was not her father but instead her step brother, we found no contradiction or inconsistency in the testimony of the victim about the identification of her assailant.

We find that the inconsistency in the testimony of the victim did not relate to and therefore did not go to the root of her evidence about the crime; it thus did not affect its credibility. Therefore, the trial judge made no error at all when he relied upon her testimony and other circumstantial evidence on the record to convict the appellant.

Ground 1 of the appeal fails.

Ground 2

In this ground of appeal, the appellant complained that the trial judge imposed a sentence that was manifestly harsh and excessive without considering the period that he spent on remand and the mitigating factors.

Submissions of Counsel

In his submissions, counsel for the appellant asserted that Article 23 (8) of the Constitution requires the sentencing court to consider the time spent in lawful custody and deduct it from the intended sentence. He referred us to the decision in **Tukamuhebwa David Junior & Another v Uganda, Supreme Court Criminal Appeal No. 59 of 2016**, in which the appellant was convicted for aggravated robbery. He submitted that the court in that case stated the court considered the period of 20 years' imprisonment as an appropriate sentence but it went on to consider that

the appellant spent 3 years and 7 months on remand. That the court therefore came to the conclusion that the appellant would be sentenced to 16 years and 3 months' imprisonment.

Counsel went on to refer us to the decision of this court in **Ngobya Aloysius v Uganda, Criminal Appeal No 265 of 2011,** in which the appellant had been convicted for the offence of aggravated defilement and sentenced to 37 years' imprisonment. He drew it to our attention that the court found the sentence to be harsh, excessive and illegal because the trial court did not consider the period that the appellant spent on remand. That the court reduced the sentence to 15 years' imprisonment, from which the period of 1 year and 10 months spent on remand was deducted and the court sentenced the appellant to 13 years and 2 months' imprisonment. Counsel then complained that in this case, though the trial judge noted that the appellant was still a young man who prayed for leniency, instead of considering the mitigating factors, the trial judge stated that rapists should be treated without mercy whenever they are convicted for they tend to show animal behaviour that is not expected of human beings. That this attitude was vindictive and led the trial judge not to deduct the period that the appellant had spent on remand which, in his view, resulted in an illegal sentence.

Counsel went on to submit that the trial judge ought to have considered the mitigating factors in favour of the appellant; that he ought to have given him a lenient sentence on account of the fact that he was still a young man and a first time offender.

In reply, counsel for the respondent referred us to the decision of the Supreme Court in **Kyalimpa Edward v Uganda, Criminal Appeal No. 10**

of 1995 for the principle that an appellate court will not interfere with a sentence imposed by a trial court unless it is evident that it was illegal or manifestly excessive as to amount to an injustice. She then submitted that counsel for the appellant did not demonstrate that the sentence of 18 years in prison imposed upon the appellant was manifestly excessive, illegal or based upon a wrong principle. She went on to submit that the mitigating factors were taken into account by the trial judge and after that he underscored the aggravating factors.

Counsel then asserted that by referring to the sentence imposed as vindictive, counsel for the appellant seemed to be invoking our feelings to interfere with the sentence. She added that interfering with the sentence of a trial court is a matter of law and not emotions. She referred us to the decision in **Aharikundira Yustina v Uganda, Supreme Court Criminal Appeal No104 of 2009**, in which the court referred to the decision in **Ogalo s/o Owoura v R (1954) 24 EACA 270**, and reiterated that interfering with a sentence is not a matter of emotions but a matter of law. And that unless it is proved that the trial judge flouted any of the principles of sentencing it does not matter whether the members of the appellate court would have imposed a different sentence if they had been the ones that tried the appellant.

With regard to the submission that the trial judge did not take into account the time that the appellant spent on remand before he was convicted, counsel for the appellant submitted that the learned trial judge could not be faulted for applying the law as it was at the time. She referred us to the decision in the case of **Karisa Moses v Uganda, Supreme Court Criminal Appeal No. 50 of 2016,** where it was held that in the case of **Rwabugande Moses v Uganda, Criminal Appeal No. 25 of 2014**, the court clarified

that taking into account the period of remand is arithmetical. That however, prior to the decision in the case of **Rwabugande** (supra) the position was that a trial judge had to demonstrate that he took the period spent on remand into consideration by stating that he had taken that period into account. That since the decision in the instant appeal was handed down on 5th July 2010, the decision in **Rwabugande** (supra) could not have been followed before it was made.

Counsel then concluded that the trial judge properly considered all the aggravating and mitigating factors and spared the appellant the maximum sentence of death. He then found that 18 years' imprisonment would meet the ends of justice. She prayed that we do not interfere with the sentence but uphold it and that we find that the whole of the appeal fails and that we accordingly dismiss it.

Resolution of Ground 2

It is a principle that is well settled that the appellate court is not to interfere with a sentence imposed by the trial court which has exercised its discretion on sentence unless the sentence is illegal or the appellate court is satisfied that in the exercise of its discretion, the trial court did not consider an important matter or circumstance which ought to have been considered when passing the sentence; or that the sentence was manifestly excessive or so low as to amount to an injustice. **See Livingstone Kakooza v Uganda Supreme Court Criminal Appeal No. 17 of 1993.**

The appellant's counsel set out three issues for this court to address under the second ground of the appeal, viz: i) that the trial judge passed an illegal sentence because he did not deduct the period that the appellant spent on

remand after he determined that his sentence shall be 18 years in prison; ii) that he did not consider the mitigating factors that were advanced in his favour, and finally that iii) the sentence appeared to be vindictive because the trial judge stated that persons convicted of rape should be treated mercilessly for they show animal behaviour and not behaviour expected of human beings. We shall address each of these complaints in reverse order to resolve ground 2 of the appeal.

While handing down his sentence to the appellant the trial judge observed and ruled as follows.

> *"Accused is allegedly a first offender. He has been on remand for about 4 years and 4 months. I take this period into account, while assessing the sentence to impose on him. He is said to be still a young man and he has prayed for leniency.*
>
> *However, accused committed a serious offence. He wantonly attacked a young and innocent girl, who was moving lawfully on the road. He forced himself on her and during the process inflicted injuries in her private parts, which started bleeding. This is a behaviour which cannot be tolerated by this court.*
>
> *Rapists must be treated mercilessly whenever convicted by court, as they tend to show animal behaviour but not what is expected to be the approach of human beings.*
>
> *It is a duty of the courts to try and protect women and girls from people like the accused person. Putting everything into consideration I sentence the accused person to 18 (eighteen) years imprisonment."*

Regarding the remark of the trial judge that rapists should be treated mercilessly once convicted, the exercise of mercy while dispensing justice has always been a controversial subject. In his article, *Should We Be*

Merciful to the Merciless - Mercy in Sentencing,[3] Doron Manashe, explains the controversy thus:

> *"At sentencing, the judge's discretion may be quite broad, and there is a perpetual tension between the judicial system's tendency to present the verdict's result as a "correct" and "just" legal decision; a product of objective analysis; and a consequence of calculated discretion which emerges from the rule of law, on one hand, and the fact that, the work of sentencing is profoundly human, sensitive work based on particular considerations and subjective impressions on the other."*

However, the courts have always recognised the fact that mercy is a composite of the decisions of the courts, especially when it comes to sentencing. We have not found any decision in Uganda where the concept of mercy has been defined and discussed. We therefore draw from decisions in other jurisdictions where the courts have explored and amplified the concept, for guidance on this point.

In **R. v. Osenkofski (1982) 30 SASR 212**, it was observed that it cannot be doubted that an element of mercy has always been regarded, and properly regarded, as running hand in hand with the sentencing discretion. The principles were laid down by the Supreme Court of Victoria in **R v. Kane [1974] VicRp 90; [1974] VR 759 (16 May 1974**), where Gowan, J delivering the lead judgment for the court had this to say,

> *"... we are not to be taken as asserting that mercy can play no part in determining the course that a court should adopt. As the passage above cited from R v Radich {[1954] NZLR 96} recognizes, justice and humanity walk together. Cases frequently occur when a court is justified in adopting a course which may bear less heavily upon an accused than if he were to receive what is rather harshly expressed as being his just deserts. But mercy must be exercised upon considerations which are supported by the evidence and which make an appeal not only to sympathy but also to well-*

[3] Emory International Law Review, Volume 35, Issue 4

balanced judgment. If a court permits sympathy to preclude it from attaching due weight to the other recognized elements of punishment, it has failed to discharge its duty."

The Supreme Court of Victoria considered an appeal in which the sentencing judge refused to consider the submissions for the convict on his plea for mercy with the retort that, *"When counsel say that I always say to counsel, 'I am not here to dispense mercy, I am here to dispense justice.'"* The Court in **R v Guiseppe Anthony Miceli [1997] VSC 22; [1997] VICSC 22 (23 June 1997)** cited with approval the decision in **R. v. Osenkowski (1982) 30 SASR 212,** where King CJ, at page 212-13, pointed out that:

"It is important that prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform."

In **DPP v Kiza Mordacai Masange [2017] VSCA 204**, the Supreme Court of Victioria relied on its previous decision in **Markocvic v The Queen (2010) 30 VR 589** where a statement from an article on the subject by Professor Richard Fox, *When Justice Sheds a Tear: The Place of Mercy in Sentencing*[4] was cited with approval that,

"The true privilege of mercy is to be found in the residual discretion vested in each sentencer (sic) which allows a downward departure from the principle of proportionality outside the principles of mitigation. It can be utilised in exceptional circumstances to allow weight to be given to factors which are ordinarily not regarded as relevant mitigating considerations. It allows sentencers (sic) to give effect to significant, but as yet unaccepted, circumstances which, in

[4] (1995) 25 Monash University Law Review 1.

their opinion, warrant leniency."

The court then observed that the requirements of justice must sometimes be tempered and that mercy may alleviate suffering that is in some sense deserved or which a judge is otherwise entitled to impose.

With the greatest respect to the trial judge, on the basis of the authorities that we have analysed above, we find that the trial judge's statement that the court would be merciless was not necessary. It was made in error for it gave the wrong impression that the exercise of sentencing was going to be vindictive and biased against the appellant.

With regard to the issue that trial judge did not take the mitigating factors that were advanced in favour of the appellant into consideration, we note that counsel for the appellant stated only three: i) that he was a first time offender; ii) that he was on remand for a period of about 4 years and 4 months; and iii) that he was a young man who if given an opportunity could reform. Counsel then prayed that the court be lenient in sentencing him. We observed that the trial judge considered all three factors before he arrived at his sentence of 18 years in prison, as it is shown in the excerpt from the judgment that we have reproduced above. We therefore find that the trial judge made no error at all in that respect.

However, we must still consider the issue raised by the appellant that the trial judge did not deduct the period of 4 years and 4 months that he spent on remand from the sentence that he imposed. This is because it is a point of law which is drawn from Article 23 (8) of the Constitution, which if not complied with results in an illegal sentence. Article 23 (8) of the Constitution provides as follows:

(8) 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*.

{Emphasis supplied}

The trial judge in his ruling on sentence stated that he had taken the period of 4 years and 4 months *"into account"* in the terms of the constitutional provision above. Counsel for the appellant asserts that the trial judge ought to have deducted the period spent in custody from the sentence of 18 years imposed on the appellant, on authority of **Ngobya Aloysius** (supra) a decision of this court, while counsel for the respondent referred us to the decision of the Supreme Court in **Karisa Moses** (supra).

We have considered the decisions referred to us by both counsel in this case on the construction of Article 23 (8) of the Constitution. We note that while the decision of the Supreme Court in **Rwabugande Moses (supra)** requires sentencing courts to deduct the period spent in custody before sentence from the sentence imposed in an arithmetical manner, the same court in **Sebunya Robert & Another v Uganda, Criminal Appeal No. 58 of 2016,** as it was stated by the court in **Karisa Moses** (supra) clarified that the decision in **Rwabugande** does not have any retrospective effect on sentences that were passed before it.

We note that the appellant in this case was convicted on 5th July 2010, while the decision in **Rwabugande** (supra) was handed down by the Supreme Court on 3rd March 2017. The trial judge sentenced him on the same day that he was convicted and we find that he demonstrated that he took the period of 4 years and 4 months that he spent in custody before conviction into account. The sentence was therefore a lawful one within

the meaning ascribed to Article 23 (8) of the Constitution before the decision of the Supreme Court in the case of **Rwabugande** (supra).

It is also observed that the maximum sentence for the offence of rape, according to section 124 of the Penal Code Act, is still death but the trial judge did not impose the maximum sentence. He considered the aggravating and mitigating factors, as well as the period spent in custody before conviction and imposed a sentence of 18 years in prison. We cannot fault the judge for that because counsel for the appellant did not impress it upon us that the sentence was based on any wrong principle or that the trial judge omitted to consider a factor that he ought to have considered, save for stating that the sentencing should be *"merciless"*. In spite of that, we do not find that the trial judge was without mercy because the appellant did not get the maximum sentence that he deserved for the offence he committed. We found no reason to disturb the sentence.

Ground 2 of the appeal therefore partially succeeds only to the extent that the trial judge erred when he unnecessarily stated that the sentencing of rapists should be 'merciless.'

In conclusion, this appeal substantially fails and it is dismissed. The appellant shall continue to serve his sentence of 18 years that was imposed upon him by the trial judge.

Dated at Fort Portal this 9th day of Nov 2022

Richard Buteera

DEPUTY CHIEF JUSTICE

Irene Mulyagonja

JUSTICE OF APPEAL

Eva Luswata

JUSTICE OF APPEAL