THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

Coram: Buteera DCJ, Mulyagonja & Luswata, JJA

CRIMINAL APPEAL NO. 188 OF 2014

BETWEEN

KAKEMBO JOSEPH ::APPELLANT

AND

UGANDA ::: RESPONDENT

(Appeal from the decision of Ibandha Nahamya, J. dated 3rd October 2011, in Fort Portal High Court Criminal Session Case No. 272 of 2013)

JUDGMENT OF THE COURT

Introduction

The appellant was indicted for the offence of rape contrary to section 123 of the Penal Code Act. He was convicted on his own plea of guilty and sentenced to 25 years' imprisonment.

Background

The facts that were admitted by the appellant were that on 24th September 2010, at around 11.00 pm, the victim who was the step mother of the appellant was on her way home from Kasawo Trading Centre, Kinoni Parish, Kiganda Sub County in Mubende District. She heard someone following her and when she turned to see who it was, by the light of the moon, she saw her step son, Kakembo, who was dressed in a stripped black T-shirt.

That the appellant then got hold of her and kicked her down. He undressed her and bound her mouth with the dress and forcefully had sexual intercourse with her. When he heard people approaching from Kasawo, the appellant got up and ran away. The victim picked up her dress and walked to her home, naked. She reported the assault to the Local Council Chairman of the area the following day.

It was further stated that the victim went to the Health Centre at Kiganda and was examined by a medical doctor. The report, which was dated 27th July 2010 showed that she sustained bruises on the face and the left arm. She also had pain in the lower abdomen. There was vaginal *introitus* consistent with forceful penetration on sexual intercourse. The report was admitted in evidence as **ExhP1**.

The appellant properly took his plea and pleaded guilty. And as is required by law, the facts were read over to him. He admitted that they were true and was thus convicted on his own plea of guilty. He was then sentenced to 25 years' imprisonment, with a note by the trial judge that the period spent on remand would be deducted from the sentence. He now brings this appeal against sentence only, with leave of court under section 132 (1) (b) of the Trial on Indictments Act, on one ground as follows:

> That the sentence that was passed against the appellant was illegal as it was ambiguous and contravened Article 23 (8) of the Constitution, or in the alternative, that the sentence was harsh and manifestly excessive in the circumstances.

He prayed that the appeal be allowed and that the sentence be set aside and substituted with an appropriate one. The respondent opposed the appeal.

Representation

At the hearing of the appeal, the appellant was represented by Mr Richard Bwiruka, learned counsel on State Brief. The respondent was represented by Mr Joseph Kyomuhendo, learned Chief State Attorney, from the office of the Director of Public Prosecutions.

Counsel for both parties filed written arguments as directed by court. They each prayed that these be adopted as their final submissions in the appeal and their prayers were granted. This appeal was thus disposed of on the basis of written submissions only.

Consideration of the appeal

The duty of this court as a first appellate court is set out in rule 30(1) of the Judicature (Court of Appeal Rules) Directions, SI 13-10. It is to reappraise the whole of the evidence before the trial court and come to its own conclusions on the facts and the law.

Submissions of Counsel

With regard to the appellant's grievance that the sentence that was imposed upon him was ambiguous, Mr Bwiruka referred us to Article 23 (8) of the Constitution. He then submitted that the trial judge first passed the sentence and then ordered that the period that the appellant spent on remand should be deducted. He explained that this would cause confusion to the prisons authorities who would have to compute the remand period and then deduct it from the sentence passed by the trial judge. He

submitted that this was contrary to the Constitutional requirements and it created ambiguity. He then referred to the decision of this court in **Bigirimana Vicent v Uganda, Criminal Appeal No 80 of 2014**, in which it was held that sentences passed by the court should not be ambiguous.

With regard to the alternative grievance that the sentence was harsh and manifestly excessive, he submitted that the appellant was 27 years old and he pleaded guilty. Further that the court should maintain consistency in sentencing. He relied on the decision of this court in **Sebandeke Abdu v Uganda, Criminal Appeal No. 287 of 2010**, in which court noted that the judicial precedents demonstrate a range of sentences between 15 years' imprisonment on the higher side and 10 years on the lower side. That the convict in that case was sentenced to 12 years and 5 months' imprisonment. He prayed that the appeal be allowed and the sentence of 25 years' imprisonment be set aside. And that thereafter, court should exercise its discretion under section 11 of the Judicature Act and impose an appropriate sentence on the appellant.

In reply, counsel for the respondent submitted that this court and the Supreme Court have made several decisions to the effect that the appellate court should only alter the sentence imposed by the trial court where the court acted on a wrong principle, overlooked some material factor, or where the sentence was manifestly excessive. He referred to the decision in **Rwabugande Moses v Uganda, Supreme Court Criminal Appeal No. 25 of 2014** to support his submission.

With regard to the requirements of Article 23 (8) of the Constitution, he submitted that the provision only requires the sentencing judge to take into account the period that the appellant spent on remand. Further that there was no legal requirement to arithmetically subtract the period that the appellant had spent on remand. He referred us to the decision of the Supreme Court in **Abelle Asuman v Uganda, Criminal Appeal No. 66 of 2016,** to support his submission.

Counsel went on to submit that in the instant case, the trial judge did state and consider the fact that the appellant spent three (3) years on remand. That thereafter, she indicated that the same was to be deducted from the sentence of 25 years' imprisonment which she imposed upon him. He added that a review of the Commitment Warrant indicates that the appellant was sent to prison to serve a period of imprisonment of 22 years. That in addition, in his notice of appeal, the appellant stated that he was sentenced to a term of imprisonment of 22 years.

Counsel then concluded with the assertion that the trial judge clearly considered the period spent on remand, though her style of doing so was different. That this did not negate or render the sentence that she imposed erroneous and no confusion was caused to the Prisons authorities because the commitment warrant clearly stated the sentence imposed.

With regard to the complaint that the sentence was excessive and inconsistent with the sentencing range for the offence of rape. Counsel for the respondent again referred us to the decision of the Supreme Court in **Rwabugande Moses** (supra), where it was held that an appropriate sentence is a matter for the discretion of the

sentencing judge. Further that this court should not interfere with the discretion of the sentencing judge unless the sentence is illegal or if the court is satisfied that the sentence imposed was manifestly excessive as to amount to an injustice.

Counsel added that court has the duty to protect vulnerable members of society by meting out sentences that it deems necessary to achieve the ends of justice. That the trial judge was thus within her rights and properly exercised her discretion in determining an appropriate sentence, given the circumstances of the case.

The respondent's counsel then referred us to some previous decisions of the court on sentences for the offence of rape. He submitted that in the case of **Adiga Adinani v Uganda, Court of Appeal Criminal Appeal No. 635 of 2014 & No 757 of 2015**, this court sentenced the appellant to 18 years' imprisonment for the offence of rape. He also drew our attention to **Walakira Lazaro v Uganda, Court of Appeal Criminal Appeal No. 119 of 2011**, where the court sentenced the appellant who raped his mother to a term of imprisonment of 35 years. He added that this appeal bears a close resemblance to the facts in **Walakira's case** (supra) because in the instant case, the appellant raped his step mother.

He concluded that the trial judge did not act on a wrong principle; neither did she overlook any material factor. That therefore, the sentence of 25 years' imprisonment imposed on the appellant was appropriate. He prayed that the appeal be dismissed.

In his rejoinder which was filed on the 6th September 2022, counsel for the appellant acknowledged that there was indeed a Commitment Warrant signed by the trial judge. However, he

contended that it did not show that the period of time spent on remand was deducted by the trial judge from the sentence that she imposed. He asserted that it was not clear who deducted the period of remand from the sentence imposed. That in spite of the contents of the Warrant, the sentence imposed by the trial judge was ambiguous because she did not comply with Article 23 (8) of the Constitution. He reiterated his earlier prayers.

Determination

We have considered the submissions of counsel and the authorities that they both cited to support their arguments. We have also reviewed the record of appeal that was placed before us. We shall address the two questions that were raised in the one ground of appeal in the same order that counsel for both parties addressed them.

Whether the sentence that was imposed on the appellant was ambiguous

We observed from the record of appeal that indeed the trial judge did not deduct the period spent on remand, though she stated that it ought to be so deducted, at page 16 of the record, in the following words:

> *"In light of those mitigating factors, I will spare him the death sentence. I will however give a long deterrent sentence as a message to him and others who think like him.*
>
> *I hereby sentence you, Kakembo Joseph to 25 years' imprisonment. The period spent on remand is to be deducted from the sentence."*

We also observed that the decision of the trial court in the appeal now before us was handed down on 3rd October 2013. The

decision in **Rwabugande** (supra), handed down on 3rd March 2017 and confirmed in **Abelle Asuman's case** (supra) could not apply to this case. However, the decision of the trial judge brings out the fact that judicial officers before the decision in **Rwabugande** (supra) had various ways of showing that they took into account the period that was spent on remand by the convict. Some, like the trial judge in this case, used the arithmetical method.

However, section 106 (1) of the Trial on Indictments Act (TIA) provides as follows:

> **106. Warrant in case of sentence of imprisonment.**
>
> **(1) A warrant under the hand of the judge by whom any person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Uganda, shall be issued by the judge, and *shall be full authority to the officer in charge of that prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death*.**
>
> ***[Emphasis added]***

In this case, the trial judge signed a Warrant on the 3rd day of October 2013. Though it was not included in the record of appeal, it was availed to us by counsel for the respondent with his submissions. Counsel for the appellant acknowledge that he saw it, though he does not agree that it made the sentence imposed compliant with Article 23 (8) of the Constitution.

We have considered the import of section 106 (1) of the TIA which we set out above. We note that it specifically states that the Commitment Warrant must be signed by the trial judge that imposed the sentence. The provision specifies that it is the warrant that authorises the prisons authorities to effect the sentence. Apparently, the sentence that is imposed in the sentencing decision of the court, is not the requisite authority.

Though counsel for the appellant asserts that it is not known who deducted the period spent by the appellant on remand, the Warrant of Commitment was not signed by any other person but the trial judge. She is the same one that sentenced the appellant and it is upon the sentencing judge that the law places the duty to specify the sentence to be imposed by the prison.

Therefore, we are of the firm opinion that the trial judge complied with the provisions of Article 23 (8) of the Constitution. She took the period spent on remand into account on sentencing the appellant. Though she did not deduct the period spent on remand immediately as she stated in her sentencing ruling, it is apparent from the Commitment Warrant that the trial judge signed that she sentenced the appellant to 22 years' imprisonment. This means that the trial judge actually deducted the period of three yeas that the appellant spent on remand. Therefore, the sentence imposed was lawful and we cannot set it aside for the reasons advanced by counsel for the appellant.

Whether the sentence was manifestly harsh and excessive

As to whether the sentence of 22 years that the trial judge imposed, as it is stated in the Warrant and the Notice of Appeal, was manifestly harsh and excessive in the circumstances of the case, we accept the submissions of counsel for the appellant that this is one of the factors that would persuade this court to set aside a sentence imposed by the trial court. We also take note of the requirement imposed on sentencing courts to consider the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances. This is provided for in

guideline 6(c) of the Sentencing Guidelines for the Courts of Judicature, 2013. We must therefore consider precedents in which this court has reviewed and sentenced appellants for the offence of rape in order to determine whether the sentence that was imposed upon the appellant was appropriate in the circumstances of the case. We now proceed to do so.

In **Adiga Adinani** (supra) the appellant committed the offence of rape when he was 33 years old. He was a relative of the victim who was married and pregnant at the time the offence was committed. The trial court sentenced the appellant to 36 ½ years' imprisonment after a full trial. On appeal, this court considered sentences previously imposed upon offenders for similar offences and instead imposed a sentence of 18 years' imprisonment.

In **Mubogi Twairu Siraji v Uganda, Criminal Appeal No. 20 of 2006**, the appellant was sentenced to 18 years' imprisonment for the offence of rape, after a full trial. The appellant was 27 years old at the time he committed the offence. Having considered that the trial judge did not take the period that he spent on remand into account, this court set aside the sentence that had been imposed, took into account the time spent on remand and imposed a sentence of 17 years' imprisonment.

In **Otema David v Uganda, Criminal Appeal No. 155 of 2008**, the appellant was convicted of the offence of rape and sentenced to 13 years' imprisonment. He was 36 years old when he committed the offence but the trial judge did not take the period that he spent on remand into account. On appeal this court considered that there was inordinate delay in concluding his trial which resulted in his stay on remand for 7 years before conviction.

The court considered the 7 years spent in lawful custody before conviction and set aside the sentence of 13 years as excessive in the circumstances. Court then imposed a sentence of 7 years' imprisonment from the date of conviction, having taken into account that the appellant spent 7 years on remand. The total sentence in that case, after a full trial, was therefore 14 years' imprisonment.

In the more recent decision of this court in **Asiimwe Maliboro Moses v Uganda, Criminal Appeal No. 141 of 2010; [2022] UGCA 269**, the appellant was convicted of the offence of rape after a full trial and sentenced to 18 years' imprisonment. On appeal, the sentence of 18 years' imprisonment was confirmed by this court.

In the appeal now before us, the appellant was 27 years old when he committed the offence. The victim was 44 years old, the wife of his father who was still alive. Certainly, the appellant unjustifiably committed a heinous offence against his father's wife. However, we consider that at that age, he was capable of reforming and contributing to development of his community. Given the sentences that we have reviewed above, some being the result of full trials, we are of the view that a sentence of 22 years' imprisonment for a youthful person was on the high side in view of the fact that he readily pleaded guilty to the offence. For that reason, we hereby set it aside as having been excessive in view of previous sentences for similar offences.

We now invoke the powers of this court under section 11 of the Judicature Act and will impose a more appropriate sentence on the appellant. In the circumstances of the case, we are of the view

that a sentence of 18 years' imprisonment would serve the cause of justice. We now take into account that the appellant spent three (3) years in lawful custody before his trial was completed, which we deduct from his sentence, pursuant to Article 23 (8) of the Constitution. The appellant is therefore sentenced to 15 years' imprisonment which will commence on 3rd October 2013, the date of his conviction.

Dated at Fort Portal this 23rd day of December 2022

Richard Buteera
DEPUTY CHIEF JUSTICE

Irene Mulyagonja
JUSTICE OF APPEAL

Eva Luswata
JUSTICE OF APPEAL