THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

Coram: Egonda-Ntende, Bamugemereire & Mulyagonja, JJA.

CRIMINAL APPEAL NO 0076 OF 2020

BETWEEN

OMARA MOSES :: APPELLANT

AND

UGANDA :: RESPONDENT

(Appeal from the decision of Stephen Mubiru, J. delivered on 6th December, 2018 in High Court Criminal Session Case No. 560 of 2018 at GULU)

JUDGMENT OF THE COURT

Introduction

The Appellant was indicted for the offence of rape contrary to Section 123 & 124 of the Penal Code Act, Cap 120. On 6th December 2018, he was convicted and sentenced to 25 years' imprisonment. He now appeals against both conviction and sentence.

Background

The facts that were accepted by the trial judge were briefly that on the 22nd November 2017, at around 5.30 am, the victim (AG) met her boyfriend, Sam Okello at the bus stop in Gulu Town. It was a pre-arranged meeting where she was to deliver money for him to purchase some items for her in Kampala. After she gave him the money, Sam Okello escorted her to a

boda boda stage where he hired a rider, the appellant, to carry her from Bed Me Iyang (be satisfied), in Pece Division, to her home in Cubu sub-ward, Pece Division, Gulu City, at a fare of UGX 2000. Sam Okello returned to the stage intending to board a bus to Kampala.

When the victim and the appellant got at an isolated spot near a forest, just before she arrived at her destination, the appellant suddenly stopped and pretended that his motorcycle had a mechanical fault. The victim decided to walk the rest of the distance home, so she handed some money to him, but the appellant seized this opportunity to grab her. He pulled her to his chest, and though she resisted, he undressed her and raped her. When he saw motor vehicle lights approaching at a distance, he jumped onto his motorcycle and fled the scene leaving the victim seated on the ground, devastated and weeping. The victim called her boyfriend, Okello, on her telephone and he quickly responded. He took the victim to the Police and she lodged a case against her assailant, was medically examined and treated for her injuries.

The appellant was arrested two days later, medically examined and found to be HIV positive. He was arraigned and tried and at the trial he denied committing the offence but admitted that on the fateful day, he carried the victim on his *boda-boda* and dropped her off at Pece Cubu, a short distance from her home, because she decided to walk the rest of the distance. He called one witness, his wife, to his defence.

The trial judge found sufficient evidence to convict him and sentenced him to 25 years' imprisonment. Being dissatisfied with both the conviction and sentence he appealed on the following grounds:

1. That the learned judge erred in law and fact when he convicted the Appellant on the uncorroborated and unreliable evidence of the single identifying witness thereby arriving at a wrong conclusion of guilt of the convict, thereby causing a miscarriage of justice.
2. That the learned judge erred in law and fact when he failed to evaluate evidence on record that was insufficient to meet the standard of proof required, and thus arrived at wrong findings that the prosecution had discharged the required burden thereby occasioning a miscarriage of justice.
3. That the learned judge erred in law and fact when he relied on the prosecution evidence that was full of contradictions and inconsistencies to convict the Appellant and thus occasioned a miscarriage of justice.
4. That the learned judge erred in law and fact when he sentenced the convict to 25 years' imprisonment which is manifestly harsh and excessive, in the circumstance of the case.

Representation

At the hearing of the appeal on 28th March 2023, Mr. Joseph Sabiti Omara represented the appellant on State Brief, while Ms. Joanita Tumwikirize, State Attorney from the Office of the Director Public Prosecutions, represented the Respondent.

The parties filed written submissions before the hearing as directed by court. Counsel for both parties applied that court considers their written arguments in the appeal and the prayers were granted. This appeal was disposed of on the basis of written arguments 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 (SI 10-13). It is to re-evaluate the whole of the evidence adduced before the trial court and reach its own conclusions on the facts and the law. But in so doing the court should be conscious of the fact that it did not observe the witnesses testify.

We have therefore considered the whole of the record that was set before us, the submissions of counsel and the authorities cited and those not cited that were relevant to the appeal, in order to reach our decision on the grounds raised in the appeal.

Submissions of Counsel

Counsel for the appellant addressed ground one on its own, grounds 2 and 3 together and ground 4 on its own. In his submissions in reply, counsel for the respondent addressed grounds 1, 2 and 3 together, under the heading *"Evaluation of evidence"* and ground 4 separately. Because of the manner in which counsel for the respondent addressed the grounds of appeal we shall address grounds 1, 2 and 3 together and then ground 4 separately. The submissions will be reviewed before we address each of the grounds of appeal.

Grounds 1, 2 and 3

The composite grievances in grounds 1, 2 and 3 of the appeal were that the trial judge failed to evaluate the evidence on record which was insufficient to discharge the standard of proof, and therefore erred in law and fact when he convicted the appellant on the basis of the uncorroborated and unreliable testimony of the victim, full of grave

contradictions and inconsistencies. That as a result, the judge occasioned a miscarriage of justice.

Appellant's Submissions

Counsel for the appellant submitted that in order for the accused to be convicted of the offence of rape, the prosecution had to prove each of the essential ingredients beyond reasonable doubt. He said he would not contest the first two ingredients of the offence, carnal knowledge of the victim and the absence of her consent, because they were proved in the court below. And that being so, he explained that the appeal was based on the 3rd ingredient only, the participation of the appellant. He explained that the ingredient of participation is satisfied by adducing direct or circumstantial evidence to show that the suspect perpetrated the offence.

He went on to submit that the testimony of the victim was that she got to know the appellant at the Police Station on 24th November 2017, but this was two days after the incident. Further, that the victim's testimony at pages 4 and 5 of the record of appeal was that she told the driver of the van that caused her assailant to flee from the scene of the crime that she did not know her assailant. With regard to the victim's observation that her assailant had a wound on his lower lip, counsel submitted that this gravely contradicted the Medical Examination Report, Police Form 24A, which was tendered in evidence as **P.EX.2**. He asserted that this cast doubt on the identification of the assailant and it ought to have been resolved in his favour; but the trial judge did not do so and therefore occasioned a miscarriage of justice.

Counsel further submitted that the trial judge based his decision on the evidence of a single identifying witness, the victim, which was not

corroborated. Further that the other prosecution witness, Okello Sam (PW4) adduced hearsay evidence which could not count as corroboration of the victim's testimony. And that in addition, PW4 contradicted the victim's testimony when he testified that he handed her torn clothes to the Police, yet she had earlier testified that she handed them to the police herself. Counsel went on to submit that the same witness did not corroborate the victim's testimony because during cross examination he admitted that he did not see the colour of victim's knickers because the light was not bright enough at the scene of crime for him to recognize colours.

Counsel then drew our attention to the cross-examination of PW4 where he stated that there were two other *boda boda* riders at the stage from whence the assailant took the victim, as well as a mechanic but none of them was called to testify to corroborate the evidence of the victim. That instead, PW4, PW5 and PW6, were called who could not corroborate the testimony of the victim as is required by law. He emphasised that the evidence of PW4 did not corroborate the evidence of the victim. He also pointed court to **P.E.X1**, the medical examination report of the victim, where Counsel claims that the victim stated that when she came off the *boda boda*, a male adult identifiable by the victim grabbed her by the hair, tore her bra, panties and had sexual intercourse with her. He asserted that this revelation by the victim was crucial and ought to have been considered in favour of the appellant because it clearly showed that it was another person that raped her, not the appellant, and this assailant is still at large.

Counsel relied on the decisions in **Chila & Another v Republic [1967] EA 722; Remigious Kiwanuka v Uganda, Criminal Appeal No. 41 of 1993** and **Abdalla Bin Wendo & Another v Republic (1953) 20 EACA 166, for**

the requirement for corroboration when relying on the testimony of a single identifying witness in sexual offences. He submitted that the trial judge would have correctly relied on the evidence of a single identifying witness if he was indeed satisfied that there was no possibility of error in the identification of the perpetrator, but it was not so in the instant case.

Counsel for the appellant then asserted that the conditions under which the assailant was identified were difficult as the victim had never seen the appellant before the incident and that there was no conversation between them. Further, that the incident took place within a short time. Counsel further submitted that the testimony of PW5 was all hearsay and not relevant in corroboration as he told the court that on the day of the incident he was at the stage at 8:00am and yet the incident allegedly took place at 5:30am. It was Counsel's contention that while PW5 testified that it was PW4 who told them about the incident, he did not see it happen.

Counsel went on to submit that both PW3 and PW4 confirmed that the incident took place at night, around a forest and a bush and that PW3 testified that she did not pay attention to the identity of her assailant as she even told the van driver that she did not know him. He concluded that all these factors fell short of the factors necessary to properly identify accused persons in difficult circumstances as they were stated in **Abdalla Nabulere & 2 Others v Uganda, Criminal Appeal No. 9 of 1978.**

Counsel further brought it to the attention of court that though the torn knickers and T-shirt of the victim were handed over to police, they were never adduced in evidence. He also wondered why they were never subjected to forensic tests to specifically link them to the assailant who was in custody. He contended that this left many questions unanswered

and that the trial court ought to have decided the matter in favour of the appellant.

With regard to grounds 2 and 3, counsel for the appellant submitted that there were grave inconsistencies and contradictions in the evidence adduced by the prosecution. For example, at pages 5 and 6 of the record, PW3 and PW4 each claimed that they handed over PW3's torn clothes to the police. He opined that this contradiction went to the root of the evidence adduced by the prosecution. He referred to the decision in **Sarapio Tinkamalirwe v Uganda, SCCA No. 27 of 1989** and contended that no explanation was offered for this contradiction. He further pointed out that though PW4 said he handed over the victim's knickers to the Police, in cross examination he said he did not see the knickers.

Counsel further asserted that PW3's private parts being tender as it was stated in the medical examination report could have been a result of sexual intercourse between her and PW4 in the morning of the alleged incident and not necessarily the result of rape. He referred to the victim's testimony on page 15 of the record where she stated that the Appellant placed her on his motorcycle and started to undress her and contended that this was impossible as it would have caused the motorcycle to fall down. He also referred court to page 6 of the record where PW4 stated that he found two *boda boda* riders and a mechanic at the state, yet PW3 at page 4 said they found only two *boda boda*s riders at the stage. He raised his concern about the existence of the third person and submitted that if there was indeed a mechanic at the stage, he would have been called to testify and that since this did not happen, the trial court ought to have ruled in the appellant's favour. He raised similar concerns about the other *boda boda* rider that PW4 claimed to have found at the stage.

Counsel further submitted that there was a gap in the prosecution case when PW3 stated that she raised an alarm as she was being raped and no one came to her rescue, yet she was just a few metres away from a house in the neighbourhood. He also noted that PW6 did not interview anyone from the neighbourhood as he carried out his investigations. He contended that the trial court occasioned a miscarriage of justice when they convicted the Appellant on the basis of *"shoddy investigations."*

Respondent's submissions

In reply, Ms. Joanita Tumwikirize noted that the Appellant was not contesting the first two ingredients of rape as his only issue was with the third ingredient, the participation of the accused. She submitted that the prosecution relied on the direct evidence of PW3 as an eye witness who had sufficient time to identify the appellant, regardless of the fact that she did not known him before the incident.

Counsel further submitted that PW3 stated that there were two *boda boda* cyclists at the stage and this was corroborated by PW4. Further that PW3 could not have hired a *boda boda* rider that she could not see and that on attempting to pay him after the journey, she must have been facing him which gave her an opportunity to see him. Counsel went on to submit that on learning about the rape, PW4 inquired about the name of the appellant from a mechanic who was at the stage at the time PW3 got onto the appellant's motor cycle. She relied on the decision in **Ntambala Fred v Uganda, SCCA No. 4 of 2015,** where the Supreme Court held that a conviction can be solely based on the testimony of the victim as a single witness provided the court finds her to be truthful and reliable. She also referred to the decision of this court in **Sewanyana Livingstone v Uganda,**

SCCA No. 19 of 2006, where it was held that what matters is the quality, not the quantity of evidence. She drew particular attention to the separate opinion of Professor Tibatemwa, JSC, in **Ntambala Fred v Uganda, Supreme Court Criminal Appeal No 34 of 2015**, in which she discussed the law on corroboration in cases of sexual assault.

Counsel further submitted that reports made by the victim to third parties immediately after the incident amount to corroboration. She invited court to find that PW3 was truthful and the reports she made after the incident amounted to corroboration.

Counsel further submitted that the trial judge did not rely on the evidence of PW3 alone; he also relied on the evidence of PW4. She discredited the allegation that the appellant was framed by PW5. She supported the conclusions of the trial judge as to identification and corroboration and prayed that this Court finds that the evidence adduced by the prosecution was strong.

In reply to the submissions that the evidence adduced by the prosecution had contradictions and inconsistencies, counsel for the respondent relied on **Alfred Tajar v Uganda (1969) EACA Cr. Appeal No. 167 of 1969**. She submitted that the inconsistencies in the prosecution case were minor and invited this Court to ignore them. Further that the evidence on record was sufficient and met the standard of proof. She also referred Court to page 21 of the record of appeal where PW4 explained that at the time of the incident, he and PW3 were not yet married but got married later that year. She asserted that it was absurd for the appellant to suggest that PW3 and PW4 had sexual intercourse that morning in order to explain away the evidence in the Medical Examination Report of the victim.

Resolution of Grounds 1, 2 and 3

The appellant's grievances about the judgment of the trial court can be summarised into three legal issues that need to be canvassed in this appeal, viz: i) corroboration of the evidence of the victim of a sexual offence; ii) identification by a single identifying witness in difficult circumstances; and iii) contradictions and inconsistencies in the evidence adduced by the prosecution. We will address these grievances as they relate to the evidence that was adduced before the trial court in order to arrive at our own decision in respect of the first three grounds of appeal.

Corroboration of the victim's evidence

It is important to note that in this case, counsel for the appellant stated at the onset that the facts of carnal knowledge and absence of the consent of the victim were not challenged by the appellant. What he challenges is that it was he, in particular, that had forceful or unlawful sexual intercourse with the victim. It is to this aspect of the offence that he demands that corroboration must be found.

In **Uganda v George Wilson Simbwa, Supreme Court Criminal Appeal No. 37 of 1995**, the court defined *"corroboration"* as follows:

> *"Corroboration affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of corroboration is the same whether it falls within the rule of practice at common law or within the class of offences for which corroboration is required."*

We must clarify that corroboration of the evidence of victims in cases of sexual assault was a rule of practice and not of law. It was based on the

discriminatory practice that in cases of alleged sexual offences it is dangerous to convict on the evidence of the woman or girl alone. And that this was considered dangerous because it was thought that in such cases girls and women sometimes tell an entirely false story which is easy to fabricate, but extremely difficult to refute. However, the East Africa Court of Appeal, in **Chila & Another v. Republic [1967] E.A. 722,** stated the principle of corroboration in sexual offences in East Africa thus:

> *"The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so, he may convict in the absence of corroboration if he is satisfied that the evidence is truthful. If no warning is given, then the conviction will normally be set aside, unless the appellate court is satisfied that there has been no failure of justice."*

The practice of requiring corroboration in sexual assaults against women victims of sexual assault has been whittled down by the courts over the years (See **Basoga Patrick v Uganda, Criminal Appeal No. 42 of 2002** and **Livingstone Sewanyana v Uganda, SCCA No. 19 of 2006,** among others). The undeniable reality is that the practice of requiring corroboration in sexual offences against women and girls is inconsistent with the principles in Article 21 (1) of the Constitution of Uganda, that all persons are equal before and under the law in all spheres and shall enjoy equal protection under the law. As a result, the Supreme Court in **Ntambala Fred v Uganda** (supra), per Tibatemwa Ekirikubinza, JSC, held that what must be emphasized is that the evidence of a victim of a sexual offence must be treated and evaluated in the same manner as the evidence of a victim of any other offence. As it is in other cases, the test to be applied to such evidence is that it must be *cogent.*

In the case now before us, after listening to the testimony of all the witnesses, the appellant denied that he raped the victim. His defence was that though it was true that he carried her from the *boda boda* stage up to a place near her home, he did not do it. Instead, the offence was fabricated by PW5, Ocen Mark Jefferson the Vice Chairperson of the *boda boda* stage, who had a grudge against him because he tried to initiate a relationship with the appellant's wife but she rebuffed him. The trial judge then resolved this in the following passage of his judgment, at page 4, page 40 of the record of appeal:

> *"To rebut that evidence, the prosecution relied on the evidence of the victim who testified that on that fateful morning at around 5.30 am she hired a boda-boda rider from Bed Me Iyang (be satisfied) also known as Kingdom Hall boda-boda stage near Sports View Guest House, in Pece Division. She had never seen the accused before but she saw him by aid of a street light nearby. At the scene, it was dark since the nearest source of light was a house at a distance but it is the rider who carried her from Kingdom Hall boda-boda stage who raped her as she was paying the fare. She was able to positively identify him after his arrest."*

The trial judge therefore relied on circumstantial evidence to come to his conclusion that the appellant was the assailant.

Identification by a single identifying witness

The facts before us in this matter point to the possibility that the victim could have been unable to positively and correctly identify her assailant, given that it appears there was insufficient light at the scene of the crime. The trial judge therefore considered the contention that the circumstances in which the offence was committed were not suitable for the positive identification of the assailant because it was still dark and the victim did not know the assailant before that day. He reasoned and found at page 5 of his judgment as follows:

"I find that the conditions of light were poor at the scene as regards familiarity, she did not know the accused prior to the incident. However, in terms of proximity he was very close to her as he grabbed her hand and pulled her to his chest. Furthermore, the act of sexual intercourse requires close physical intimacy. As regards duration, she had ample opportunity to recognise him since she had talked to him as she asked him why he had stopped, handed over the fare and asked his motive when he pulled her to his chest. She also stated that the entire episode took about ten minutes. In the result, I have found that the conditions favouring identification outweighed the unfavourable ones, thus significantly reducing the possibility of mistaken identification."

However, in her testimony, at page 18 of the record, the victim states that the assailant stopped his motorcycle when he got to a bush near her home where he proceeded to undress and then rape her. The victim was taken to task about the identification of her assailant during cross examination. She stated, at page 19 of the record of appeal, that:

"I did not know the accused before that day. I knew the boda boda stage before that day. I was not a frequent use of that stage. The scene was near a forest and the houses were far away. The house with solar power is the one I am referring to. At 5.30 am it is not all that dark. It was not very clear though. When I was giving him the money is when he held my hand. ***It was when he was returning from Gulu Regional Referral Hospital that I saw him again, I was not simply told that he was the one who raped me. I recognised him."***

{Emphasis added}

However, we note that during her examination in chief the victim stated that there was light at the *boda boda* stage as they hired the appellant to take her home. She stated thus:

"There was light at the boda-boda stage. It was a street light. It was ten meters from the boda-boda stage. He was facing the light. Sam asked him the fare as he talked to him. I was not paying a lot of attention to him at that time."

The victim further stated that there was light at the scene of the crime though it was a distance away, and this is how the image of the assailant was imprinted on her mind:

> *"At the scene there was a home with solar light at a distance. It was about twenty metres. I could not tell the colour of the motorcycle. The jacket was black. I saw his face because I feared him. He had no helmet on."*

Further, that after the appellant forced her into sexual intercourse, fortuitously, another source of light appeared at the scene. In her own words,

> *"I paid him shs. 2,000/: he grabbed my hand and pulled me to his chest. I asked what his problem was. He was wearing a thick jacket. He did not reply and I got scared.*
>
> *He pulled me a second time and held me by the wrist. I had a long skirt and a T-shirt. He held my knickers. He tore it on one side. He placed me on his motorcycle and began undressing me. He threw me on the ground and began having sex with me. He did not say anything. I began making an alarm and he was holding me by the hair and pulling it at the top of my head. There are homes nearby but at a distance and no one responded.* ***It was about 5.30 and school vans had begun to move. There was no one on the road at the time. The attack took about ten minutes. I felt pain in my, private parts and my head. When he finished his act there was a school van coming and when he saw the lights he jumped onto his motorcycle and ran away. I sat down and cried.*** *The driver of the van stopped and asked me what was wrong and I told him I had been raped by a boda-boda man who had escaped."*
>
> *{Emphasis added}*

In view of the testimony of the victim that we carefully reappraised and laid out above, the conditions for identification were not as poor as the trial judge found. We instead came to the conclusion that there was sufficient light for the victim to positively identify her assailant at three points in time during the offence. First, she saw his face under the light at

the *boda boda* stage. He was facing the light as PW4 and she entered into the transaction with him to ferry her to her home. Secondly, at the scene of the crime there was a solar light at a home that was about 20 metres away as he grabbed and undressed her and threw her on the ground before he forced himself on her. Thirdly, a van appeared on the road after he completed the sexual assault upon her. It is the head lights of that van that caused the appellant to jump onto his motorcycle and flee from the scene of the crime.

Therefore, having seen him at the *boda boda* stage, and then at the scene of the crime as he grabbed and undressed her and then as the van approached the scene, hers was not just a laboured effort to identify her assailant in the dark. The victim had sufficient opportunity and light to positively identify her assailant, and we so find.

The trial judge went on to consider other evidence on the record and came to the following findings and conclusions:

> *"The possibility of error is eliminated by circumstantial evidence of the victim's boyfriend P.W.4 Okello Sam, who testified that it is him who negotiated the fare with the accused at the boda boda stage although he had not seen him before and did not know his name. Upon the victim revealing what had happened to her, he returned to the stage where the identity of the accused was revealed to him. The accused was called on phone but could not come that day. The following day the accused came to the stage and he recognised him. After some interaction involving him, the accused, and P.W.5 Ocen Mark Jefferson the Vice Chairman, of the stage, the accused was arrested. ... It was the testimony of the victim that the boda-boda rider who carried her is the one who pretended the motorcycle had malfunctioned, he is the one to whom she handed over the fare, it is him that grabbed her, it is on his motorcycle that he placed her as he undressed her and it is on that motorcycle that he fled from the scene.*
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> *By his own admission in his defence the accused is the boda-boda rider that carried the victim. Although he claimed to have dropped her off safely as*

aforestated ... I found that the account of the victim places him at the scene before, during and shortly after the act since the constant object in the transaction is the motorcycle of the accused. ... Therefore, in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that it is the accused who committed the offence."

The excerpt above from the judgment of the trial court shows that, though it was not a legal requirement, the trial judge did not rely on the evidence of the victim alone to come to his conclusion that it was the appellant who raped her. He explored other evidence on the record, specifically that of PW4 and PW5 who testified about the circumstances under which the victim hired the *boda boda* rider, the appellant. The appellant himself admitted that it was he that was hired and that indeed he ferried the victim from his designated *boda boda* stage to a place where he alleged that she told him to stop. He therefore placed himself at the scene of the crime. There was no need for the prosecution to labour in doing so.

The trial judge emphasised that he relied on circumstantial evidence to convict the appellant. The law on circumstantial evidence was stated in **Simoni Musoke v R [1958] EA 715**. It is that where the prosecution depends solely on circumstantial evidence, which does not seem to be the case here, the court must before deciding to convict find that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt.

In the instant case, there was no other person that carried the victim to the place where she was found other than the appellant. He too admitted that he did so. He was the last person seen with the victim that morning as he took her from the *boda boda* stage at Bed Me Iyang to her home.

PW4 and PW5 were both there and saw him do so. PW4 participated in the initiating the transaction that led to his ferrying the victim to the place where she was raped. She specifically referred to a motorcycle where he placed her and tore her clothes off.

We therefore agree with the finding of the trial judge that the circumstances in this case were such that no other *boda boda* rider had a similar opportunity to do what the appellant did at/or around 5.30 am on 22nd November 2012. The inculpatory facts point to no other person but the appellant, and we so find.

Contradictions and inconsistencies in the prosecution evidence

The main contradiction that counsel for the appellant brought to the fore was that though the victim claims to have handed over her torn clothing to the police, PW4 also stated that it was he that did so. He also contends that the said clothing should have been brought in evidence to prove the offence. We are of the view that whether or not the victim handed the clothing to the police was not an important factor in determining whether the offence was committed or not. We also note that the trial judge did not refer to the torn clothing at all as a determinant factor in his evaluation of the evidence.

Counsel then goes on to contend that the clothing ought to have been subjected to DNA testing to establish whether the appellant was implicated in the offence. We do not think that given the evidence on the record, it was necessary for the prosecution to subject any of the evidence before the court to DNA testing. The offence was clearly one of rape. The appellant placed himself at the scene of the crime. The victim and PW4 saw him

before he proceeded to the scene of crime with his victim. Perhaps, we need to further point out that the absence of further evidence to prove the offence cannot be considered as a contradiction or inconsistency in the evidence.

Counsel for the appellant further submitted that the victim could have had sexual intercourse with PW4, her boyfriend, that morning and that because the trial judge did not consider it in the evaluation of evidence he occasioned a miscarriage of justice. Given the narration of the facts by the victim and PW4, we see no possibility that this was the case. Indeed, with the bulk of the evidence that was placed before us, it was preposterous, nay mischievous of counsel for the appellant to make such a proposition. The facts were also not contradictory or inconsistent with any of the evidence that the trial judge relied upon to convict the appellant of the offence.

Grounds 1, 2 and 3 of the appeal therefore fail.

Ground 4

The appellant complained that the learned trial judge erred in law and fact when he sentenced him to 25 years' imprisonment; that the sentence was manifestly harsh and excessive in the circumstances of the case.

Submissions of Counsel

Counsel for the appellant relied on the decision of the Supreme Court in **Kyalimpa Edward v Uganda Criminal Appeal No. 10 of 1995,** in which reference was made to **R v Havilland (1983) 5 CR. APP 1995,** on the principles upon which an Appellate Court may interfere with a sentence

passed by a trial court. He also referred to the case of **Kiwalabye Bernard v Uganda SCCA No. 143 OF 2001** for the same principles.

Counsel further relied on the decision in **Aharikundira Yustina v Uganda CACA No. 104 of 2009,** where the court stated that sentence is not a matter of emotions but rather one of law. He also referred court to the decision of the Supreme Court in **Mbunya Godfrey v Uganda, SCCA No. 4 of 2011** where the court emphasized the need to maintain consistency while sentencing persons convicted of similar offences. He referred to the decisions in **Kalibobo Jackson v Uganda CACA No. 45 of 2001** and **Otema v Uganda CACA No. 155 of 2008,** where this court substituted sentences of the High Court for the offence of rape. He submitted that the sentence imposed on the appellant was manifestly excessive given that he was found to be HIV positive, suffering from haemorrhoids and a first time offender. He further submitted that had the trial judge employed the principle of consistency and uniformity in sentencing, he would have sentenced the appellant to 7 years' imprisonment. He prayed that this court reduces the appellant's sentence from 25 to 7 years' imprisonment from the date of his conviction.

In reply, counsel for the respondent submitted that court can only interfere with the discretion exercised by the lower court in imposing a sentence where the sentence is manifestly excessive or so low as to amount to a miscarriage of justice, or where the court does not consider an important matter or circumstance which ought to be considered while passing sentence. She referred court to the decision in **Kiwalabye Bernard v Uganda (supra).**

Counsel then pointed us to page 44 of the record of appeal and submitted that the trial judge considered all the aggravating and mitigating factors, as well as precedents before arriving at the sentence. She added that the victim was raped in the same year that she was to get married, which she opined could have traumatized her and could affected her self-esteem. She further submitted that the offence of rape attracts a maximum sentence of death but the sentencing judge imposed 25 years after considering the mitigating factors. She added that the sentence was consistent with other sentences meted out in the recent past. Counsel referred court to the decision in **Mubangizi Alex v Uganda SCCA No. 07 of 2015,** where this court upheld a sentence of 30 years' imprisonment for a similar offence and on further appeal to the Supreme Court, the sentence was found to have been lenient considering the seriousness of the offence. She urged court not to interfere with the discretion of the learned trial judge and to dismiss this appeal.

Resolution of Ground 4

It is a well-established principle that sentencing is within the discretion of the trial judge. In **Kiwalabye Bernard v Uganda (supra)** the Supreme Court restated the principle in **R v De Havilland [1983] EWCA Crim J0330-2**, that the appellate court is not to interfere with the sentence imposed by a trial court unless the exercise of its discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice, or where the trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence, or where the sentence imposed is wrong in principle. We are duty bound to follow these principles in

reviewing the sentence of 25 years that was imposed upon the appellant in this case.

The appellant's counsel complains that the only error that the trial judge committed was that he did not consider the principles of uniformity and consistency and so arrived at a sentence that was manifestly excessive and harsh in the circumstances. Counsel for respondent on the other and asserts that the trial judge did reflect that he did so. We have reviewed the proceedings and find that before he imposed the sentence on the appellant, at pages 43 and 44, the trial judge did consider sentences that had been imposed by various court for the offence of rape as follows:

> *"In doing so, the court must take into account current sentencing practices for purposes of consistency and uniformity in sentencing. I have therefore reviewed current sentencing practices for offences of this nature. In this regard, I have considered the case of* ***Kalibobo Jackson v. Uganda C.A. Cr. Appeal No. 15 of 2001*** *where the court of appeal in its judgment of 5th December 2001 considered a sentence of 17 years' imprisonment manifestly excessive in respect of a 25-year-old convict found guilty of raping a 70-year-old widow and reduced the sentence from 25 years to 7 years' imprisonment. In the case of* ***Mubogi Twaibu Siraj v. Uganda C.A Cr. Appeal No.20 of 2006*** *in its judgment of 3rd December 2014, the court of appeal imposed a 17-year term of imprisonment for a 27-year-old convict far the offence of rape, who was a first offender and had spent one year on remand. In another case,* ***Naturinda Tamson v. Uganda C.A. Cr. Appeal No. 13 of 2011****, in its judgment of 3rd February 2015, the Court of Appeal upheld a sentence of l8 years' imprisonment for a 29-year-old appellant who was convicted of the offence of rape committed during the course of a robbery. In* ***Otema v. Uganda, C.A. Cr. Appeal No. 155 of 2008*** *where the Court of Appeal in its judgment of 15th June 2015, set aside the sentence of 13 years' imprisonment and imposed one of 7 years' imprisonment for a 36 year old convict of the offence of rape who had spent seven years on remand. Lastly,* ***Uganda v Olupot Francis H.C Cr. SC. No. 006 of 2008*** *in a judgment of 21st April 2011, a sentence 2 years' imprisonment was*

imposed in respect of a convict for the offence of rape, who was a first offender and had been on remand for six years."

Having done so, it appears to us that the trial judge then had recourse to the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013.** Schedule 1, Part 1 of the Guidelines indicates that for the offence of rape, the starting point is 35 years, and the sentencing range, after taking into account the aggravating and mitigating factors, is from 30 years' imprisonment to death. At the time of sentencing the appellant, the 6th December 2018, it was the practice to follow the Sentencing Guidelines to the letter and we do no fault the trial judge for doing so.

However, we note that while the Guidelines provide for sentencing ranges in Part 1 of Schedule 3, the ranges do not seem to reflect the range of sentences that have been imposed by this court and the Supreme Court for similar offences. They actually do not even reflect the sentencing ranges at the time that they came into force as Legal Notice No. 8 of 2018. As a result, as an appellate court, this court has the duty of determining appropriate sentences for capital offence based on sentences that have been imposed by it and the Supreme Court for similar offences. The trial judge had done that but due to the requirements of the Sentencing Guideline, he ignored the precedents and relied on the Guidelines.

In view of the sentences that the trial judge reviewed for the offence of rape, we accept the submissions of counsel for the appellant that a sentence of 25 years for rape, even after subtracting the period of one year that the appellant spent in lawful custody before sentence was excessive, taking into account the circumstances of the case and the mitigating factors. We will therefore not review many decisions of the courts, but we will consider

the decisions reviewed by the trial judge. We further observe that in **Asiimwe Maliboro v Uganda, Criminal Appeal No 141 of 2010, [2022] UGCA 268,** on 9th November 2022, this court confirmed a sentence of 18 years' imprisonment for rape that was committed in 2006 against a victim who was 18 years old. Further to that, in **Adiga Adinani v Uganda, Consolidated Criminal Appeal No 637 of 2014 and 757 of 2015 [2021] UGCA 13**, this court imposed a sentence of 15 years and 3 months' imprisonment of a convict that has been sentenced to 36½ years' imprisonment for rape committed against a victim who was heavily pregnant, and in the process caused her physical injuries on the face and neck. As result, we now set aside the sentence of 25 years that had been imposed on the appellant and shall impose our own sentence, pursuant to section 11 of the Judicature Act.

We have considered the aggravating and mitigating factors that were advanced before the trial judge imposed his sentence. We are also alive to the fact that the appellant was HIV positive at the time he committed the offence and had haemorrhagic piles, which would make his stay in prison onerous. We are also mindful of the fact that rape is a heinous offence and is especially so where the assailant, like the appellant was, is aware that he is HIV positive.

Much as offenders ought to be given deterrent sentences in order to discourage would be offenders from attempting it, we are of the view that a sentence of 15 years would serve the ends of justice in this case. We now deduct the period of one (1) year that the appellant spent in lawful custody before he was convicted, with the result that the appellant should serve a sentence of 14 years' imprisonment. We sentence him accordingly and he

shall serve the sentence of 14 years' imprisonment from the date of his conviction, the 6th of December 2018.

Dated at Gulu this 15th day of May 2023

Frederick Egonda-Ntende
JUSTICE OF THE COURT OF APPEAL

Catherine Bamugemereire
JUSTICE OF THE COURT OF APPEAL

Irene Mulyagonja
JUSTICE OF THE COURT OF APPEAL