THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HELD AT MBARARA

Coram: Muzamiru Mutangula Kibeedi, Christopher Gashirabake & Eva K. Luswata, JJA)

CRIMINAL APPEAL NO. 184 OF 2011

TURYATUNGA YOROKAMU :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

[Appeal from the decision of the High Court of Uganda at Mbarara (Hon. Justice Akiiki Kiiza, J) in Criminal Session Case No. HCT-05-CR-CSC-0032 of 2009 delivered on the 08th July 2011]

JUDGMENT OF THE COURT

Introduction

The appellant was indicted, tried and convicted of the offence of rape contrary to Sections 123 and 124 of the Penal Code Act, Cap. 120 (PCA), and sentenced to 20 years' imprisonment.

The particulars of the offence, as set out in the indictment, were that the appellant on 8th June 2008, at Kahenda Cell, Ntungamo District, had unlawful carnal knowledge of a lady, "TR" (Names withheld) without her consent.

The appellant denied the offence and gave evidence on oath. He set up a defence of an *alibi* to the effect that at the material time, he was grazing cattle and could not have committed the crime. The trial Court found the appellant guilty of the offence, convicted him and, as already stated, sentenced him to 20 years' imprisonment.

Grounds of Appeal

Being dissatisfied with the decision of the trial Judge, the appellant appealed to this Court against both the conviction and sentence on three grounds of appeal as set out in his memorandum of appeal, namely: -

1. *The learned trial Judge erred in law and fact when he held that the appellant participated in the commission of the offence by ignoring the grave discrepancies and inconsistencies in the prosecution evidence on record, thus causing a miscarriage of justice.*

2. *The learned trial Judge erred in law and fact when he convicted the appellant on uncorroborated evidence that there was carnal knowledge by the appellant.*

3. *The learned trial Judge erred in law and fact when he imposed a harsh and excessive sentence of 20 in the circumstances.*

Representations

At the hearing of the appeal, Ms. Benita Namusisi represented the appellant on State brief; while Mr. Jacob Nahurira, a State Attorney in the office of the Director of Public Prosecutions (DPP), represented the respondent.

The parties proceeded by way of written submissions as directed by the Court. However, Counsel for the parties briefly addressed court when the appeal was called for hearing. This judgment has therefore been prepared largely based on the written submissions. However, the oral submissions have also been considered.

Appellant's Written Submissions

Counsel for the Appellant submitted on grounds 1 and 2 concurrently and ground 3 separately.

With regard to grounds 1 and 2, Counsel for the appellant contended that the trial Judge did not properly evaluate the evidence on record which is marred with uncorroborated grave consistencies and contradictions. The grave inconsistencies complained about were with regard to the prosecution witnesses' testimonies as to whether the victim was actually raped, the time of the commission of the offence, where it was reported, and how and where the victim was found after the rape.

Counsel for the appellant disputed the fact as to whether PW1 was actually raped and argued that the victim did not demonstrate to Court whether the appellant inserted his penis into the victim's vagina through the Bamuda short, then the knickers, or whether the victim was raped

through only the Bamuda shorts. According to counsel, without corroboration of this evidence, doubt is created by the evidence on whether there was rape, and whether PW1 was consistent in her testimony so as to be relied upon by the Court without corroboration.

The other inconsistency raised by the appellant's Counsel was that PW2, stated that about 5:30PM, he received a call from the Vice Chairman of Kahenda informing him that the appellant had raped PW1. But this testimony contradicts that of PW1 who stated that she reported the matter to Chairman Otafire Sebehe immediately, which means that she was no longer at the scene of the crime as alleged by PW2.

The other contradiction alluded to by Counsel for the appellant was that of the date of committing the crime. That PW1 said that she was raped on 08/06/2008 when the appellant attacked and had forceful sex with her, whereas PW2 testified that it was on 02/06/2008. That the discrepancy in the date when the act was done makes the entire evidence of PW1 and PW2 very untrue. As such, Counsel prayed that this Court disregards the same.

Counsel relied on the case of *Obwalatum Francis Vs Uganda Criminal Appeal No. 30 of 2015* where it was held that contradictions and discrepancies which are grave would ordinarily lead to the rejection of such testimony unless satisfactorily explained.

Counsel further submitted that he was alive to the law which is to the effect that in sexual offences, corroboration is not mandatory. However, argued Counsel, this requirement was to be applied by Courts in situations where there is no direct evidence and medical evidence. Counsel submitted that the instant case was an exception which required medical and direct evidence for corroboration before the learned trial Judge could convict the appellant since it was available. Counsel referred to the testimony of PW1 in which she stated that she was medically examined, but such vital medical evidence was not tendered in the court to corroborate the sexual offence. Counsel also referred to one Akankwasa Serena, who was stated by PW1 to be a direct witness but was not summoned by the prosecution.

For the above reasons, Counsel prayed to Court to quash the conviction and set the appellant free as a lot of doubt existed in the prosecution case which should be resolved in favour of the appellant.

With regard to ground 3, Counsel submitted that the trial Judge did not deduct the 3 years spent on remand by the appellant contrary to Article 23(8) of the Constitution of Uganda and the principles set out in *Rwabugande Moses Vs Uganda SC Criminal Appeal No. 0025 of 2014.*

Further, Counsel argued that the sentence was harsh. Counsel referred to the case of *Naturinda Tamson Vs Uganda, Criminal Appeal No. 13 of 2011,* in which the appellant was convicted of 3 counts, rape, defilement and aggravated robbery and sentenced to 18 years for each of the offences by the trial court. In that case, the appellant was a first offender; had spent slightly over 2 years on remand prior to his trial and conviction; and was 29 years at the time of the commission of the offences. On appeal, the Appellate Court set aside the 18 years and substituted it with a 10 years' sentence from the date of conviction.

Counsel also referred to the case of *Kalibobo Jackson Vs Uganda Criminal Appeal No. 45 of 2001*, where the appellant, a 25 years' old, raped a 70-year-old lady and was sentenced to 17 years' imprisonment by the trial court. That on appeal, the Court of Appeal allowed the appeal against sentence for being harsh and excessive and reduced it to 7 years' imprisonment.

Counsel submitted that had the trial Judge considered the duty to maintain uniformity of sentences, he would certainly not have imposed a sentence of 20 years. Counsel contended that the appellant was 32 years when he raped a lady of 45 years; he has a family to take care of; he is a first time offender; he is remorseful; he is sickly and also had been on remand for a period of 3 years. That, therefore, 20 years' imprisonment was manifestly so excessive as to amount to a miscarriage of justice.

Counsel concluded by praying to the court to allow the appeal.

Respondent's submissions in Reply

Counsel for the respondent opposed the appeal and submitted on each ground separately.

With regard to ground 1, Counsel submitted that the victim was very clear that she was raped. The victim testified that the appellant failed to remove the Bamuda shorts, but he turned up one side of the Bamuda shorts which had very wide openings for legs, then he put his penis in her vagina.

As regards the alleged contradiction or inconsistency as to where the victim was at the time of reporting the offence, Counsel stated that PW1 testified that upon the appellant being removed from her after raping her, she went and reported the matter to the Local Council Chairman called Otafire Sebehe, and that this testimony was not contradicted at all during cross examination.

As regards the time the offence is alleged to have taken place and the place where PW2 met PW1, Counsel submitted that there was no contradiction in that aspect. That PW1 stated that the whole ordeal lasted for about one- and-a-half hours. And that PW2 said that he was called about 5:30PM and informed that PW1 had been raped.

With regard to the last contradiction alluded to by Counsel for the appellant, namely the date of commission of the crime, Counsel submitted that no contradiction existed. Counsel referred to the evidence of PW2 which was to the effect that he went to the scene and found the victim in a distressed state.

In the alternative, Counsel submitted that if this Court finds that there were any contradictions and inconsistencies, the same were minor and did not go to the root of the case and that there was no deliberate untruthfulness on the part of the witnesses.

On ground 2, Counsel submitted that the trial Judge properly evaluated the evidence and found that the appellant had carnal knowledge of the victim. That the victim in her testimony demonstrated that she clearly knew the appellant very well. And her evidence was not in any way contradicted. 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 as was held in *Ntambala Fred Vs Uganda, Supreme Court Criminal Appeal No. 34 of 2015;* and in *Sewanyana Livingstone Vs Uganda, Supreme Court Criminal Appeal No. 19 of 2016*.

On ground 3, Counsel submitted that whereas the appellant's ground of appeal is to the effect that the learned trial Judge erred in law and fact when he imposed a harsh and excessive sentence of 20 years, their arguments in submission are challenging the legality of the sentence for reasons that the trial judge did not consider the time the appellant spent on remand while sentencing him, thus introducing a totally different and new ground of appeal not contained in the memorandum of appeal.

Counsel then proceeded to respond that the learned trial Judge while sentencing the appellant considered both the mitigating factors and aggravating factors and discounted the 3 years spent on remand by the Appellant. As such, he exercised his discretion judiciously within the precincts of the law and no illegality was occasioned and all material factors were duly considered in imposing the sentence.

Counsel concluded by praying that the appeal be dismissed, and the conviction and sentences of the trial Court be upheld by this court.

Duty of the Court as a first appellate court

As a first appellate court it is our duty to reappraise all material evidence that was adduced before the trial court and come to our own conclusions of fact and law while making allowance for the fact that it neither saw nor heard the witnesses testify. See *Rule 30(1)(a) of the Judicature (Court of Appeal) Rules; Baguma Fred Vs Uganda, Supreme Court Criminal Appeal No. 7 of 2004; Kifumante Henry Vs Uganda Uganda, Supreme Court Criminal Appeal No. 10 of 1997; and Pandya Vs R [1957] EA 336.*

We shall bear in mind the above principles when resolving the grounds of appeal in the order they were set out in the Memorandum of appeal.

Ground 1 – Participation of the appellant

The appellant's complaint in ground one is that the prosecution evidence relied upon by the trial Judge to convict him had grave contradictions regarding the participation of the appellant in the commission of the offence of rape. The inconsistencies complained about related to the

prosecution witnesses' testimonies as to whether the victim was actually raped, the time of the commission of the offence, where it was reported, and how and where the victim was found after the rape. It was the appellant's submission that had the trial Judge properly evaluated the evidence before him, he would have found that the contradictions and inconsistencies were grave and warranted a rejection of the prosecution evidence and an acquittal of the appellant. For this proposition, the appellant relied on *Alfred Tajar vs Uganda E.A.C.A Cr. Appeal NO. 167 of 1969 (unreported)*.

The respondent disagreed and supported the findings of the trial Judge as based on a proper evaluation of the evidence before the trial Judge.

We have reviewed the trial proceedings and the judgment of the trial court. The direct evidence as to the participation of the appellant consisted of the victim (PW1) as a single identifying witness. It was the testimony of PW1 that it was about 4.00pm when the appellant found her in her garden of potatoes. She was gathering potato veins for planting. She was alone. Then she saw the appellant come to her. He demanded to have sex with her. PW1 refused. PW1 was a widow. The Appellant was one of her brothers-in-law and had been known to her for about 28 years. Having refused the appellant's sexual advances, PW1 got scared and decided to return home. She was grabbed by the appellant from behind and thrown down. He got on top of her. He then started struggling to remove her knickers called "Bamuda" which she described as tough and having a wide leg room. The appellant then took off his pair of shorts, and managed to turn up one of the wide leg openings of the Bamuda and put his penis in her vagina. She raised an alarm in vein. The appellant held her by the neck. The appellant raped her till she was rescued by one of the neighbours, Serena Akankwasa, who had come to cut a banana nearby. The ordeal lasted about one and a half hours. PW1 then reported the ordeal to the LC1 Chairperson, Otafire Sebehe.

PW1's evidence was corroborated by PW2 Buzima Jafari. He testified that in 2008 he was the Parish Local Defence Unit (LDU) Commander. He knew the appellant for about 20 years as a resident of Kahenda Cell. That on 02nd June 2008 at about 5:30p.m he received a call from the

Vice Chairman of Kahenda that the appellant had raped PW1. He went to the scene on a motorcycle and found PW1 crying. She had soil over her clothes and elbows. She told him that she had been raped by the appellant. He then went to the bar where the appellant was at the material time, arrested him, and took him to the Police Post at Rwamirama.

In his defence, the appellant denied being the rapist and set up an *alibi* to the effect that at 4PM, he was grazing cattle and not at the crime scene as claimed by the victim. That thereafter, at 7PM he went to the home of his sister, DW2, and stayed there till 9PM.

DW2 supported the appellant. She said that the appellant went to her home at 3PM.

In his judgment, the trial Judge rightly set out the three ingredients which the prosecution had to prove in order to secure a conviction on the charge of rape, namely: 1) The victim must have experienced penetrative sexual intercourse; 2) Absence of the victim's consent to the act of sex; and 3) The appellant is the culprit.

With regard to the evidence of the appellant's participation, the trial Judge properly addressed himself to the law of a single identifying witness, then evaluated the evidence of PW1 and the appellant's *alibi*. The trial Judge found that the conditions favoured the correct identification of the appellant. He stated thus:

> *"I now turn to the alleged participation of the accused in the crime. This can be done by direct evidence from the victim and/or by eye witnesses to the crime, and in certain cases by circumstantial evidence. In this particular case, we have direct evidence from the victim. She is the sole identifying witness. I warned the assessors as I warn myself of the need to be careful so as to avoid mistaken identity. [PW1] told court that on the material day at around 4p.m,. she was in her garden of potatoes. She was gathering the potato veins for planting. She was alone. Then she saw the accused come to her…She clearly explained what happened to her on that day. She knew the accused as her brother in law for 28 years. This is not denied by the accused. It was daytime, i.e. 4p.m. The victim said that she first talked with the accused, when he was proposing to her about sex, then he struggling with her so as to access her private parts. He even stood up and removed his pair of shorts before raping her. She told court that she spent about 1 ½ hours with the accused during her ordeal. In those circumstances, I am satisfied, as assessors are, that the conditions for a correct identification on the part of PW1 regarding her rapist were favourable. She positively identified the accused as the culprit. Hence, even if she is a single identifying witness, there is no possibility of mistaken identity on her part. After warning the assessors they were of the same view. Though*

*sexual victim's evidence no longer requires corroboration (see: **KABOGERE STEVEN Vs UGANDA, UCA CR. APPL. NO. 9/2002**), corroboration can also be got from the depressed condition of the victim. PW2 told court that he had seen the victim at the Chairman's place crying and had her clothes covered with soil. (See: **KABAZO VS UGANDA [1965] EA 507**)"*

We are satisfied that the appellant's complaint that the trial Judge did not evaluate the evidence as to the appellant's participation has no valid basis.

With regard to the specific contradictions in the testimonies of PW1 and PW2 as to the date, time and place when/where the rape took place, we find them to be minor and inconsequential in the circumstances of this case. PW1's testimony was that she was raped from the sweet potatoes garden on 08th June 2008 from around 4 Pm and that the ordeal lasted about one-and-a-half hours. That after being disentangled from the rapist by one of the neighbours, Serena Akankwasa, PW1 went and reported the ordeal to the LC1 Chairperson, Otafire Sebehe. On the other hand, PW2 testified that after receiving a call from the Vice Chairman on 02.06.2008, he rode his motorcycle to the scene and found PW1 crying and her clothes soiled. The trial Judge found PW1 to be truthful and found the date of commission of the offence to be 08.06.2008 and the place where PW2 found her crying to be the Local Council Chairman's place. We have no basis to fault him. PW1 having personally undergone the traumatizing experience of being raped is more likely to remember, with more certainty, the fine details of the ugly experience than PW2 who was simply a witness after the fact.

As regards the alleged contradictions in time, we accept the respondent's submissions that the time which PW2 stated of receiving the call from the LC Vice Chairman as 5.30PM, and the testimony of PW1 that the ordeal lasted for about one-and-a-half hours from about 4PM, are simply different ways of stating the same thing. There is no contradiction in the substance of the meaning of the two versions.

The upshot of all the aforesaid is that ground one fails.

Ground 2 – Corroboration of evidence of carnal knowledge

In ground two, the appellant faults the trial Judge to have convicted him based on uncorroborated evidence that there was carnal knowledge of the victim.

The respondent disagreed and supported the findings of the trial Judge.

This Court and the Supreme court have on several occasions held that *the evidence of a victim of sexual violence, no longer requires corroboration.* That a conviction can be based on the testimony of the victim of the sexual offence even when he/she is a single witness. That what matters is the quality and NOT quantity of evidence. It is sufficient that the victim's evidence is considered to be cogent. And this must be held as true in a sexual assault prosecution as it is in other offences. See: *Livingstone Sewanyana Vs. Uganda; Criminal Appeal No. 19 of 2006; Ntambala Fred Vs Uganda, Supreme Court Criminal Appeal No. 34 of 2015* and *Basoga Patrick Vs Uganda, Criminal Appeal No.42 of 2002.*

When dealing with the evidence of PW1, the trial Judge stated that he found her to be a mature lady with five children which made her knowledgeable as to what a sexual act or sexual intercourse is all about. He found her testimony about the ordeal and how the appellant forcefully put his penis into her vagina was truthful and sufficient by itself to prove that the appellant had carnal knowledge of the victim without the need for corroboration.

The aforesaid notwithstanding, the trial Judge found corroboration of the victim's evidence in the depressed condition in which PW2 found her shortly after the occurrence of the rape. PW2 testified that he had seen the victim at the Chairman's place crying and had her clothes covered with soil.

We are satisfied that the trial Judge properly evaluated the evidence and applied the law to it, and there is no valid basis to fault him. Ground two therefore fails.

Ground 3:

Ground three was couched as follows:

> *The learned trial Judge erred in law and fact when he imposed a harsh and excessive sentence of 20 in the circumstance(sic?).*

However, in her submissions, Counsel for the appellant widened the scope of her complaint beyond what was set out in the Memorandum of appeal as ground three, to encompass the

question of illegality in so far as she claimed that the trial Judge did not arithmetically deduct the remand period before sentencing the appellant to twenty years. On the other hand, Counsel for the respondent objected to such a course of action contending that the appellant is barred from raising new grounds of appeal without first obtaining leave of court.

As a general rule, Rule 74(1)(a) of the Judicature (Court of Appeal) Rules, S.I No. 13-10 bars an appellant from presenting any arguments on a matter not contained in the grounds of appeal without leave of court. The Rule is couched as follows:

> ***"74. Arguments at hearing.***
>
> *1) At the hearing of an appeal—*
>
> *(a) the appellant shall not, without leave of the court, argue any ground of appeal not specified in the memorandum of appeal or in any supplementary memorandum lodged under rule 67 of these Rules"*

The issue of the illegality of the sentence being raised by an appellant, while not being one of the grounds specified in the Memorandum of Appeal, was considered by the Supreme Court of Uganda when faced with the same question in *Rwabugande v Uganda (Supreme Court Criminal Appeal No. 25 of 2014) [2017] UGSC 8 (3 March 2017)*. The Court held thus:

> *"The general rule is that an appellate court will not consider an argument raised for the first time on appeal ... However, there are exceptions to this general rule. For example, as explained in the well-known legal maxim, "Ex turpi causâ non oritur action", a court of law cannot sanction what is illegal. (**See: Kisugu Quarries vs. The Administrator General SCCA No.10 of 1998**).*
>
> *The instant case warrants a departure from the general rule since it deals with a constitutional imperative, the issue at hand being in the nature of a fundamental right of a convict as guaranteed by the Constitution. **Article 2** of the **Constitution** states that the Constitution is the Supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda."*

On the basis of the above authority, we rejected the respondent's objection. Instead, we likewise adopted the approach of the Supreme Court and proceeded to resolve the issue of illegality raised by the appellant, the general rule as contained in Rule 741(a) of the Court of Appeal Rules notwithstanding.

The illegality raised by the appellant is that the trial Judge did not arithmetically deduct the period the appellant spent on remand before sentencing him to 20 years' imprisonment as required by Article 23 (8) of the Constitution.

Article 23 (8) of the Constitution of the Republic of Uganda, 1995 provides as follows:

> *"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 added]

According to the case of *Rwabugande Moses Vs. Uganda, (op cit)* "taking into account" involves an arithmetic deduction of the remand period. The Supreme Court stated it thus:

> *"the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused".*

A review of the sentencing order of the trial court in the instant matter reveals that the learned trial Judge did not arithmetically deduct the remand period. He simply stated that the *"Accused is allegedly a first offender. He has been on remand for 3 years. I take this period into consideration while sentencing him…"*

The decision of the trial court having been made on the 08th of July 2011 before the decision in *Rwabugande Moses Vs. Uganda, (op cit)* which was made in March 2017, we are satisfied that by the style used, the learned trial Judge demonstrated that he was mindful of the period that the appellant spent on remand when sentencing the appellant. This complied with what was accepted as the meaning of Article 23(8) of the Constitution at that moment in time as enunciated by the Supreme Court in several decisions rendered before the *Rwabugande case* which include *Kizito Senkula Vs. Uganda, Supreme Court Criminal Appeal No. 24 of 2001* (unreported), where the Supreme Court stated as follows:

> *"As we understand the provisions of Article 23 (8) of the Constitution, they mean that when a trial Court imposes a term of imprisonment as sentence on the convicted person*

the Court should take into account the period which the person spent in remand prior to his/her conviction. Taking into account does not mean an arithmetical exercise."

Accordingly, we find that the sentence imposed by the learned trial Judge was not illegal as claimed by the appellant.

As regards the complaint that the sentence was harsh and manifestly excessive and out of range with the decided cases on the same matter, we are mindful of this court's power to interfere with the sentence imposed by the trial court is limited and exercisable only where it is shown that the sentence is illegal, or the sentence is harsh or manifestly excessive, or that there has been a failure to exercise discretion or to take into account a material factor, or an error in principle was made. *See: Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014; Kyalimpa Edward Vs Uganda, Supreme Court Criminal Appeal No. 10 of 1995; Kamya Johnson Wavamuno Vs Uganda, Supreme Court Criminal Appeal No. 16 of 2000; and Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001*

The learned trial Judge's Sentencing Order is as follows:

> *"**Court: Sentence and reasons thereof: -***
>
> *Accused is allegedly a first offender. He has been on remand for 3 years. I take this period into consideration while sentencing him. He has prayed for leniency and has a family to look after. I also take into consideration the sickness he has talked about. However, accused committed a serious offence. The maximum sentence upon conviction is a possible death. Hence the law is serious with convicted rapists.*
>
> *In this case, accused attacked a defenseless widow and who was also his own sister-in-law. In my view he is expected to comfort and protect her from predictors but accused decided to take advantage of her vulnerability and ravage her sexually.*
>
> *Such behavior cannot be tolerated by this court. The accused in my view deserves a stiff sentence. Putting everything into account, I sentence accused to 20 (twenty) years imprisonment. Right of Appeal explained."*

We have also closely examined the sentencing proceedings of the trial court and we are satisfied that the trial Judge considered both the aggravating and mitigating factors that were presented to him.

With regard to the issue of consistency of the sentence, we noted that from the cases cited to us by the appellant, the sentences imposed by this court for the offence of rape were 7 and 10 years' imprisonment. In the case of *Naturinda Tamson Vs Uganda, Criminal Appeal No. 13 of 2011* this Court set aside the sentence of 18 years' imprisonment imposed on the appellant by the trial court upon being convicted of rape and reduced it to 10 years' imprisonment. In the case of *Kalibobo Jackson v Uganda Criminal Appeal No. 45 of 2001*, this court set aside the sentence of 17 years' imprisonment imposed on the appellant by the trial court and reduced it to 7 years' imprisonment. The appellant in the case was 25 years old while the victim was a 70-year-old lady.

This court (Muzamiru M. Kibeedi, Christopher Gashirabake & Eva K. Luswata, JJA) in its recent decision in *Tumweheise Innocent Vs Uganda, CA Criminal Appeal No.403 of 2014 (unreported)* observed that the range of sentences imposed by this court and the Supreme Court for the offence of rape is between 10 to 15 years' imprisonment. See: *Lugi Sairus v Uganda, CA Criminal Appeal No.50 OF 2000, (unreported); Kizito Nuhu Wasswa Vs Uganda, Court of Appeal Criminal Case No. 89 of 2013; Karibasenyi Erisa Vs Uganda, Court of Appeal Criminal Appeal No. 268 of 2017; Boona Peter Vs Uganda, Court of Appeal Criminal Appeal No. 16 of 1997; Yebuga Majid Vs Uganda, Court of Appeal Criminal Appeal No. 303 of 2009; and Adiga Adinani Vs Uganda, Court of Appeal Criminal Appeal Nos. 635 of 2014 and 757 of 2015; and Asiimwe Maliboro Moses Vs Uganda, Criminal Appeal No. 141 of 2010*.

Court further observed that nonetheless, higher sentences have also been imposed where there is evidence of exceptional circumstances. For instance, in *Mubangizi Alex Vs Uganda, Supreme Court Criminal Appeal No. 07 of 2015*, the Supreme Court considered the sentence of 30 years' imprisonment as lenient in the circumstances of the case. In that case, the appellant was a 23-year-old man. He raped an old woman aged 60 years who was taking care of her sick daughter who was admitted in Lyantonde Hospital when the victim had gone to a nearby eucalyptus forest to collect firewood. Court considered the advanced age of the victim, the humiliation and the HIV+ status of the appellant as aggravating factors which could have even attracted a higher sentence of life imprisonment.

In the premises, the appellant's complaint that the sentence contravened the principle of uniformity in sentencing is valid. The principle is set out in *Sentencing Principle No.6(c) of the Constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions, 2013 – Legal Notice No.8 of 2013* thus:

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

We find that as a result of the above omission on the part of the trial court, it imposed a sentence that was out of range with sentences imposed in cases of similar nature and thus manifestly excessive in the circumstances of this case. This was not a proper exercise of discretion by the trial court. One of the circumstances under which the appellate court may interfere with the sentence of the trial court is where "*...it is evident that the [trial] judge had acted on some wrong principle or overlooked some material factor. (See: James S/O Yoram V R [1950] 18 EACA 147 at page 149 and Muhwezi Bayon Vs Uganda, Court of Appeal Criminal Appeal No. 198 of 2013.*

On account of the aforesaid, we allow ground three and set aside the sentence of the trial court. We shall now proceed to sentence the Appellant afresh pursuant to *Section 11 of the Judicature Act* which provides as follows:

> ***"11. Court of Appeal to have powers of the court of original jurisdiction.***
>
> *For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."*

In the matter before us, we have taken into account both the aggravating and mitigating factors set out in the sentencing proceedings and the order of the trial court as reproduced hereinabove. We have also considered the range of sentences for the offence of rape as already mentioned in this judgment.

DECISION.

1. The appeal succeeds in part.
2. The conviction of the appellant is upheld.
3. The sentence imposed by the High Court against the appellant for the offence of rape is hereby set aside and substituted with 13 years' imprisonment which we consider as the appropriate sentence in the circumstances of this case. When we deduct the period of about 3 years spent by the appellant in pre-trial remand, we find that the appellant has already completed serving the full term of 10 years' imprisonment commencing from the 8th day of July 2011, the date of conviction.
4. We accordingly order that the appellant be immediately and unconditionally released, unless held on other lawful charges.

We so order.

Delivered and dated this 4th day of Sept 2023.

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MUZAMIRU MUTANGULA KIBEEDI
Justice of Appeal

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CHRISTOPHER GASHIRABAKE
Justice of Appeal

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EVA K. LUSWATA
Justice of Appeal