THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

[Coram: R. Buteera, DCJ. C. Gashirabake, JA, O. Kihika, JA.]

CRIMINAL APPEAL NO. 404 OF 2014

(Arising from RUK- 00-CR-CSC-No.0030 of 2013)

BETWEEN

TURYASINGURA AMBROSE..... APPELLANT

AND

UGANDA ..... RESPONDENT

(Appeal against the sentence passed by Bashaija K. Andrew J. of the High Court of Uganda at Rukungiri delivered on 06/01/2014)

JUDGMENT OF COURT

Introduction

1.] The appellant was indicted, tried and convicted of Rape contrary to sections 123 & 124 of the Penal Code Act.

2.] It was alleged that on the 30th day of September 2011, there was a party at Nyakinoni Secondary School. The victim was one of those who attended the party. At about 7:30 p.m., while on her way home, the victim saw the appellant behind following her at a short distance. The appellant reached out to her and grabbed her by the hand. He pulled her to the nearby bar of Kadeo. The appellant and another person not known to the victim forcefully put her on the motorcycle took her to the appellant's home and locked her there. The victim escaped, however, the appellant followed her and got her at a short distance,

tore off her clothes and raped her. After raping her the victim escaped naked to the nearby school where she found a lady who gave her clothes. She went home and reported the matter to the parents who escorted her to the police station at Nyamirama to report the case of rape. The appellant was arrested, indicted, tried, convicted and sentenced to 17 years and 6 months' imprisonment. Aggrieved with the trial Court findings the appellant lodged this appeal on one ground;

> *The learned trial Judge erred in law and fact when he imposed the sentence of 17 years and 6 months. The sentence was harsh and manifestly excessive considering the circumstances of the case.*

Representation

3.] At the hearing of the appeal, the appellant was represented by Ms. Maclean Kemigisha on State brief. The respondent was represented by Mr. Sam Oola Senior Assistant DPP.

Submissions by counsel for the appellant

4.] Counsel for the appellant faulted the trial Judge for failure to put into consideration the mitigating factors by the appellant. In the counsel's view, had the trial Judge considered the mitigating factors, the conviction would have attracted a lesser sentence compared to the 17 years and 6 months handed down to the appellant.

5.] During the appellant's allocutus, Mr. Matsiko the then counsel for the appellant on state brief submitted in mitigation that the convict is a first offender, had been on remand for 3 years and 4 months. He was a student and the victim was 18 years old. He was about 23 years old. He appeared repentant and remorseful. He was a young man, 26 years now. Counsel prayed for a lenient sentence.

6.] In his own words during the appellant's allocutus, the appellant stated that, *"I am an orphan. I am repentant and will be a good citizen".*

7.] Counsel for the appellant argued that while sentencing, the trial Judge did not consider such mitigating factors, and only pointed out aggravating factors. Furthermore, counsel submitted that the victim did not contract any serious sexually transmitted disease, and this should have been put into consideration. Counsel cited the South African case of **State Vs. Mukwanyane, [1995] S. A. 391**, where Court stated that:

> *"Mitigating and aggravating circumstances must be identified by the Court, bearing in mind that the onus is on the state to prove beyond reasonable doubt the existence of aggravating factors, and to negate beyond reasonable doubt the presence of any mitigating factors relied on by the accused..... Due regard must be paid to personal circumstances and subjective factors that might have influenced the accused person's conduct and these factors must be weighed with the main objective of punishment which have been weighed, which have been held to be; determined, prevention, reformation and retribution. In this process any relevant considerations should receive the most scrupulous care and relevant considerations should receive the most scrupulous care and reasonable attention...."*

8.] From the proceedings, it is also clear that the appellant was drunk when he committed the offence, which amounts to a defence of intoxication, which if considered, would reduce the sentence even more. Additionally, the victim herself testified to the fact that the appellant was drunk at the time she was raped. She said on page 3 of trial court proceedings;

> *"I know the accused he is Turyasingura Ambrose. On 30/09/2011, I was coming from school in the evening at 6:300 p.m. There had been a conference. I was walking on the way I entered a restaurant and bought some chapatti, I met the accused and greeted him. I answered.* ***He was drunk,"***

9.] In the case of **Kidega Francis v. Uganda, (2019) CA No. 570 of 2015,** it was emphasized that the defense of intoxication mitigates the severity of the penalty to be imposed for the offence, Moreover, it is immaterial that the accused did not raise or plead the defense.

10.] Yet also in **Okello Okidi Vs. Uganda, SCCA No.3 of 1995,** it was stated that;

> *"Court is required to investigate all the circumstances of the case including any possible defense even though they were never duly raised by the appellant for as long as there is some evidence before the court to suggest such a defence"*

11.] The appellant's counsel prayed that the appellant's sentence be reduced on account of intoxication.

12.] Counsel noted that they were alive to the fact that an appellate court does not normally interfere with the discretion of the sentencing Judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial Judge was manifestly so excessive to occasion an injustice and prayed that court finds this sentence as being harsh. Counsel cited the case of **Wamusonze Wilson Vs. Uganda, Criminal Appeal No. 319 of 2010,** where after considering a range of cases, a sentence of 30 years was reduced to 12 years.

13.] Counsel for the appellant invited this Court to find that this sentence was harsh and excessive. Furthermore, counsel prayed that this Court invoke section 11 of the Judicature Act, Cap 13 and in its discretion impose an appropriate sentence in the circumstances the appellant prayed for 10 years,

taking into account the mitigating factors cited above and the time the appellant had spent on remand to be deducted from the said 10 years.

Submissions by counsel for the respondent.

14.] Counsel for the respondent submitted that the sentence passed against the appellant was neither harsh nor manifestly excessive, bearing in mind that the maximum sentence for the offence of rape is death. In assessing the sentence, the learned trial Judge took into account the seriousness of the offence and the manner in which the appellant committed the offence. He beat the victim in the process of raping her. The trial Judge also took into account the period the appellant spent on remand and sentenced him to an appropriate sentence of 17 years & and 6 months' imprisonment. To buttress his submissions counsel for the respondent cited the case of **Mubangizi Alex vs. Uganda, Supreme, Court Criminal Appeal No. 7 of 2015,** where the appellant raped a 60-year woman while upholding the sentence of 30 years' imprisonment passed against the appellant the Supreme Court stated that;

"We find that 30 years' imprisonment was actually very lenient considering the seriousness of the offence which the appellant was convicted of".

15.] It is trite law that an appellate Court is not to interfere with a sentence imposed by a trial court where that trial court has exercised its discretion on sentence. See the case of **Kiwalabye Bernard Vs. Uganda, S/C Criminal Appeal No. 143 of 2001.**

16.] Counsel argued that the trial Judge considered the seriousness of the offence and the manner in which it was committed and properly arrived at an appropriate sentence of 17 years and 6 months' imprisonment. It was therefore his submission that the sentence passed against the appellant was neither harsh nor manifestly excessive in the circumstances.

17.] Counsel prayed that the appeal should be dismissed and the sentence upheld.

Consideration of Court.

18.] We have studied the Court record, and carefully considered the submissions for both counsel and authorities availed to this court and those not availed. The duty of this Court is to reappraise the evidence and draw inferences of facts. Additionally, the first appellate court has a duty to review the evidence and to reconsider the materials before the trial Judge. Thereafter, makes up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See: **Rule 30 (1)(a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10,** and the Supreme Court decision in the case of **Kifamunte Henry vs. Uganda, SC Criminal Appeal No. 10 of 1997**.

19.] This appeal was based on only one ground, which is against the sentence. It was submitted by counsel for the appellant that the sentence of 17 years and 6 months' imprisonment was manifestly harsh and excessive. On the other hand, counsel for the respondent submitted that the sentence was appropriate in the circumstances of the case.

20.] We agree with both counsel that an appropriate sentence is a matter of discretion of the sentencing Judge. We also agree that each case presents its unique facts that require the Judge to exercise that discretion. See **Kyalimpa Edward vs. Uganda, SCCA No. 10 of 1995 and Kiwalabye vs. Uganda, SCCA No. 143 of 2001**.

21.] The appellate court while considering the severity of the sentence, whether it is harsh or manifestly excessive, it will consider whether the

sentence exceeded the permissible range by law. The Supreme Court in the case of **Aharikundira Yustina vs. Uganda, SCCA No. 27 of 2015,** held that;

> *"There is a high threshold to be met for an appellate court to intervene with the sentence handed down by a trial judge on grounds of it being manifestly excessive. Sentencing is not a mechanical process but a matter of judicial discretion therefore perfect uniformity is hardly possible. The key word is* ***"manifestly excessive".*** *An appellate court will only intervene where the sentence imposed exceeds the permissible range or sentence variation."* (Emphasis ours)

22.] When considering such an appeal on reduction of sentence, the Court should consider the facts of this case as presented before the trial Court, as well as the mitigating and aggravating factors presented before the Court. In this particular case in mitigation, counsel for the appellant submitted that the appellant was a first time offender, had been on remand for 3 years and 4 months, was a student, and the victim was 18 years old. He was aged 23 years and sought leniency. The appellant himself stated that he was an orphan, repentant and promised to be a good citizen. Counsel for the appellant raised the defence of intoxication on appeal. Which we will first address before we consider the issue of mitigating factors.

23.] The appellant did not raise the defence of intoxication during the trial, counsel however brings it out on appeal because the victim testified that the appellant was drunk. Section 12 of the Penal Code Act defines the defence of intoxication. It provides: -

> *"12 intoxication*
>
> *(1) Except as provided in this section, intoxication shall not constitute a defence.*

(2) intoxication shall be a defence to any criminal charge if by reason of the intoxication, the person charged at the time of the Act or omission complained of did not know that the act or omission was wrong or did not know what he or she was doing.

(a) the state of intoxication was caused without his or her consent or by malicious or negligent act of another person; or

(b) The person charged was by reason of intoxication insane, temporarily or otherwise.

24.] Therefore, from the above provision, for intoxication to constitute a defence to a criminal offence, it must be demonstrated that by reason of the intoxication, the appellant at the time of the act or omission complained of, did not know that the act or omission was wrong or did not know what he or she was doing. Furthermore, it must be shown that the state of intoxication was caused without his or her consent by the malicious or negligent act of another person, or that the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

25.] Considering the facts before us, the appellant did not adduce any evidence to show that he was intoxicated by another person without his consent, neither did he adduce any necessary evidence to show that at the time of the act, he did not know that the act was wrong or did not know what he was doing since by reason of that intoxication he was insane, temporarily or otherwise. Mere drinking does not amount to a defence. We agree with the findings of this Court in **Feni Yasin vs. Uganda, Criminal Appeal No. 51 of 2006,** where they cited the case of **Philibert v R, [1976-1985] 1 E.A 477**. Court held that'

*"We agree with his finding and wish to quote from the case of **Philibert V R (Supra)** cited by counsel for the appellant in which the justices of the Court of Appeal of Tanzania approved an observation of the trial court thus:*

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*"**Mere drinking does not count in law otherwise many killers would get off by arming themselves with alcohol before they go on their murderous missions"***

We can't find better words to express our view than the above which we endorse. In the instant case, there was no evidence of drinking. Not even from the horse's mouth, the appellant. Even if he had been drinking, which could have been the basis of P.W.3's opinion, there is no evidence that he was so drunk that he did not know what he was doing within the meaning of section 12(2) of the Penal Code Act."

26.] The appellant did not adduce any evidence to the effect that he was drunk. Neither did PW1 state to what extent the appellant was drunk in order to enable the court to assess the inability to understand what he was doing.

27.] Additionally, it is also trite law that the defence of intoxication is not available for general intent offences. It is only available for specific intent offences. We are persuaded by the decision of the Supreme Court of Canada in the case of **R V. Daviault, [1994]3 SCR 63**, held that

"this Court's decision in Leary still stands for the proposition that evidence of intoxication can provide a defence for offences of specific intent but not offences of general intent. Since sexual assault is a crime of general intent, intoxication is no defence. This rule is supported by sound policy considerations. One of the main purposes of criminal law is to protect the public. ..."

28.] Furthermore, this was an appeal on sentence only. It was not proper to raise a defence which relates to conviction.

29.] Turning to the mitigating factors, while sentencing the trial Judge had this to say;

"The convict committed a grave offence. Rape is a crime against womanhood and a crime against humanity. It attracts a severe

sentence. The convict committed the offence with impunity toning the clothes of the victim and beating her up. Such acts are barbaric. Given the period spent on remand. The convict is sentenced to SEVENTEEN YEARS AND SIX MONTHS IMPRISONMENT."

30.] It is evident that when sentencing the appellant, the trial Judge only considered the aggravating factors. The trial Judge did not consider mitigating factors that the appellant was a first-time offender, had been on remand for 3 years and 4 months, was a student and the victim was 18 years old. He was aged 23 years and sought leniency. The appellant himself stated that he was an orphan, repentant and promised to be a good citizen. The sentencing court is implored to always exercise its discretion meticulously by considering all the mitigating factors presented before it. See **Aharikundira Yustina vs. Uganda**, (Supra). In this case, the Supreme Court interfered with the sentence of the lower court because both the Court of Appeal and the trial court did not consider the mitigating factors. The Supreme Court then held that;

"From the foregoing, we find that the Court of Appeal erred in law when it failed to re-evaluate and re-consider the mitigating factors before it came to its conclusion. This court as the second appellate court and court of last resort can interfere with a sentence where the sentencing judge and the first appellate court ignored circumstances to be considered while sentencing; See ***Kyalimpa Versus Uganda (supra), Kiwalabye Benard Vs Ug*** *(supra)" emphasis ours*

31.] We find on account of the above omission, the trial court erred in law by imposing a sentence without considering the mitigating factors. This was not a proper exercise of the discretionary power of the sentencing court. One of the factors that permit the appellate court to interfere with the sentence of the lower court is when the court overlooks some material factors. See **Kyalimpa Edward vs. Uganda**, (Supra)

32.] On this account we allow this ground 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;

> *"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."*

33.] Considering similar cases, in the case of Asiimwe **Maliboro Vs. Uganda, Court of Appeal Criminal Appeal No 141 of 2010,** the court of appeal upheld the sentence of 18 years' imprisonment passed down by the trial Court where the victim was 18 years. In the case of **Biguraho Adonai Vs. Uganda, Court of Appeal, Criminal Appeal No. 007 of 2012**, this court upheld the lower court sentence of 25 years' imprisonment.

34.] We have taken into account both the mitigating and aggravating factors as set out in the sentencing proceedings. We shall not reproduce them here since we have referred to them above. We considered the principle of consistency as well. According to section 124 of the Penal Code Act, the maximum penalty of rape is death, however when imposing a custodial sentence on a person convicted of the offence of Rape c/s 123 and 124 of the Penal Code Act, the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, stipulate under Item 2 of Part I, of the Third Schedule, that the starting point should be 35 years' imprisonment, which can then be increased on basis of the aggravating factors or reduced on account of the relevant mitigating factors.

35.] After considering the above factors, it is our finding that the sentence of 17 years and 6 months is appropriate having deducted the 3 years and 4months the appellant spent on remand

36.] The appellant will therefore serve a sentence of 17 years and 6months, from 16/01/2014 the date of his conviction.

37.] The appeal succeeds.

We so order

Dated at Kampala this 12th **day of** Oct **2023**

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RICHARD BUTEERA

DEPUTY CHIEF JUSTICE

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CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

.....

OSCAR KIHIKA

JUSTICE OF APPEAL