THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

(Coram: B Cheborion, JA, C. Gashirabake, JA, O. Kihika, JA.)

CRIMINAL APPEAL NO. 0016 OF 2019

(Arising from Criminal Session No. HCT-00-CR-CS- 149/2016)

BETWEEN

KODET MARIKO.....APPELLANT

AND

UGANDA.....RESPONDENT

(Appeal from the Judgment of the High Court of Uganda Holden at Jinja, by Oyuk Ojok Anthony, J. delivered on 04th January 2018)

JUDGMENT OF COURT

Introduction

1.] The appellant was charged with the offence of rape contrary to sections 123 and 124 of the Penal Code Act.

2.] That on the 4th day of January 2016 at Kapelbyong Town Board in Amuria District, the appellant had unlawful carnal knowledge of A.B. The Appellant and one Egwapu Nicholas were jointly arrested and subsequently charged with rape contrary to Sections. 123 & 124 of the Penal Code Act Cap 120 as amended upon which a plea of not guilty was entered to that effect. The Respondent (prosecution) presented 3 witnesses to wit: PW1 (Doctor Egona), PW2 (Eyosu Olujin) and PW3 Akol Betty) upon which they adduced evidence to prove beyond reasonable doubt that the appellant committed the above captioned offence being corroborated by PEX 1 (Medical report examining the victim) and PEX2 (Medical report

examining the accused). The respondent having established a prima facie case against the appellant, the appellant opted to give sworn evidence upon which he raised the defense of alibi in reply to the allegations put forward by the respondent. The trial Court found the appellant guilty as charged and he was sentenced to 60 years' imprisonment.

3.] The appellant being aggrieved with the decision of the High Court lodged an appeal in this Court. The appeal is premised on six grounds set out in the Memorandum of Appeal as follows;

1. *That the learned trial Judge erred in law and fact when he denied the appellant an opportunity to cross examine prosecution witnesses hence occasioning a substantial miscarriage of justice.*
2. *The learned trial Judge erred in law and fact when he considered and relied on unsworn testimony of PW3 to convict the appellant hence occasioning a substantial miscarriage of Justice.*
3. *That the learned trial Judge misdirected himself on the procedure governing the tendering of PEX1 and PEX 2 hence occasioning to substantial miscarriage of justice.*
4. *That the learned trial Judge erred in law and fact when he relied on the admitted documents without a memorandum of agreed documents filed on court record to convict the appellant hence occasioning a miscarriage of justice.*
5. *That the learned trial Judge erred in law and fact when he failed to follow proper procedure for summing up the law and evidence to the assessors hence occasioning a miscarriage of justice.*
6. *That the learned trial Judge erred in law and fact when he imposed a harsh severe and excessive sentence of 60 years to the appellant without considering mitigating factors hence occasioning to miscarriage of justice.*

Representation

4.] At the hearing of the appeal, the appellant was represented by Mr. Obedo Deogratuis. The respondent was represented by Ms. Happiness Ainebyoona State Attorney.

Ground one

That the learned trial Judge erred in law and fact when he denied the appellant an opportunity to cross examine prosecution witnesses hence occasioning a substantial miscarriage of justice.

And

That the learned Trial Judge erred in law and in fact when considered and relied on unsworn testimony of PW3 to convict the appellant hence occasioning to substantial miscarriage of justice.

Submissions by counsel for the Appellant.

5.] Counsel submitted that Section 136(2) of the Evidence Act, defines cross examination as the examination of a witness by the adverse party. Further, Section 72 of the Trial on Indictments Act, is to the effect that the witnesses called for prosecution shall be subject to cross examination by the accused or his advocate and re-examination by the advocate for prosecution. Counsel cited the case of **Sula Kato V. Uganda [2001] UGSC 3,** where the Supreme Court noted;

> *Furthermore, in Uganda, all trials of cases are subject to the provisions of Article 28 of the Constitution. This article is about fair hearing. The virtue of a fair hearing is that a party in a cause should be in a position to controvert his or her opponent either by contrary*

evidence or by cross-examining a witness who gives evidence against him to test the veracity of the witness who testifies.

6.] Counsel submitted that nothing on the Court record indicates that prosecution witnesses inclusive of the Victim (PW3) were ever cross examined. To the contrary, the state cross examined the appellant (DW1) upon giving his sworn testimony under examination in Chief. Further, DW2 was cross examined by the state upon testifying under examination in Chief.

7.] The trial Judge did not indicate any justifiable reason in his judgment whatsoever for the deliberate and willful denial of the appellant's constitutional right to cross examine the prosecution witnesses.

8.] Considering the case of **Sula Kato** *(Supra)*, counsel submitted that failure to accord the appellant a right to cross examine prosecution witnesses constituted a glaring error apparent on the face of the record thus prejudicing the appellant's constitutional right to a fair hearing.

9.] Section 40(1) of the Trial on Indictments Act, is to the effect that every witness in a criminal cause or matter before the High Court shall be examined upon oath and the Court shall have full power and authority to administer the usual oath. Additionally, section 10 of the Oath's Act Cap 19, provides that no person shall be convicted or judgment given upon the uncorroborated evidence of a person who shall have given his or her evidence without oath or affirmation.

10.] Counsel submitted that Section 73(2) (b) of the Trial on Indictments Act, vests only in the accused a right to make unsworn statements, not prosecution witnesses. In the case of **Sula Kato** *(Supra)*;

"it would appear that the misconception arises from a view that because accused persons are not cross examined whenever they make unsworn statements in their defense, a child who does not take oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross examined."

11.] Counsel argued that nothing on the Lower Court record indicated that PW3 was sworn before testifying under examination in chief thus equating the said evidence to be unsworn testimony whose weight attached is less as to reliability.

Submissions by counsel for the respondent

12.] Counsel for the respondent submitted that the evidence of PW1 and PW2 was admitted in the preliminary hearing as agreed facts and evidence in the presence of the prosecution and the accused. These were deemed proved in accordance with Section 57 of the Evidence Act and Section 66 (3) of the Trial on Indictments Act.

13.] PW3 testified on 12/11/2018 in the presence of the appellant and his advocate. Counsel carried out due diligence and perused original court records. The handwritten record of proceedings of the trial Judge indicates that PW3 was cross examined on 30/11/2018 under oath. He invited this court to confirm the original court record.

14.] Counsel prayed that the two grounds fail.

Consideration of Court

15.] This being a first appellate Court, it has a duty to re-evaluate the evidence, weighing conflicting evidence, and reach its own conclusion on

the evidence, bearing in mind that it did not see and hear the witnesses According to **Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10.**

16.] In ***Kifamunte v Uganda, Supreme Court Criminal Appeal No. 10 of 1997*** court stated that:

> *We agree that on the first appeal, from a conviction by a Judge, the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.*

See also the cases of ***Pandya v. R [1957] EA 336, Bogere Moses v. Uganda, SCCA No. 1 of 1997.***

17.] Ground one raises two issues, one on whether the prosecution witnesses were cross examined, PW3 inclusive, and whether she gave evidence on oath. In respect of PW1 and PW2, the record shows that they tendered in PEX1 which is Police Form No. 3A, and PEX 2, Police Form 24A, as agreed documents. Once the documents are agreed upon, they do not have to be formally proved unless the Court thinks there is a need for formal proof. (See section 66(3) of the Trial on Indictments Act.) This shall be handled in detail while addressing grounds 3 and 4.

18.] Turning to the issue of whether PW3 was sworn in before she gave her evidence, the record of the trial Judge does not show whether or not PW3 was sworn in before he testified. The respondent counsel submitted that PW3 gave evidence on 30/11/2018 under oath. The usual practice in all

our courts is, of course, to show in the record that a witness has taken an oath before testifying. In the record before us, there is no way we can determine that PW3 was sworn in before she gave her evidence. When recording DW1, the Court indicated that the appellant was going to give sworn evidence. This clarity was not evident for PW3. There is a possibility that PW3 took an oath, but there is also a possibility that she did not take it. If the latter is true then, it would appear that the appellant was convicted on unsworn evidence contrary to section 40 (1) of the Trial on Indictment Act and section 10 of the Oath Act Cap 19. If so this would be an error apparent of the face of the record.

19.] The question for this Court then is to establish if such an error occasioned the appellant a miscarriage of justice as provided for under section 139 of the Trial on Indictments Act. The Trial on Indictments Act gives room to Courts to uphold decisions even when there is an error during the proceedings. Section 139 of the Trial on Indictment Act provides that;

> *"Subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission, irregularity or misdirection in the summons, warrant, indictment, order, judgment or other proceedings before or during the trial unless the error, omission, irregularity of misdirection has, occasioned a failure of justice".* (emphasis ours)

20.] To establish whether this error occasioned a failure of justice, we have to establish the purpose of the oath. The purpose of taking an oath is to have the witness reminded of the duty of telling the truth. Upon giving the evidence on oath the witness is then cross examined to interrogate the credibility of their evidence. The purpose of cross examination is to test the

credibility of the statements made during examination in chief. Cross examination attempts to destroy the testimony and credibility of the opponent's witness as justice is not served if a witness is unable to communicate credibility to the Court. The search for the truth is the ultimate and idealistic end of all litigated matters on trial.

21.] The original handwritten record shows that whereas PW3 did not take oath, she was cross examined. The typed record missed the title head "*cross examination*" and just recorded the proceedings which appear as examination in chief. The handwritten record shows on page 3 the proceedings as follows;

> ***Cross examination***
>
> *Was Lomuria arrested?*
>
> *PW3. Ran away*
>
> *How long have you stayed with Kodet?*
>
> *PW3. 2years as neighbours*
>
> *What is the name of your husband?*
>
> *PW3: Ogone Peter*
>
> *Before this incident, had Kodet ever Proposed to you or molested you?*
>
> *PW3. No never*
>
> *Any grudges against Kodet?*
>
> *PW3. Nothing*

22.] Through cross examination the defence had an opportunity to discredit the credibility of PW3 as a witness. PW3's evidence was consistent and truthful. Cross examination prevented a miscarriage of justice from occasioning. We therefore find that failure to take the oath by PW 3 per se did not occasion a mischarge of justice.

23.] Ground 1 and 2 fail.

Ground 3 and 4

The learned trial Judge misdirected himself on the procedure governing the tendering of PEX1 and PEX 2 hence occasioning to substantial miscarriage of justice. And;

That the learned trial Judge erred in law and fact when he relied on the admitted documents without a memorandum of agreed documents filed on court record to convict the appellant hence occasioning a miscarriage of justice.

24.] It was submitted for the appellant that the trial Judge misdirected himself on the procedure governing tendering of PEX1 and PEX2 hence occasioning a substantial miscarriage of justice. Counsel cited Section 66(2) of the Trial on Indictments Act Cap 23, which is to the effect that at the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed; and the memorandum shall be read over and explained to the accused in a language that he or she understands, signed by the accused and by his or her advocates and by the advocate of the prosecution and then file it. Counsel cited **Kamanzi Fred v Uganda, CACA No. 38/1997**, where the Court of Appeal held inter alia that:

> *"the proper procedure should have been to record all the evidence that was sought to be admitted as narrated by the state counsel from his records. After recording, it should be read to the accused who should then sign it together with his /her counsel and state counsel. The rationale behind the above procedure was to enable the accused to know what sort of evidence was being admitted without calling the witness who was the source of that evidence".* **Abasi Kanyike v. Uganda, (SCCA No. 34/1998).**

25.] Counsel submitted that in light of the authority, the import of section 66(2) is coached in mandatory terms and noncompliance of the same cannot be treated as a mere technicality but fundamentally affects the trial which may lead to the conviction to be quashed and sentence set aside.

26.] The record of proceedings indicated that PW1 tendered in PEX1 and PW2 tendered in PEX2. Nothing on record indicates that the memorandum of agreed documents of PEX1 and PEX2 was signed by the accused or his advocate. According to counsel, failure to file a memorandum of agreed documents caused a grave miscarriage of justice. Such a provision must be strictly complied with and any noncompliance with the same be resolved in favour of the appellant. These grounds should be allowed, counsel for the appellant prayed.

Submissions by counsel for the respondent

27.] Counsel for the respondent submitted that no miscarriage of justice was occasioned to the appellant. The preliminary hearing was conducted in accordance with section 66 of the Trial on Indictments Act. The appellant was duly represented by counsel on state brief. Counsel submitted that justice should be delivered without undue regard to technicalities, in light of article 126 (6) of the Constitution.

28.] Section 57 of the Evidence Act provides that facts agreed by parties or their agents at the hearing need not be proved. In the case of **Etoma Vs Uganda, Criminal Appeal, No. 404 of 2016** the trial Judge was not faulted for relying on a medical report admitted in the preliminary hearing to prove grievous harm in a case of aggravated robbery.

Consideration of Court.

29.] For ease of reference, the procedure for considering admitted documents stated under section 66 of the Trial on Indictments Act provides;

> *(1)Notwithstanding section 65, if an accused person who is legally represented pleads not guilty, the court shall as soon as is convenient hold a preliminary hearing in open court in the presence of the accused and his or her advocate and of the advocate for the prosecution to consider such matters as will promote a fair and expeditious trial.*
>
> *(2) At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed; and the memorandum shall be read over and explained to the accused in a language that he or she understands, signed by the accused and by his or her advocate and by the advocate for the prosecution, and then filed*
>
> *(3) Any fact or document admitted or agreed (whether the fact or document is mentioned in the summary of evidence or not) in a memorandum under this section shall be deemed to have been duly proved; but if, during the course of the trial, the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved.*

30.] Under subsection (1), once an appellant who is represented pleads not guilty, the Court conducts a preliminary hearing in open Court in the presence of the appellant and his advocate. According to the evidence on record, on 30/11/2018, the court conducted a preliminary hearing in the presence of Ms. Anyong Josephine for the State, Mr. Amodoi Samuel Moses for the appellant was also in court.

31.] At the conclusion of the preliminary hearing, it is required that the court should prepare a memorandum of matters agreed and the same must be read and explained to the accused in the language he understands. The trial Judge recorded the matters agreed upon on pages 1 and 2 of the proceedings. It is not in contention that the same was read back to the appellant in the language he understands, what is in contention by counsel for the appellant is the fact that the memorandum of agreed documents was neither signed by the appellant or his advocate nor filed in court.

32.] We acknowledge that the trial Judge faulted the procedure under subsection (2). He conducted the preliminary hearing and wrote the agreed matters, but did not draw a formal memorandum of agreed matters, neither was it signed by the appellant nor his advocate. It was not filed in Court.

33.] The proper procedure is that the court should prepare a memorandum of agreed matters. Thereafter read it to the appellant in the language he understands. It has to be signed by the appellant or his advocate. It has to be filed in Court as part of the record of proceedings.

34.] However, just like we resolved the first ground, for the appellate Court to set aside a conviction and a sentence on the ground of an error, there must be evidence of failure of justice due to that error as provided under section 139*(Supra)*. It is evident on record that both counsel and the appellant were available during the preliminary hearing, the documents were tendered in with no objection from counsel of the appellant or the appellant himself, this implied that they agreed to the documents and the content thereof. We are convinced that failure to prepare a formal

memorandum and the appellant or counsel not signing it did not occasion a miscarriage of justice.

35.] We also note that once a document has been admitted, the contents thereof are considered proved unless, during the course of the trial, the Court is of the opinion that it has to be proved formally. **In Etoma vs. Uganda, (Supra), this Court held that;**

> *A memorandum of agreed facts speaks for itself, that is, the contents of the documents conceded thereunder would amount to conceded facts. If the Appellant was not comfortable with the findings in the medical report or the credentials of the author thereof, as is the contention before us now, he should never have conceded to its admission under the memorandum of agreed facts. That is the import of section 57 of the Evidence Act, which obviates the need for further proof of a fact that has been admitted by consent of the parties.*

36.] With the above analysis we find that grounds 3 and 4 have no merit.

37.] Grounds 3 and 4 therefore fail.

Ground 5

That the learned Trial Judge erred in law and fact when he failed to follow proper procedure for summing up the law and evidence to the assessors hence occasioning to miscarriage of justice.

38.] Counsel for the appellant submitted that Section 82(1) of the Trial on Indictments Act provides that "when the case on both sides is closed, the Judge shall sum up the law and evidence in the case to the assessors and shall require each of the assessors to state his or her opinion orally and shall record each such opinion. The judge shall take note of his or her summing

up to the assessors. Counsel cited **Sam Ekolu Obote V. Uganda [1995] UGSC 7 Supreme Court,** where the court noted that,

> *"Sec 81 (1) [now S.82 (1)] of TIA imposes a statutory obligation on the trial Judge to sum up the law and the evidence in a case to the assessors. In the instant case, there is no evidence on the record that the learned trial Judge summed up the case to the assessors after the close of both sides. This in our view amounted to a failure to comply with the obligatory requirement of Sec. 81(1) by the learned trial Judge. It was a procedural error, which was, fatal to the appellant's conviction."*

39.] This position was recently invoked by this Court in the Case of **Agaba Lilian & Ors versus Uganda CACA no.247 & 239 of 2017) [2019]** where the Court of Appeal rendered the trial nullity due to the trial Judge's failure, to sum up to assessors constituting of an irregularity which is fatal and incurable under Sec. 139 of TIA.

40.] It was submitted for the appellant that considering the above authorities, failure to adopt the appropriate procedure for summing up the relevant law and evidence to the assessors by the trial Judge, rendered the trial nullity thus occasioning a substantial miscarriage of justice against the appellant, and this Court ought to set aside the lower court's decision.

<u>Submissions by counsel for the respondent</u>

41.] Counsel for the respondent submitted that the Record of Appeal shows that the trial Judge summed up the law and evidence for the assessors in the presence of counsel Robert for the appellant and the appellant. The assessors gave their opinion for the trial Judge to convict the appellant.

Counsel invited this court to find that there was a summing up of law and evidence to the assessors by the trial Judge.

42.] As regards the missing summing up notes, counsel invited this court to apply the law on missing records as set out by this court in the civil case of **Ephraim Mwesigwa Kamugwa vs. The Management Committee of NyamirimaPrimary School, Civil Appeal No. 101 of 2011**:

> *"The law on missing record of proceedings has long been established. Where a record of trial is incomplete by reason of parts having been omitted or gone missing, or where the entire record goes missing, in such circumstances, the appellate court has the power to either order a retrial or reconstruction of the record by the trial court.*

43.] He prayed that this ground fails

Consideration of Court

44.] Section 82(1) of the Trial on Indictments Act provides that;

> *"When the case on both sides is closed, the judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his or her opinion orally and shall record each such opinion. The judge shall take a note of his or her summing up to the assessors."*

45.] According to the above provision it is a procedural requirement that the trial Judge sums up the law and the evidence for the assessors. The record shows that the case was summed up for the assessors.

46.] The manner in which summing up should be done was addressed by this Court in **Tindyebwa Emmanuel & 2others vs. Uganda, Criminal**

Appeal No. 396 of 2017, it cited **Simbwa Paul vs. Uganda; CACA No. 23 of 2012**, where this Court noted that:

> *"it is a good and desirable practice that the substance of the summing up notes to the assessors appears in the record of proceedings. It is the only way an appeal Court can tell whether the summing up was properly done. We are however satisfied that this essential step was undertaken by the trial Judge and that failure to file the notes on record was not fatal to the conviction."*

47.] In **Simbwa Paul** *(supra)*, this Court held that failure to file notes on record was not fatal to the conviction of the appellant. The record shows that the assessors gave their opinion, after considering the fact that PW3 was a single identifying witness. The assessors also analyzed PW3's evidence and came to the conclusion that even when there were contradictions, the same could be ignored because they were minor. Having assessed the legal issues raised during the hearing the assessors came to the conclusion that the appellant was guilty as charged. The question, then before this Court is whether failure to file summing up notes occasioned a miscarriage of justice against the appellant to justify a retrial.

48.] It has been held by this Court that where there is evidence of summing of the law and the evidence for the assessors, even in the absence of the summing up notes, the Court will not Order for a retrial. Case in point was in **Jumba Joshua aka Suleiman aka Kirabo vs. Uganda, CACA No. 087 of 2021,** this Court held that;

> *"The assessors were guided and they understood their role. They fulfilled it but the Judge's notes on how he summed up for the assessors are missing from the record. Given that the prosecution*

evidence upon which the appellant was convicted was strong enough, it would be unnecessary to subject him to a fresh trial."

49.] The Court in **Jumba (Supra)** when declining to order a retrial relied on the decision of this Court in **Adiga Johnson David vs. Uganda; C.A Criminal Appeal No. 0157 of 2010,** where the Court stated:

"the overriding purpose of a retrial as stated in the case of ***Rev. Father Santos Wakpora vs. Uganda C.A.C. A No. 204 of 2012****, is to ensure that the cause of justice is served in a case before Court. A serious error committed as to the conduct of a trial or the discovery of new evidence, that was not obtainable at the trial, are the major considerations for ordering a retrial. The Court that has tried a case should be able to correct the errors as to the manner of the conduct of the trial or to receive other evidence that was then not available. However, that must ensure that the accused person is not subjected to double jeopardy, by way of expense, delay, or inconvenience by reason of the retrial. The other considerations to be taken into account before ordering a retrial include; where the original trial was illegal or defective, the rule of the law that a man shall not be twice vexed for one and the same cause (Nemo bis vexari debet pro eadem causa), where an accused was convicted of an offence other than the one with which he was either charged or ought to have been charged, the strength of the prosecution case, the seriousness of otherwise of the offence, whether the original trial to the accused, who should not suffer a second trial unless the interest of justice so require and the length of time between the commission of the offence and the new trial, and whether the evidence will be available at the new trial. see* ***Ahamed Ali Dharamsi Sumar vs. R [1964] EA 481; Ta mano vs. R [1969] EA 126."***

50.] After considering the evidence on record and the above cited authorities, it would have been a serious error if there was no evidence on the record that the summing up was done. We are of the view that failure to file the summing up notes alone cannot be said to be a serious error to warrant a retrial. There is evidence that the Judge summed up the evidence and this guided the assessors in making their opinion. We decline to fault the trial Judge.

51.] This ground fails.

GROUND 6

That the learned trial Judge erred in law and fact when he imposed a harsh severe and excessive sentence of 60 years on the appellant without considering mitigating factors hence occasioning to miscarriage of justice.

52.] It was submitted for the appellant that had the learned trial Judge addressed himself properly on the law governing sentencing, taking into account the mitigating factors pleaded by the appellant, probably he would have arrived at a different position owing to the fact that the victim never contracted HIV.

53.] Counsel contended that the trial Judge's discretion was based on biblical teachings other than the State law, as the said sentence was so severe to the extent that even God granted Adam a right of redemption with the appropriate sentence upon eating the forbidden fruit, thus same (appropriate and lesser sentence) be accorded to the appellant to serve.

54.] Counsel submitted that the Court is bound by the principle of ***stare decisis et non quieta movera***. It was further argued that the element of

consistency in sentencing is fundamental. See **Mbunya Godfrey v. Uganda, (SCCA No. 4/2011.)** To emphasize his point counsel cited **John Kasimbazi & Ors v. Uganda, (CACA No. 167 of 2013)** where the appellants were charged with murder and sentenced to life imprisonment, and on appeal this Court reduced this sentence to 12 years. The court considered their appeal. Furthermore, in the case of **Magala Ramadhan v. Uganda (SCCA No. 1/2014),** the Supreme Court reduced 2 counts of murder for 14 years to 7 years' imprisonment on each count.

55.] According to the judgment it indicates that the convict is a first time offender with no previous criminal record, he did not waste the court's time, the victim never contracted HIV, he was married and with little children who still need his care.

56.] Considering the above authorities and the mitigating factors, it was firmly submitted that 60 years' imprisonment imposed on the appellant was too harsh, severe, and excessive bearing in mind the gravity of other offences involving violence and death such as murder, aggravated robbery, have served appropriate sentences determined by this Court, as illustrated above.

57.] Counsel prayed that this ground be allowed.

Submissions by counsel for the respondent

58.] For the respondent, counsel submitted that the sentence imposed on the appellant was neither harsh nor manifestly excessive. The Appellant was convicted of Rape under Sections 123 and 124 of the Penal Code Act, an offence that carries a maximum sentence of death. The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013

prescribes a sentencing range of 30 years' imprisonment to death for rape. The proposition by the appellant that 60 years is manifestly excessive is not sustainable, considering the violence that was used on the victim. The gang rape of the victim without protection. The Judge observed the trauma of the victim during the trial. This court was invited to find that the trial Judge passed an appropriate sentence.

59.] An appropriate sentence is a matter for the discretion of the sentencing Judge. It is a well settled law that a sentence is at the discretion of a trial Judge and an appellate Court will only interfere with a sentence imposed by the trial court if it is evident that the sentence was illegal or harsh and manifestly excessive to amount to injustice as was held in **Kyalimpa Edward vs. Uganda, SCCA No. 10 of 1995** that:

> *"Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing Judge unless the sentence is illegal or the court is satisfied that the sentence imposed by the Trial Judge was manifestly so excessive as to amount to an injustice. The appellate court will not interfere with the discretion of the sentencing Judge except also in instances where the trial court ignores an important matter or circumstances which ought to be considered when passing the sentence."*

60.] As regards consistency, it was submitted for the respondent that each case should be considered on its own merit. Counsel argued that whereas the courts have passed sentences of less than 60 years for rape, it has also imposed longer sentences. In the case of **Atugonza vs. Uganda, SCCA No. 11 of 2018 (unreported)**, the Supreme Court upheld a sentence of life imprisonment for rape.

61.] In the alternative, counsel invited Court to consider the violence used against the victim by the appellant during the commission of this offence and sentence the appellant to 30 years' imprisonment. In the case of **Mubangizi Alex vs Uganda, SCCA No. 0012 of 2012(unreported),** the Supreme Court upheld a sentence of 30 years' imprisonment imposed on the appellant for the offence of rape. Further, the counsel prayed court finds that the cases relied on by the appellant are not relevant to the instant case and are distinguishable from the instant case because the facts and offences with which the appellants were convicted and sentenced are different from the instant case. The cases cited by the appellant of **John Kasimbazi & Ors vs Uganda, CACA 167/2013,** and **Magala Ramadhan vs Uganda, SCCA 1/2014** are murder cases.

Consideration of Court

62.] The law regarding sentencing and the circumstances under which the court can interfere with the discretion of the trial Court is well settled in **Kyalimpa Edward vs. Uganda; Supreme Court Criminal Appeal No.10 of 1995,** the Court relied on **R vs. Haviland (1983) 5 Cr. App. R(s) 109** and held that:

> *"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will 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 as to amount to an injustice:* ***Ogalo s/o***

Owoura vs. R (1954) 21 E.A.C.A 126 and R vs. MOHAMEDALI JAMAL (1948) 15 E.A.C.A 126."

63.] In **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal N0.143 of 2001** it was held:

> *"The appellate court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentences unless the exercise of the discretion is such that the trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence."*

64.] In this case the appellant's counsel was of the view that had the trial Judge properly considered the mitigating factors, he would have come up with a different sentence. The mitigating factors in this case were the appellant was a first time offender, and has a family with little children to take care of. The victim did not contract HIV even when he did not use the condom.

65.] While sentencing the Judge considered both the mitigating and aggravating factors. Guided by the above authorities we shall consider decided cases to establish whether the sentence was manifestly excessive. In **Biguraho Adonai vs. Uganda, Criminal Appeal 007 2012**, this Court upheld a sentence of 25 years as appropriate. In **Mubangizi vs. Uganda, Criminal Appeal No 0012 of 2012**, the Court upheld the sentence of 30 years' imprisonment.

66.] We think that if the trial Judge considered the need to maintain uniformity of sentence he would have imposed a lesser sentence. We acknowledge the fact that the victim was gang raped, however considering

all the circumstances of the case, we think a sentence of 60 years was manifestly excessive to do justice to the case. It is for this reason that we allow the appeal and reduce the sentence from 60 years to 35 years from the time of Conviction. We shall deduct the 2 years and 10 months spent on remand and the appellant shall serve a sentence of 32 years and 2 months from 04 /12 /2018.

67.] This ground succeeds

68.] Consequently, the appeal partially succeeds.

We so Order

Dated at Kampala this 1st **day of** May **2023**

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CHEBORION BARISHAKE

JUSTICE OF APPEAL

.....

CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

.....

OSCAR JOHN KIHIKA

JUSTICE OF APPEAL