

5 **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)*

10 BETWEEN

**KODET MARIKO.....APPELLANT**

AND

**UGANDA..... RESPONDENT**

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

**JUDGMENT OF COURT**

**Introduction**

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

2.] That on the 4<sup>th</sup> 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  
25 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  
30 (Medical report examining the victim) and PEX2 (Medical report

5 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.

10 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;

15 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.*

20 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.*

25 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.*

30 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.*

5 **Representation**

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

**Ground one**

10 **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**

15 **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;

25 *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*

