THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Cheborion Barishaki, Hellen Obura, Eva K. Luswata, JJA)

CRIMINAL APPEAL NO. 380 OF 2019

BETWEEN

KIMBOWA JOSEPH ::APPELLANT

AND

UGANDA::: RESPONDENT

(Appeal from the Judgment of the High Court sitting at Mpigi in Criminal Session Case No. 0041 of 2019 and Criminal Case No. 1 of 2017 Kawesa J, delivered on 25th September, 2019)

JUDGMENT OF THE COURT

Introduction

1] The appellant was indicted with rape contrary to Section 123 and 124 of the Penal Code Act, convicted and sentenced to 22 years' imprisonment. The particulars of the offence as set out in the indictment are that Kimbowa Joseph on 23/12/2017 at Nabaziza cell, Kyengera Town council in Wakiso District performed a sexual act with a woman (who we shall refer to as NP), without her consent.

2] The facts of the case as discerned from the record are that NP knew the appellant as a man who usually passed by her home and had one time proposed to have a love affair with her, which she rejected. That on 23/12/2017 at about 9.00am, she was at home with her brother when the appellant asked her to sell him some cabbages. NP proceeded to cut cabbages in the garden and when handing them over to the appellant, he held her by the mouth then pulled her into a nearly bush, removed her knickers and raped her. She raised an alarm which alerted her father Sentamu Joseph who arrived at the scene and found the appellant still on top of her. Sentamu raised an alarm and with the help of other people, removed the appellant from NP, arrested him and took him to Kyengera Police, where NP recorded a statement. She was examined at Crane Hospital where she reported pain and bleeding from her private parts. The appellant was accordingly indicted for rape, tried and sentenced to the term abovementioned.

3] The appellant being aggrieved with the decision of the High Court lodged an appeal to this Court on two grounds in his memorandum of appeal that:

i. **The learned trial Judge erred in law and fact in failing to consider and/or properly evaluate and weigh all the evidence laid before court thereby arriving at a wrongful determination in convicting and sentencing the appellant which resulted into miscarriage of justice.**

ii. **The sentence of imprisonment for 22 years was harsh and excessive in the circumstances.**

Representation

4] At the hearing of the appeal, the appellant was represented by Mr. Stephen Birikano on State brief, while the respondent was represented by Mr. Joseph Kyomuhendo, a Chief State Attorney. Both Counsel filed written submissions as directed by Court. We considered those submissions and authorities provided by counsel and sourced by the Court, to decide the appeal.

Ground one.

Appellant's written submissions

5] By way of introduction, Mr. Stephen Birikano reminded the court of her duty as the 1st appellate court, which is to re-appraise and re-evaluate the evidence and other material presented before the trial court. He in particular referred us to Rule 30 (1) (a) Judicature (Court of Appeal Rules) Directions SI. 13-10 (hereinafter Rules of the Court) and a number of decisions, for example, **Pandya v. R [1957] EA 336** and **Kifamunte Henry vs. Uganda, Criminal Appeal No. 10 of 1997.** Counsel went on to refer to **Article 28 (3) (a)** of the Constitution, and the authorities of **Woolmington Vs DPP [1935] AC 462,** and **Oketcho Richard versus Uganda, Supreme Court Criminal Appeal No. 26 of 1995,** where court stated that an accused person does not bear the duty to prove his innocence since he is presumed innocent until proved guilty, or where he chooses to plead guilty.

6] Mr. Birikano further expounded on the degree of proof for criminal cases and the fact that the burden of proof never shifts to the accused person. Further that the accused is only convicted on the strength of the prosecution case, and not because of weaknesses in his defence. For guidance, counsel cited **Ssekitoleko versus Uganda [1967] EA 531.** In that respect, he submitted that the prosecution had to prove that there was an act of sexual intercourse without consent of the victim, and that the appellant committed the offence of rape.

7] Counsel then recounted the prosecution evidence as well as the defence raised that the appellant found the victim with her father in the garden and requested to pick some cabbages from them. That instead, NP's father who was smoking something, manhandled him and in the process, tore his trousers. Counsel also attacked PW2's evidence that a neighbor came to his rescue yet that neighbor was not called to testify. He then argued that in the absence of any corroboration, it remained a father and daughter testimony against the appellant and that if the prosecution wanted to prove its case beyond reasonable doubt, it ought to have brought more cogent evidence. He then concluded that the prosecution evidence adduced did not prove the case against the appellant, and prayed that the conviction be set aside.

Respondent's written submissions

8] In response to the appellant's submissions, Mr. Joseph Kyomuhendo contended that, the first ground of appeal offends **Rule 66(2)** of the Rules of this Court, as it does not specify the

points of law or fact or mixed law and fact, that were wrongly decided. For guidance, counsel cited the decision in **Mutebi Ismah** and **Kiwanuka Mubiru versus Uganda, Criminal Appeal No. 080 and 089 of 2021.** Counsel prayed that this honourable court be pleased to strike out ground one of the appeal.

9] Even so, Mr. Kyomuhendo discussed the merits of the appeal. He substantially agreed with his colleague on the law of proof in criminal cases as well as the ingredients of the offence of rape. With regard to the ingredient of unlawful carnal knowledge, counsel referred to the definition of carnal knowledge which means penetration of the victim's vagina, however slight, by a sexual organ; where sexual organ is a penis. In his view, penetration was established by the evidence of NP and PW2, as well as medical evidence. He then recounted NP's evidence and added that during the process of her rape by the appellant, she raised an alarm that was answered by PW2, her father. That PW2 offered corroboration to NP's evidence when he testified that he found the appellant raping NP. That the evidence of NP was also corroborated by PF3A and was admitted as "PE2", where it was recorded that NP was examined and found with a freshly ruptured hymen with blood and a milky discharge, which PW3 testified was possibly caused by penile penetration. For guidance, Mr. Kyomuhendo referred to the case of **Basita Hussein versus Uganda, SC Criminal Appeal No. 35 of 1995** cited with approval by this honourable Court in **Magino Joseph versus Uganda, Criminal Appeal No.27 of 2020.**

10] With regard to NP's consent or lack thereof, Mr. Kyomuhendo submitted that such can be established from the victim's evidence, medical evidence and any other cogent evidence. He then recounted NP's evidence of the rape and that of PW2, who testified that he heard NP saying that *"don't strangle me, leave me it's painful"*. In conclusion to this ingredient, Mr. Kyomuhendo submitted that further corroboration was given in PF3 which indicates that NP was examined and found with injuries on her vagina, which confirmed her story that the sexual intercourse was forceful.

11] Mr. Kyomuhendo continued that the appellant's participation in the offence was proved by the direct evidence of PW1 who testified that she knew the appellant since he used to pass at their home in 2017. Further, by that of PW2 who testified that he found the appellant on top of NP, having sexual intercourse with her. Mr. Kyomuhendo argued then that the evidence of PW2 corroborated NP's testimony, and that the testimonies of the two witnesses were not discredited during cross examination. For guidance on corroboration, counsel referred to the case of **Rwalinda John versus Uganda, SC Criminal Appeal No. 03 of 2015**, where the Supreme Court cited with approval **R versus Baskerville?**

12] Counsel submitted that the two witnesses knew the appellant very well and the offence was committed in the morning, meaning that the conditions of identification were very clear and that the appellant who was arrested from the scene of crime, was taken to police. In conclusion, counsel submitted that the ingredients of

the offence were all proved beyond reasonable doubt, and that the offence was committed by none other than the appellant.

Submissions in rejoinder for the appellant

13] In his rejoinder, Mr. Birikano submitted that the first ground of appeal clearly sets out the points of objection against the decision. He then invited the Court to take into account the provisions of Article 126 (2) (e) of the Constitution and overrule the objection. He in addition referred to Rule **30 (1) (a)** of the Rules of this Court, and the decisions of **Pandya versus R (1957) E.A. 336, Bogere Moses versus Uganda, SC Criminal Appeal No.1 of 1997** and **Henry Kifamunte versus Uganda, SC Criminal Appeal No. 10/1997.** On that basis, he submitted that the first ground of appeal addressed the duty of this Court to reappraise all the evidence and come up with its own conclusions on all matters of law and fact. He thereby considered the preliminary objection as one without merit and prayed that the Court overrules it, and instead, consider the appeal on its merits.

14] Mr. Birikano further reiterated his original submissions and added that the appellant testified about a grudge between him and PW2, in that, PW2 retained the appellant's money earned out of a business transaction of cabbages. That when the appellant went to collect his money, he found NP and PW2 in the cabbage garden and that PW2 fought him. Counsel added that although the trial Judge took note of the evidence of a grudge between the appellant

and PW2, he simply called it unacceptable, but without giving reasons.

15] In conclusion, counsel contended that the prosecution did not exhaust its burden of proof beyond reasonable doubt.

Analysis and decision of court

16] We have carefully studied the court record, considered the submissions for either side, as well as the law and authorities cited to us, and those not cited but which we find relevant to this matter. We are alive to the duty of this court as a first appellate court to review the evidence on record and reconsider the materials before the trial Judge, including the decision of the trial Court, and come to our own decision. See for example, Rule 30(1) (a) Rules of Court. We do agree and follow the decision of the Supreme Court in **Kifamunte Henry versus Uganda, SC Criminal Appeal No. 10 of 1997** where it was held that on a first appeal, this court has a duty to:

> *"... review the evidence of the case and to consider the materials before the trial Judge. The appellate court must then make up its own mind not disregarding the judgement appealed from, but carefully weighing and considering it."*

17] Alive to the above stated duty, we shall proceed to resolve the ground of appeal as below;

18] We shall start by addressing the preliminary objection raised by counsel for the respondent, that ground one was drafted in a

manner that offends Rule 66(2) of the Rules of the Court for it did not specify the points of law or fact or mixed law and fact that were wrongly decided. In order to determine the merits of the objection, we shall revisit the law as stated. Rule 66(2) of the Rules of the Court, which states that:

> *"The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact ... which are alleged to have been wrongly decided. . .".*

Mr. Birikano considered the memorandum as properly drafted because under **Rule 30 (1) (a)** of the Rules of this Court and decided cases, this Court has the duty to reappraise all the evidence and come up with its own conclusion on all matters of law and fact. He also relied on this court's decision in **Ndyaguma versus Uganda, CA Criminal Appeal No. 263 of 2006** where this Court was prepared to take the more liberal approach to consider an appeal, even where it felt the grounds were not well drafted. Counsel argued further that **Article 126 (2) (e)** of the Constitution can be applied to cure any anomaly.

19] With respect, we do not agree with Mr. Birikano's submissions. It is our considered view that Rule 66(2) of the Rules of Court was enacted for a purpose. After reading a judgment, the appellant or his counsel should as concisely as possible set forth the matters of law and fact on which the trial Court erred. This gives the

respondent due notice and correct direction on how to tailor their response. The court, is equally guided when preparing a decision. By law, the appellate court must restrict itself only to matters specifically raised in the memorandum appeal. Mr. Birikano did not in ground one, specify which pieces of evidence were wrongly evaluated, or the matters of law not considered.

20] In his submissions, Mr. Birikano generally attacked the prosecution evidence which he found weak for lacking corroboration and for not being cogent. He also considered the appellant's evidence of a grudge between him and PW2, which the court noted but discarded as unacceptable. Those submissions were not supported or reflected in the memorandum of appeal which is the principle pleading on which the appeal is based. The duty of the Court to re-evaluate the evidence is a matter of statute and cannot be used as the basis of a ground of appeal. Again, Article 126(2)(e) cannot be quoted to cure a clear contravention of the law. With respect, even where substantial submissions are made by the appellant's counsel, without adherence to the law, those submissions would carry no weight.

21] We therefore agree with respondent's counsel that ground one was framed in general terms. It is not clear which particular pieces of evidence or law that the trial Judge failed to properly evaluate. Accordingly, ground one is struck off the record.

Ground Two

Submissions for the appellant

22] As a precursor to his submissions, Mr. Birikano referred to **Section 11 of the Judicature Act** which gives this Court all the powers, authority and jurisdiction of a trial Court to impose an appropriate sentence. He further referred to Guideline No. 6 (c) of The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 (hereinafter Sentencing Guidelines) and the Supreme Court decision in **Aharikundira Yusitina versus Uganda, SC Criminal Appeal No. 27 of 2015** where court stated that:

> *"While sentencing, an appellate court must bear in mind that it is the sentencing guidelines upon which lower courts shall follow while sentencing. According to the doctrine of stare decisis, the decisions of appellate courts are binding on the lower courts. Precedents and principles contained therein act as sentencing guidelines to the lower courts in cases involving similar facts or offences since they provide an indication on the appropriate sentence to be imposed."*

23] Mr. Birikano further referred to various decisions where this court considered both the aggravating and mitigating factors and issued sentences in the range of 10 to 15 years' imprisonment for the offence of rape. He in particular referred to **Onaba Razaki versus Uganda, CA Criminal Appeal No. 327 of 2009,** where this Court set aside a sentence of 15 years' imprisonment and substituted it with 14 years. Also that of **Yebuga Majid versus Uganda, CA Criminal Appeal No. 303 of 2009,** in which a sentence of 15 years was on appeal upheld by this Court, and lastly that of **Boona**

Peter versus Uganda, CA Criminal Appeal No. 10 of 1997, where this court confirmed a sentence of 10 years' imprisonment. Counsel then argued that in comparison, a sentence of 22 years was harsh and excessive. He prayed that the sentence be set aside. He suggested a term of seven years as appropriate in the circumstances.

24] In response, Mr. Kyomuhendo referred to the Supreme Court decision in **Kiwalabye Bernard versus Uganda, Criminal Appeal No. 143 of 2001** cited with approval in **Kato Kajubi Godfrey versus Uganda, SC Criminal Appeal No. 2 of 2014** where the Court gave guidance on when an appellate court can interfere with sentence, which is a matter of discretion. In his view, the sentence given was neither harsh nor excessive given the circumstances under which the offence was committed. However, he conceded that because the learned trial Judge did not deduct the period spent on remand as directed by Article 23(8) of the Constitution, the resultant sentence was illegal. He relied on the now well followed decision of **Rwabugande Moses versus Uganda, SC Criminal Appeal No. 25 of 2014,** in that regard.

25] Mr. Kyomugendo then submitted that this court could exercise its powers under section 11 of the Judicature Act, to maintain the 22-year imprisonment sentence. The basis of his arguments were that females who are always at the receiving end of the crime of rape require protection. In addition, counsel referred us to the Sentencing Guidelines), which indicate 35 year's imprisonment as the starting point for the offence of rape, that can then be

increased on the basis of the aggravating factors, or reduced on account of the relevant mitigating factors. In his view, the aggravating factors far outweighed the mitigating factors because the offence was premeditated, the victim lost her virginity in a very degrading and painful manner, and that she also suffered embarrassment before her own father.

26] Citing the decision of this Court in **Byaruhanga Okot versus Uganda, CA Criminal Appeal No. 078/2010,** Mr. Kyomuhendo further pointed to the importance of consistency or parity for cases committed in a similar manner, but bearing in mind that the circumstances under which the offences are committed can never be identical. As a way of comparison, counsel referred to the case of **Bacwa Benon versus Uganda, CA Criminal Appeal No.869 of 2014** where this honourable Court confirmed a sentence of life imprisonment for an appellant who had pleaded guilty to aggravated defilement. Also that of **Bonyo Abdul versus Uganda, SC Criminal Appeal No. 07 of 2011**, in which the Supreme Court equally confirmed a life imprisonment sentence of an H.I.V positive appellant who had been convicted of aggravated defilement. Finally, that of **Kabazi Issa versus Uganda, Criminal Appeal No. 268 of 2015,** in which this court confirmed a 32 years' imprisonment sentence against an appellant who had defiled two girls.

27] In conclusion, counsel prayed that the appeal be dismissed and the sentence of 22 years' imprisonment be upheld, less the period spent on remand.

28] In rejoinder, Mr. Birikano maintained that the sentence is harsh and excessive in the circumstances and in light the range of sentences for the offence of rape which he quoted. He in addition alluded to the mitigating factors presented for the appellant, before praying that the appeal be allowed, and the sentence be set aside.

Analysis and decision of court

29] In this ground, the appellant contested the sentence of 22 years as being harsh and excessive in the circumstances because the trial Judge did not consider the mitigating factors, or follow the principle of consistency when issuing the sentence. Respondent's counsel did not agree but conceded that the sentence was illegal because when sentencing the appellant, the trial Judge failed to consider the period spent on remand. We do agree that the sentence was illegal, and our reasons are given below.

30] Article 23(8) of the Constitution of the Republic of Uganda, 1995 must be applied by any court while exercising its sentencing function. It is provided under that law that:

> *"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."*

31] While interpreting the above provision, the Supreme Court in **Rwabugande versus Uganda (supra)** guided that the remand period must be credited to the convict's benefit by having it arithmetically determined, and then removed from the sentence imposed. In the latter decision of **Abelle Asuman versus Uganda, SC Criminal Appeal No. 66 of 2017**, the same Court held that it is enough for the sentencing Judge to demonstrate in their judgment that the remand period has been credited to the benefit of the convict. Nonetheless, the Supreme Court still advised lower Courts to follow the position of the law stated in **Rwabugande (supra).** For that reason, the Supreme Court in her decision of **Byamukama Herbert versus Uganda, Criminal Appeal No. 21 of 2017** cited with approval in **Abelle Asuman versus Uganda, (Supra)**, held that:

> *".....a sentence arrived at without taking into considering the period spent on remand is illegal for failure to comply with mandatory constitutional provisions."* We add that the requirement of deducting the period spent on remand is couched in mandatory terms, and must be followed by any sentencing court."

32] After perusing the record, we agree with Mr. Kyomuhendo's submission that the trial Judge omitted to consider and then deduct the period that the appellant had spent on remand before the date he was sentenced. For that reason, the sentence of 22 years' imprisonment was illegal and we hereby set it aside. Having

done so, we proceed to invoke the provisions of Section 11 of the Judicature Act, which grants this Court the same powers as the trial Court to impose an appropriate sentence on the appellant.

33] While making our decision, we shall be guided by the consistency principle enunciated by the Supreme Court in her decision of **Aharikurinda Yustina versus Uganda** (supra) and other cases. appellant's counsel referred us to several cases of rape, showing a sentencing range of 10 to 15 years' imprisonment by this Court and the Supreme Court. Mr. Kyomuhendo countered that submission by providing decisions with prison terms ranging from 32 years to life imprisonment. However, we note that those sentences were in respect of the offence of aggravated defilement and not rape that is before us. We therefore find them irrelevant and inapplicable to this case.

34] Own research has yielded sentences for rape that fall between15 to 30 years. For example, in **Asiimwe Maliboro versus Uganda, CA Criminal Appeal No. 141 of 2010, [2022] UGCA 268**, this court confirmed a sentence of 18 years' imprisonment for rape of an 18-year-old woman. Yet in **Biguraho Adonia versus Uganda, CA Criminal Appeal N0. 007 of 2012,** this court upheld a sentence of 25 years' imprisonment where the facts indicated extreme violence during the rape. In **Yebuga Majid versus Uganda, CA Criminal Appeal No. 3030 of 2009,** this Court confirmed a sentence to 15 years' imprisonment, but in **Mubangizi Alex versus Uganda, Criminal Appeal No. 7 of 2015,** the Supreme Court confirmed a sentence of 30 years for the same offence.

35] Guided by the above authorities, and those provided by Mr. Birikano, we are persuaded that the custom of this Court and the Supreme Court, has been to reserve sentences for rape between 10 to 30 years' imprisonment. There would be exceptional circumstances that would compel a Court to sentence outside that range.

36] The submissions by counsel during the allocution proceedings are also instructive. We consider what was stated as aggravating factors that the appellant who had no criminal record but was unremorseful, committed a grave offence which can attract the maximum penalty of death or a harsh sentence to deter others. That although married, he unleashed his lust on a victim, thereby demining her dignity as a woman. She lost her hymen in a violent way. Conversely, it was stated in mitigation that the appellant a first time offender of 33 years, and who was remorseful, should be allowed to be rehabilitated and to reform. In addition, that he had a wife and children who need his care. That he was remorseful and his counsel thereby proposed a sentence of 10 years. The appellant himself prayed for leniency and stated that he was sickly.

37] The circumstances of this case are that the appellant raped NP a 20-year-old woman. The rape was violent and the victim suffered physical and psychological harm. Rape is a serious offence that should attract stringent punishments of the offender and at the same time, deter others who may consider offending in a similar

manner. The appellant a married man, should have desisted from such criminal behavior. However, the facts in mitigation here are equally compelling, and we would consider a suggestion of 22 years by the prosecution as too harsh. The appellant who demonstrated remorse during his trial, should be given a chance to reform. He has a wife and family to care for. Even so, basing our judgment on the facts before us, we find the sentence his counsel suggested as too lenient.

38] Thus taking into account both the aggravating and mitigating factors above, as well as the principle of consistency, we consider a sentence of 18 years' imprisonment appropriate in the circumstances. We are enjoined by Article 23(8) of the Constitution to take into consideration and then deduct from that sentence, the period that the appellant had spent on remand, prior to the sentencing date. Unfortunately, according to the record, the remand period was never disclosed in the trial Court. We would under those circumstances consider the remand period to run from the date when the appellant was arrested. In her testimony NP, mentioned that the appellant was arrested on 23/12/2017, the same date recorded in the summary of evidence on record. The appellant was sentenced on 25/9/2019. The remand period would then be 1 year, 10 months and 3 days.

39] The appellant shall accordingly serve a term of 16 years, 1 month and 27 days' imprisonment, with effect from 25/9/2019, the date of his conviction.

40] Accordingly, this appeal has succeeded in part.

Dated at **Kampala** this ..30th.. day of ..January..., 2024.

.....

HON. CHEBORION BARISHAKI
JUSTICE OF APPEAL

.....

HON. HELLEN OBURA
JUSTICE OF APPEAL

.....

HON.EVA K. LUSWATA
JUSTICE OF APPEAL