THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT FORT PORTAL

(Coram: Egonda-Ntende; Bamugemeire & Mugenyi, JJA)

CRIMINAL APPEAL NO. 208 & 451 OF 2015

ISINGOMA GODWIN ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

(Appeal from High Court of Uganda at Fort Portal (Okwanga, J) in Criminal Case No. 143 of 2012)

JUDGMENT OF THE COURT

A. **Introduction**

1. Mr. Godwin Isingoma ('the Appellant') was on 18th February 2015 convicted of the offence of rape contrary to sections 123 and 124 of the Penal Code Act, Cap. 120; and sentenced to twenty-five (25) years' imprisonment. The facts as accepted by the trial court are that on the night of 21st January 2012 at Magura village in Karambi sub-county, Kabarole District, the Appellant had unlawful carnal knowledge of one Rose Kabahuma without her consent.

2. The Appellant now contests his conviction and sentence on the following grounds:

    I. *THAT the learned trial judge erred in law and fact when he failed to properly evaluate the evidence on record which occasioned a miscarriage of justice.*

    II. *THAT the learned trial judge erred in law and fact when he imposed a manifestly harsh and excessive sentence against the appellant.*

3. At the hearing it was clarified that the specific evidence in issue under *Ground 1* above is the evidence in respect of the Appellant's identification as the perpetuator of the offence. Mr. Geoffrey Chan Masereka represented the Appellant at the hearing while the Respondent was represented by Ms. Happiness Ainebyona, a Chief State Attorney.

B. **Parties' Legal Arguments**

4. With regard to *Ground 1* of the Appeal, learned Counsel for the Appellant cites the authorities of **Senoga Sentumbwe vs Uganda, Criminal Appeal No. 102 of 2009** (Court of Appeal), **Uganda vs Dick Ojok (1992-93) HCB 54** and **Woolmington vs DPP (1935) AC 462** for the proposition that the duty to prove each and every allegation of fact rests with the prosecution and does not shift throughout a criminal trial. It is argued that in this case the trial judge erroneously relied on the identification evidence adduced by the victim, Rose Kabahuma (PW2) and her spouse, Joseph Byaruhanga (PW3) to conclude that the Appellant was responsible for the rape. On the basis of the test of correct identification as laid down in **Abdala Nabulere & Another vs Uganda (1979) HCB 77**, it is argued that PW2 and PW3's

testimonies were not consistent with regard to the circumstances obtaining at the time of the rape and thus did not favour correct identification.

5. In Counsel's view, given that the attack on PW2 and PW3 had taken place at 10.00pm at the hands of an assailant that was not known to the victim, was covered in a hood at the time and had raped her in a poorly lit banana plantation, as well as the fear she must have experienced at the time; the circumstances did not favour correct identification. In the same vein, it is argued that the sudden attack on PW3, which in any case had left him unconscious, did not allow sufficient time for him to identify his attacker. It is thus opined that the highlighted circumstances did not favour correct identification and create reasonable doubt as to the veracity of the identification evidence, which doubt ought to be resolved in favour of the Appellant.

6. In relation to *Ground 2*, Counsel acknowledges the discretionary nature of sentencing that is not to be interfered with unless a sentence is illegal, so manifestly excessive as to amount to an injustice or where a material consideration was overlooked. The authorities of **Kyalimpa Edward vs Uganda, Criminal Appeal No. 10 of 1995**; **Livingstone Kakooza vs Uganda, Criminal Appeal No. 17 of 1993**, and **Kiwalabye Bernard vs Uganda, Criminal Appeal No. 143 of 2001** are cited in that regard. Nonetheless, it is argued that the 25-year sentence handed down to the Appellant was harsh and excessive given his age and other mitigating factors. On the premise that the Appellant was only 31 years old at sentencing, this Court is urged to underscore consistency in sentencing by following its decision in **Kalibobo Jackson vs Uganda, Criminal Appeal No. 45 of 2001** where a 17-year sentence imposed on a 25 year old man that had raped a 70 year old woman was considered to have been manifestly excessive and was reduced to seven years.

7. Conversely, learned State Counsel contends that the trial judge properly evaluated the evidence of PW2 and PW3 in arriving at the conclusion that the Appellant had been correctly identified. It is argued that PW2 was able to identify the Appellant with the aid of moonlight and torch light and she had earlier in the day seen him at his kibanja (which was about 12 meters away from PW3's house) and thus properly

recognized him in the banana plantation. In Counsel's view, PW2's evidence was corroborated by PW3, who attested to having known the Appellant for over a year before the attack; on the date in question there was moonlight and he had tried to fight the Appellant off after he struck him with a cable wire but fell down upon being hit by him again. On the basis of the test in **Abdala Nabulere & Another vs Uganda** (supra), it is argued that there were favourable conditions for the correct identification of the Appellant. Additionally, citing section 156 of the Evidence Act, Cap. 6, it is argued that the testimonies of PW2 and PW3 were further corroborated by PW4 whom they had informed of PW2's rape by the Appellant; as well as the 3 witnesses' cumulative evidence that the Appellant had disappeared from the village for over week after the incident, which conduct was not consistent with his innocence.

8. Under *Ground 2*, State Counsel contends that the trial judge took into account both the mitigating and aggravating factors of the case, considering his being a first offender and 31 years old to have been mitigating factors while the gravity of the offence and the the fact that the Appellant had used violence against his victim's spouse were considered by the trial court to have been aggravating factors. It is argued that the trial court did also take into account the 3 years that the Appellant had spent on remand, as by law required. It is opined that the trial judge cannot be faulted for sentencing the Appellant to 25 years imprisonment considering that in **Mubangizi Alex vs Uganda, Criminal Appeal No. 7 of 2015** the Supreme Court upheld a 30-year sentence that had been imposed by the trial court and confirmed by this Court for the rape of a 60 year old woman. In comparison with the sentence in that case, the 25-year sentence in issue presently is opined to be neither harsh nor manifestly excessive.

C. **Determination**

9. This being a first appeal from a decision of the High Court, this Court is required to review the evidence and make its own inferences of law and fact. *See Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, S.I 13 – 10.* It is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial Court and, while giving allowance for the fact that it has neither seen

nor heard the witnesses, come to its own conclusion on that evidence. In so doing, the first appellate court must consider the evidence on any issue in its totality and not any piece thereof in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial Court. *See* ***Baguma Fred vs Uganda, Criminal Appeal No. 7 of 2004*** *and* ***Kifamunte Henry vs Uganda, Criminal Appeal No. 10 of 1997*** *(both, Supreme Court).*

10. We are alive to the test of correct identification as laid out in **Abdala Nabulere & Another vs Uganda** (supra), to which we were referred by both parties. We deem it necessary to reproduce the decision in that case in considerable detail. The court summed up the practice on the evidence of a single identifying witness as follows:

> (a) The evidence of a single witness regarding identification must be tested with the greatest care.
>
> (b) The need for caution is even greater when it is known that the conditions favouring correct identification were difficult.
>
> (c) Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.
>
> (d) Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge adverts to the danger of basing a conviction on such evidence alone.

11. It then held as follows on the test of correct identification:

> Where the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of witnesses can be mistaken. The judge should then examine closely the circumstances in which the identification came (to) be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of mistaken identity is reduced but the poorer the quality, the greater the danger. .... When the

quality of identification is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused well before, a court can safely convict even though there is no other evidence to support the identification evidence; provided the court adequately warns itself of the special need for caution. If a more stringent rule were to be imposed by the courts, for example if corroboration were required in every case of identification, affronts to justice would frequently occur and the maintenance of law and order greatly hampered. When, however, in the judgment of the trial court the quality of identification is poor, as for example, when it depends solely on a fleeting glance or on a long observation made in difficult conditions; if for instance the witness did not know the accused before and saw him for the first time in the dark or badly lit room, the situation is very different. In such a case the court should look for 'other evidence' which goes to support the correctness of identification before convicting on that evidence alone. The 'other evidence' required may be corroboration in the legal sense; but it need not be so if the effect of the other evidence available is to make the trial court sure that there was no mistaken identification.

12. Turning to the evidence on record, PW2 testified in examination in chief that she knew the Appellant, having first met him on 21st January 2011. She then clarified that the year she met him was 2012 which would suggest that she first met him on the day she was raped. It was her evidence that on their way home at about 10.00pm that day, she and her husband (PW3) met a man dressed in a black jacket/ coat and had his head covered in a '*hat like material, like a hood.*' She testified that after beating PW3 with a wire whip till he fell down, this man dragged her to a nearby banana plantation and raped her. Upon returning home, she and PW3 decided to report the matter to the LC 1 Chairman but did not find him at home so they reported the incident to the Secretary for Defence whom they had met along the way. The witness testified that her husband informed the Secretary to Defence that it was the Appellant that had raped her and assaulted him and she thereupon attested to having recognized the Appellant with bright moonlight and a torch, and her husband had known him prior to the incident.

13. Under cross examination, PW2 testified that she had seen the Appellant on his kibanja that was 12 meters from PW3's house at about 1.00pm that day; and when she met him standing in the road on their way home she had not known that it was him, but upon reaching home was informed by PW3 that it was the Appellant that

had assaulted him. She then testified that although she had not recognized the Appellant at the road side, she did in the banana plantation recognize him as the man that she had seen earlier although she did not know his name. Under re-examination the witness clarified that she had not recognized the Appellant during the rape incident but when he removed his hood while still in the banana plantation, she was able to recognise him as the man she had seen earlier that day. However, in response to a question from the trial judge, the witness indicated that the Appellant had removed his hood prior to raping her, and not afterwards as stated in re-examination.

14. Meanwhile, PW3 testified in examination in chief that he had known the Appellant for over a year as at on 30th October 2014 when he gave his evidence; he did not know him before the rape and assault incident but started to know him when he (PW3) started working at one Molly Mutazindwa's home. He testified that on the date of the rape, he had recognized the Appellant as the man they founding standing in the road dressed in a long black coat. However, he thereupon testified that it was after he had been beaten and was starting to feel dizzy that he turned and recognized his attacker as the Appellant. He thereafter lost consciousness and woke up to find his wife (PW2) nowhere to be seen. When PW2 came home she reportedly informed him that she had been raped by the Appellant. Under cross examination, PW3 confirmed that he did not know the Appellant prior to the incident; and that there was moonlight but he did not know who was beating him. He further testified that it was PW2 that had informed him that the man that lived close to him called Isingoma (the Appellant) had raped her.

15. With respect, we do not find the foregoing identification to meet the test of correct identification as espoused in **Abdala Nabulere & Another vs Uganda** (supra). PW2 testified that her attacker donned a hood and claimed that she was able to identify him when he removed it in the banana plantation. We do however have reservations about relying on the identification evidence of a witness that had no prior knowledge of her attacker, having only seen him once on the very day she was raped. To compound matters, she subsequently testifies that it was her husband (PW3) that informed the Secretary for Defence (PW4) that the Appellant

was responsible for her rape, but PW3 himself claims to have been informed of the identity of the rapist by PW2.

16. Both of the supposed identification witnesses had no dependable prior knowledge of the Appellant, PW2 having only seen him that day on his kibanja, which we would think would have been a fleeting sight of a neighbour rather than a long observation. PW3, on the other hand, initially attested to not having known the Appellant prior to the rape incident before changing his testimony to claim to have known him since he (PW3) had started working at his employer's home, without indicating when that was. In any event, although he attested to having recognized the Appellant as the man they found standing in the road, under cross examination he conceded that he did not know the Appellant prior to the incident and did not know who assaulted him, but was later informed by his wife that the Appellant had raped her. Not only is this evidence riddled with contractions on material questions of fact and thus devoid of cogency, it raises serious doubts as to the correctness of the Appellant's identification. This is particularly so given the Appellant's evidence on oath that he did not rape PW2, denied having been to jail before as alluded to by PW2 and explained his whereabouts when PW4 first came to his home, presumably to arrest him. In addition, the 'other evidence' to which we were referred by the prosecution in support of its case is worthless for purposes of proof of the Appellant's participation in the offence as PW4 simply relied on the identification of the Appellant by PW2 and PW3.

17. In the result, we find that the prosecution did not prove the Appellant's participation in the rape of PW2 to the required standard, and he therefore was wrongly convicted of the offence of rape as charged. We would therefore uphold *Ground 1* of the Appeal.

D. **Disposition**

18. Having so held, we find no reason to delve into *Ground 2* of the Appeal. This Appeal is allowed; the Appellant's conviction and sentence are quashed. We hereby order that the Appellant be discharged forthwith unless held on other lawful charges.

19. It is so ordered.

Dated and delivered at Kampala this ..25th.. day of ..January....., 2024

.

Frederick M. S. Egonda-Ntende

Justice of Appeal

Catherine Bamugemereire

Justice of Appeal

Monica K. Mugenyi

Justice of Appeal