THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

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

CRIMINAL APPEAL NO. 378 OF 2019

SSEMAKULA SAIDI::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mpigi before Kaweesa, J delivered on the 25/09/2019 in Criminal Session Case No. 021 of 2018.)

JUDGMENT OF THE COURT

Introduction

The appellant was convicted of the offence of rape contrary to sections 123 and 124 of the Penal Code Act by the High Court (Kaweesa,J.) on the 25/09/2019 and was sentenced to 20 years imprisonment.

Background

The facts of this case as ascertained from the court record are that on 10/09/2017 the appellant while at Gwatiro Village in Butambala district had unlawful carnal knowledge of N.M without her consent. He was consequently tried and convicted of the offence of rape and sentenced as aforementioned.

Being dissatisfied with the decision of the trial court, the appellant appealed to this Court on the following grounds;

1. *That the learned trial Judge erred in law and fact when he found that the appellant had been positively identified as the perpetrator of the said offence.*

2. *That the learned trial Judge erred in law and fact when he meted out a manifestly harsh and excessive sentence against the appellant.*
3. *That the learned trial Judge erred in law when he passed an illegal sentence to the prejudice of the appellant.*

The appellant implored this Court to allow the appeal, quash the conviction and set aside the sentence and, or in the alternative reduce the sentence. The respondent opposed the appeal.

Representation

At the hearing, Mr. Henry Kunya, represented the appellant on State brief whereas Ms. Sherifah Nalwanga, Chief State Attorney from the Office of the Director Public Prosecutions (ODPP) represented the respondent. The appellant followed proceedings from Kitalya Mini Max Prison via video link. Both Counsel filed written submissions which were adopted and have been considered in this judgment.

Appellant's Submissions

Counsel submitted in respect of ground 1 that the undisputed facts on record reveal that the victim, N.M (PW1), was sexually molested by a man whom she only identified by his voice as the incident happened at night under circumstances with limited or questionable sources of light. That the victim during cross-examination categorically stated that she was not able to see the face of her attacker. Counsel also argued that whereas the victim claimed to have identified the appellant by his voice, she confirmed in her examination in chief that she had never had any conversation with the appellant before the incident.

Counsel faulted the learned trial Judge for relying on the decision in ***Sabwe Abdul vs Uganda, SCCA No. 19 of 2007*** for the proposition that to identify a voice one does not necessarily need to have talked to that person. He distinguished the decision of ***Sabwe Abdul vs Uganda*** (supra) from the instant case whilst arguing that whereas in the former there was close proximity between the victim and the appellant who used to come to their home and

they used to hear him speak to their father, in the instant case no proximity was established between the victim and the appellant apart from being village mates. That furthermore, the level of interaction between these two remained unknown.

It was further submitted that neither was there any independent corroborative evidence linking the appellant to the offence nor an attempt to prove that it was indeed the appellant who had participated in the commission of the same. Counsel invited this Court to reevaluate the evidence on record and find that the victim's voice identification was not sufficient enough for the trial court to consider as a basis for conviction, especially in the absence of other corroborative evidence.

On grounds 2 and 3 that were argued together, counsel submitted that it is now settled law that an appellate court will not interfere with the sentence imposed by the trial court which exercised its discretion whilst sentencing unless the exercise of discretion was such that the trial court ignored to consider an important matter or circumstances which ought to have been considered when passing sentence. He referred to ***Kiwalabye vs Uganda, SCCA No. 143 of 2001*** cited in ***Kimera Zaverio vs Uganda, Court of Appeal Criminal Appeal No. 427 of 2014*** for that position.

Counsel submitted that the appellant was a first time offender, was of a youthful age of 27 years at the time of committing the offence and had family responsibilities of children plus a wife. He had spent 1 year and 11 months on remand at the time of sentencing. Counsel invited this Court to find the sentence of 20 years' imprisonment manifestly harsh and excessive and out of the sentencing range for rape cases. In support of his submission, counsel relied on the decision in ***Kalibobo Jackson vs Uganda, Court of Appeal Criminal Appeal No. 45 of 2001*** where an appellant who was 25 years old raped a 70-year-old lady and was sentenced to 17 years' imprisonment. On appeal against that sentence, this Court found it to be harsh and excessive and reduced it to 7 years' imprisonment.

Counsel also cited ***Naturinda Tamson vs Uganda, Court of Appeal Criminal Appeal No.13 of 2011*** where the appellant was convicted of rape and sentenced to 18 years, imprisonment and on appeal this Court reduced the sentence to 10 years' imprisonment for reason that 18 years was manifestly harsh and excessive.

Counsel pointed out that in this appeal, the learned trial Judge passed a very irregular sentence when he pronounced that the 20-year sentence would be running from the first day of remand. He argued that by this pronouncement, the appellant was deprived of the constitutional imperative regarding the period spent on remand as per Article 23(8) of the Constitution. Counsel prayed this Court to allow the appeal, quash the conviction and set aside the sentence and, or in the alternative, if conviction is upheld, the sentence be substituted with an appropriate one.

Respondent's Submissions

Counsel argued the 3 grounds of appeal separately and submitted in respect of ground 1 that the learned trial Judge rightly found both in law and fact that the appellant had been positively identified as the perpetrator of the offence. He referred to the evidence of PW1, the complainant who testified that she had identified the appellant by voice as he was known to her prior to the commission of the offence and he used to speak the word "boy dose". Further, that the complainant also heard the appellant say, "keep quiet, I will kill you". She further submitted that the trial court relied on the decision in ***Sabwe Abdu vs Uganda*** (supra) for the position that to identify a person's voice, one does not necessarily need to have talked to that person.

Guided by that position, counsel submitted that in the instant appeal, PW1 told court that the appellant was a neighbour, his father was called Muhammed Mukiibi, which clearly showed that the appellant was familiar to PW1 and he talked to her at close proximity. She asserted that the learned trial Judge found the appellant's contention that the victim could not identify

him given that she had never had a conversation with him untenable for the reason that she did not necessarily need to have talked with him before she could ably identify his voice. She contended that the appellant's claim that he slept at his home on the fateful night was found unacceptable as he had been placed at the scene of crime.

In respect of ground 2, Counsel submitted that the learned trial Judge so rightly both in law and fact, sentenced the appellant to 20 years' imprisonment, which sentence was not manifestly harsh and excessive considering the circumstances of the case. She contended that whereas court took into account the mitigating factors, it did not consider all the aggravating factors such as; the victim's advanced age (75 years), bruises in her right upper limb, lateral aspect and on genitals, reddening of her vulva, and the youthful age of the appellant (27 years old) that made him too energetic for the old woman. According to counsel, that clearly showed that the trial court was too lenient and the sentence was not manifestly harsh and excessive in the circumstances.

In support of her submission, counsel relied on ***Karisa Moses vs Uganda, SCCA No. 23 of 2016*** where the Supreme Court cited ***Kiwalabye Benard vs Uganda*** (supra) for the position that an appellate court is not to interfere with the sentence imposed by a trial court, which has exercised its discretion on sentence unless the exercise of discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice. She then asserted that in this appeal, the learned trial Judge did a very good job in considering the provisions of the law as stipulated and in the circumstances of the case.

With respect to ground 3, counsel conceded that the learned trial Judge erred both in law and fact when he failed to mathematically deduct the period of 1 year and 11 months spent on remand by the appellant. She relied on the Supreme Court decision in ***Rwabugande Moses vs Uganda, SCCA No. 25 of 2014*** where it was held that in imposing a sentence of imprisonment against the convict, the period spent on remand must be deducted arithmetically. She further submitted that the decision in ***Rwabugande Moses vs Uganda***

(supra) is binding on all decisions post the 3rd of March, 2017. She prayed that this Court upholds the sentence of 20 years' imprisonment and deducts the period spent on remand.

Resolution by the Court

We have carefully studied the court record and considered the submissions of both counsel as well as the law and authorities cited to us plus those not cited but which we find relevant to the issues under consideration. 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, and make 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 decisions in ***Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No.10 of 1997 and Pandya vs R (1957) EA 336.***

On ground 1 of the appeal, this Court is required to consider whether the learned trial Judge erred in law and fact when he found that the appellant had been positively identified as the perpetrator of the said offence. We have considered the submissions of both counsel on this ground which are already summarized above.

In ***Sabwe vs Uganda case*** (supra) the appellant appealed to the Supreme Court on the ground that the two girls who included the victim could not have properly identified him by voice because they had never spoken to him. The Supreme Court agreed with the learned trial Judge's finding that given the circumstances of the case, the girls would be able to identify the appellant by voice even if they had never directly talked to him. Court held that to identify a person's voice, one does not necessarily need to have talked with that person.

The learned trial Judge in this appeal was alive to the position in ***Sabwe Abdu vs Uganda*** (supra) which he alluded to as follows: -

> *"In **Sabwe Abdu vs Uganda, SCCA No.19 of 2007**, the Supreme Court made some observations with regard to identification by voice which I consider instructive in this case. The Court thus stated*

that: There is evidence on the record that the two girls were familiar with the appellant because he lived about a quarter a mile from their home, they always passed by his home as they went to school and they used to hear him speak to other people. The appellant also used to come to their home where they would hear him speak to their father. We agree with the learned trial Judge's finding that given these circumstances the girls would be able to identify the appellant by voice even if they had never directly talked to him. To identify a person's voice, one does not necessarily have to have talked with that person".

The victim in this appeal testified that she would hear the appellant speak the *words "boy dose"* and on the fateful night the appellant told her; "keep quiet, I will kill you". The victim also testified that she used to see the appellant every day in the village as he was a neighbour and that his father was Mohammed Mukiibi and so she was able to distinguish his voice because she knew it. We agree with the learned trial Judge's finding that given those circumstances, the victim who was quite familiar with the appellant and knew his voice well, would be able to identify the appellant by voice. In the result ground 1 fails.

On grounds 2 and 3, this Court is required to consider whether the learned trial Judge erred in law and fact when he meted out a manifestly harsh and excessive sentence against the appellant and whether the learned trial Judge erred in law and fact when he passed an illegal sentence to the prejudice of the appellant.

We are alive to the decision in ***Kiwalabye Benard vs Uganda (Supra)*** which counsel for the respondent alluded to.

We shall first deal with whether the sentence passed was illegal as argued by the appellant. We note that while sentencing, the learned trial Judge stated as follows;

"Accused is found guilty of an offence whose maximum sentence is death. Accused has prayed for leniency. He is a first offender. The accused needs a sentence which is deterrent and which will enable him be rehabilitated. In view of all factors above he is sentenced to a custodial period of 20 years running from first date of remand."

Article 23 (8) of the Constitution requires court while passing a sentence to take into account the period a convict spent in lawful custody prior to completion of his trial. Failure to do so renders the sentence illegal. It was held by the Supreme Court in ***Rwabugande Moses vs Uganda*** (supra) that: -

> *"A sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision."*

We note from the above wording of the learned trial Judge's sentence that the period spent on remand was not deducted from the final sentence imposed on the appellant and this was conceded to by counsel for the respondent. Perhaps when the learned trial Judge stated that "*In view of all factors above he is sentenced to a custodial period of 20 years running from first date of remand*" he assumed that he was complying with the requirement of Article 23(8) of the Constitution. However, the decision in ***Rwabugande Moses vs Uganda*** (supra)and the subsequent decision of the Supreme Court in ***Abelle vs Uganda, Supreme Court Criminal Appeal No. 16 of 2016***, guided on how the trial court can take into account the period a convict has spent on remand. What stands out is that, that period should be credited to a convict when he/she is sentenced to a term of imprisonment. We therefore find that the learned trial Judge did not credit the period spent on remand to the appellant when he was sentencing him.

Consequently, we find the sentence illegal and we accordingly set it aside. We invoke section 11 of the Judicature Act which permits this Court to exercise the power of the trial court to impose an appropriate sentence. In so doing, we shall take into consideration the mitigating and aggravating factors as presented by counsel during trial and also look at the range of sentences in similar offences.

The mitigating factors were that the appellant was a first time offender who was remorseful and as a young man aged 27 years, he was capable of reforming into a useful citizen. He had

some people he was looking after and his children needed to be cared for by him. Counsel prayed that the period of 1 year and 11 months be considered while sentencing him. The aggravating factor was that the appellant raped a vulnerable woman aged 75 years. A deterrent sentence of 30 years was prayed for.

We have also been fortified by the Supreme Court decision in ***Aharikundira Yustina vs Uganda, SCCA No. 221 of 2005*** where it was held that consistency is a vital principle of sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied without unjustifiable differentiation.

In ***Yebuga Majid vs Uganda, CACA No. 303 of 2009,*** this Court upheld a sentence of 15 years imposed upon the appellant by the trial court for the offence of rape. It held that the sentence of 15 years' imprisonment befitted the circumstances of the case.

In ***Onaba Razaki vs Uganda, CACA No. 327 of 2009,*** this Court set aside the sentence of 15 years' imprisonment for the offence of rape and substituted it with 14 years. The appellant had attacked the victim at 11:00 p.m. while she was on her way from work and raped her in the grass.

In ***Lugi Sairus vs Uganda, CACA No. 50 of 2000,*** the appellant who raped his neighbour was convicted of the offence of rape and sentenced to 13 years' imprisonment. On appeal, that sentence was reduced to 10 years on the ground that it was so manifestly excessive as to cause a miscarriage of justice.

Having taken into account both the aggravating and mitigating factors set out above and the range of sentences in cases of rape, we are of the considered view that a sentence of 13 years will be appropriate in the circumstances of this case. We deduct the period of 1 year and 11 months from the 13 years and sentence the appellant to 11 years and 1 month which he shall serve from the date of conviction, that is, 25/09/2019.

We so order.

Dated at **Kampala** this.....8th.....day of.....February.....2024

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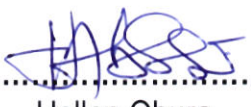
Cheborion Barishaki

JUSTICE OF APPEAL



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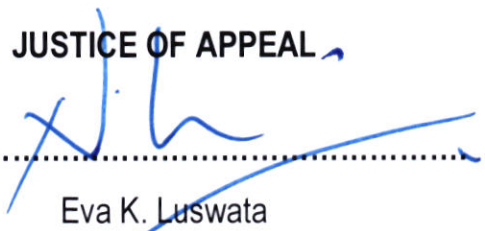
Hellen Obura

JUSTICE OF APPEAL



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Eva K. Luswata

JUSTICE OF APPEAL