THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

[CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA AND KATO, JJ.S.C)

CRIMINAL APPEAL No.23 OF 2002

BETWEEN

UMAR SEBIDDE ………………………………………………….. APPELLANT

AND

UGANDA .... RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Berko, Twinomujuni and Kitumba, JJ.A) dated 10th May, 2002 in Criminal Appeal No.25 of 2001]

JUDGMENT OF THE COURT

Umar Sebidde, the appellant, was convicted of rape by Bamwine, J, in the High Court, and sentenced to imprisonment for 11 years. His appeal to the Court of Appeal was dismissed. He now appeals to this Court against that dismissal.

Initially, the memorandum of appeal contained two grounds, the first of which was a complaint that the Justices of Appeal failed to evaluate the evidence on record and, as a result, they arrived at a wrong decision. Mr. Kafuko - Ntuyo, counsel for the appellant abandoned that ground. We have studied the record and considered the judgments of both the trial judge and the Court of Appeal. In our opinion, Mr. Kafuko -Ntuyo acted properly in abandoning that ground because there was ample evidence against the appellant justifying his conviction and in our view the Court of Appeal had in fact re-evaluated the evidence.

The second ground, as amended with leave of the Court, states as follows:

> ***The learned Justices of Appeal misdirected themselves on fact and in law when they held that the trial judge acted on wrong principle in sentencing the appellant.***

Under subsection (3) of section 6 of the Judicature Statute, 1996, an appeal to this Court, against sentence or order, is on a matter of law, but not on fact as stated in part of this ground. To that extent the ground was poorly formulated and is misleading.

Be that as it may, Mr. Kafuko - Ntuyo, contended that the Justices of Appeal wrongly interpreted the sentence passed by the trial judge and thereby caused prejudice to the appellant by upholding the sentence of 11 years which was imposed by the trial judge. Counsel relied on three of our decisions (see post) made during this session whereby we modified the sentence in each case to

reflect what in our opinion was the intention of the trial judge.

Mr. Elubu, Principal State Attorney, opposed the appeal contending that the sentence passed by the Court of Appeal is not illegal and that that court only had corrected the vagueness created by the style of language in which the trial judge imposed the sentence. He distinguished this appeal from the three decisions cited by Mr. Kafuko -Ntuyo.

When imposing the sentence the learned trial judge expressed himself this way: -

> ***"Doing the best I can, I deem sentence of 11 years imprisonment period on remand inclusive, appropriate. I sentence him so"***

In the cases relied on by counsel for the appellant, namely **Musisi.Z. Vs Uganda** (Criminal Appeal No.9 of 2002) **Akwam Vs. Uganda** (Criminal Appeal No.14 of 2002) and **Kizito Senkula Vs Uganda** (Criminal Appeal No.24 of 2001) , (all unreported) , we stated that this mode of sentencing is erroneous and ambiguous in that the trial court in effect sentenced the appellant for

the period before the appellant was convicted. We do not think that Clause (8) of Article 23 of the Constitution authorises Courts to impose sentences on accused persons for the period when such persons are still presumed innocent.

In the Court of Appeal, an alternative ground of appeal

relating to sentence stated that: -

> ***" .... the learned trial judge imposed a sentence which is in the circumstances of the case excessive"***

This was followed by a prayer that the sentence be reduced.

During the hearing of the appeal in that Court, although Mr. S.N. Sserwanga, counsel for the appellant, conceded that the sentence of 11 years was not illegal, he contended that the sentence was excessive and that since the appellant had been on remand for 3 years, the sentence be reduced to 7 years. Ms. Betty Khisa, a Principal State Attorney, opposed this. In that regard the issue of sentence was canvassed before the Court of Appeal and the Court expressed its disapproval of the vague manner in which sentence was imposed, observing that: -

> ***"With respect to the learned trial judge, we are unable to appreciate that he could have intended to pass a sentence that included the period the appellant spent on remand. Did he pass a sentence of 11 years or 11 years minus the period spent on remand?"***

The Court quoted Clause (8) of Art. 23 of the Constitution which reads: -

> **"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"

Thereafter the court observed, correctly in our view, that it is the duty of the court to pass a definite and clearly ascertainable sentence. The learned Justices further noted that at the time the trial judge sentenced the appellant, the latter had been in custody for almost three years. They concluded: -

> ***"Taking into account this period in custody, we find that a sentence of 11 years imprisonment is the appropriate sentence and we so hold"***

As we pointed out earlier, the appellant's counsel had urged court to reduce the period of 11 years to 7 years because of the period which the appellant had spent in custody before his conviction. The court did not consider these arguments and therefore never indicated whether the argument was baseless or not. Our understanding of the provisions of clause (8) (supra) is that the period spent on remand has a definite bearing on the sentence to be imposed by a trial Court. In our opinion the framers of the constitution must have intended that such a period should be considered in favour of the accused, when a sentence of imprisonment is imposed. Our understanding of the judge, in this case, is that the three years spent on remand by the appellant is part of the sentence of 11 years. The effect of that is that although the learned trial judge alluded to clause (8) he did not apply it practically in that he sentenced the appellant for a period during which he was deemed to be innocent. In our opinion, the intention of the learned judge must have been that the period of 3 years spent on remand is to be subtracted from the sentence of 11 years. This is consistent with our other decisions comprised in the three appeals upon which Mr. Kafuko-Ntuyo relied and which appeals we have referred to already in this judgment.

We accordingly think that the learned Justices of Appeal erred by effectively maintaining the sentence of 11 years. We allow the appeal. To that extent we set aside that sentence. Instead we

substitute it with a sentence of 8 years which the appellant is to serve from 1/3/2001, the day when the trial judge first sentenced him.

Dated at Mengo this 15th day of January 2004.

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

J.W.N. TSEKOOKO
JUSTICE OF THE SUPREME COURT

A.N. KAROKORA

JUSTICE OF THE SUPREME COURT

J.N. MULENGA

JUSTICE OF THE SUPREME COURT

C.M. KATO

JUSTICE OF THE SUPREME COURT