THE REPUBIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

[CORAM: Egonda-Ntende, Obura &Musota JJA]

CRIMINAL APPEAL NO. 89 OF 2013

(Arising from High Court Criminal Session Case No.12 of 2010 at Masaka)

BETWEEN

KIZITO NUHU WASSWA ....APPELLANT

AND

UGANDA ....RESPONDENT

(An appeal from the judgement of the High Court of Uganda (Mike J. Chibita, J.,) delivered on 4th April 2011)

JUDGEMENT OF THE COURT

Introduction

1. The appellant was indicted and convicted, on his own plea of guilty, of the offence of rape contrary to section 123 of the Penal Code Act. The particulars of the offence were that on the 27th day of September 2009 at Mirindi Landing site Maziga sub-county in Kalangala District, the appellant did have unlawful carnal knowledge of Nabasirye Jane without her consent. On 4th April 2009, the learned trial judge sentenced him to serve a period of imprisonment for 12 years. He now appeals, with the permission of this court, against sentence only.

2. The appellant contends in the ground of appeal that the learned trial judge erred in law when he sentenced the appellant to a period of 12 years imprisonment without taking into account the period the appellant had spent on remand.

3. At the hearing of the appeal, the appellant was represented by Mr Innocent Wanambugo and the respondent by Mr Ndamurani David

Atenyi, Senior Assistant Director of Public Prosecutions in the Office of the Director, Public Prosecutions.

Submissions of Counsel

4. Mr Wanambugo Innocent submitted that in sentencing the appellant, the learned trial judge did not take into account the period of I year and 7 months he spent on remand as mandated by Article 23(8) of the Constitution. He relied on the case of Rwabugande Moses v Uganda SC Criminal Appeal No. 25 of 2014 for the preposition that such a sentence is illegal for failure to comply with the mandatory provision of the Constitution. He submitted that this court should now set aside the sentence and impose an appropriate sentence taking into account the mitigating factors less the period spent on pre-trial custody.

5. Mr Ndamurani David Atenyi for the respondent conceded that the sentence imposed on the appellant is indeed illegal as the learned trial judge had not complied with the provisions of Article 23(8) of the Constitution. He submitted that this court should invoke its powers under section 11 of the Judicature Act and impose upon the appellate an adequate sentence taking into account the aggravating factors.

Analysis

6. In the case of Livingstone Kakooza V Uganda, SC Criminal Appeal No. 17 of 1993[unreported] court stated,

> 'An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration'

7. The powers of an appellate court to interfere with the sentence of a trial court are governed by the above stated principles.

8. The sentencing order of the learned trial judge was set out in the following words,

> 'The convict committed a very serious offence of rape. He on top of it committed it while HIV positive meaning that he exposed his victim to the virus. He then threatened to defile her child if he was a girl. He additionally robbed her of her money and then tried to strangle her. All this barbarism was enough to warrant the maximum penalty.
>
> However, because the convict did not waste court's time but pleaded guilty and also saved the victim from further trauma. I have considered his and his lawyer's plea for leniency and decided not to give him the maximum penalty.
> The convict is thereby sentenced to 12 years in prison.
> Right of appeal against sentence explained.'

9. It is evident that the learned trial judge did not make any reference at all to the period the appellant had spent in pre-trial custody.

10. Article 23(8) of the Constitution provides,

> '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.'

11. This provision is mandatory. The Supreme Court decided in Rwabugande Moses v Uganda, SC Criminal Appeal No. 25 of 2014 (unreported) 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. The period spent on remand must be subtracted from the appropriate sentence assessed by court after taking into account all relevant factors. This position has been reiterated in the recent decisions of Abelle v Uganda, SC Criminal Appeal No. 66 of 2016 (unreported), Wamutabanenewe v Uganda, SC Criminal Appeal No. 74 of 2007 (unreported).

12. In light of the above, the sentence imposed against the appellant is illegal and is hereby set aside.

13. We now invoke Section 11 of the Judicature Act which gives this court power as that of the trial court to impose a sentence of its own.

14. The appellant was a first time offender. He pleaded guilty to the offence saving the courts time and resources. At the time of conviction and sentence, the appellant was 38 years old who given an opportunity to reform can be useful to society. He had a family who were dependant on him. Nonetheless, the appellant was convicted of a serious offence. The victim was a 24 year old housewife. The offence was committed violently with brutal force and the appellant raped the victim the second time without a condom yet he was HIV positive, thus exposing the victim to the possibility of an HIV infection.

15. There is also need for uniformity and consistence in sentencing. We therefore have to take into consideration the sentences this court and the Supreme Court have imposed on offenders of similar circumstances.

16. In <u>Lugi Sairus v Uganda, CA Criminal Appeal No.50 OF 2000</u>, (unreported) the appellant who raped his neighbour was convicted of the offence of rape and sentenced to 15 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.

17. In <u>Boona Peter v Uganda, CA Criminal Appeal No. 18 0f 1997</u>, (unreported) the appellant was convicted by the High Court of rape and was sentenced to 10 years imprisonment. His appeal against sentence on the ground that the sentence was manifestly excessive was rejected and the sentence was confirmed.

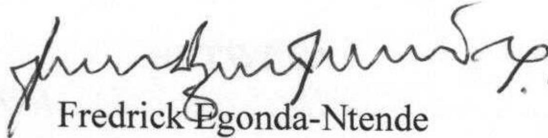
18. In the case of <u>Otema Vs Uganda, CA Criminal Appeal No. 155 of 2008</u>, (unreported) the appellant was convicted by the High Court for the offence of rape and was sentenced to 13 years of imprisonment. On appeal, the sentence was reduced to 7 years imprisonment.

19. Having taken into account the above factors and the decided cases, we consider in this case that a term of 10 years imprisonment will meet the ends of justice. We now deduct 1 year and 7 months the period spent on

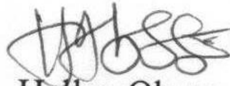
remand. The appellant will therefore serve a sentence of 8 years and 3 months starting from 4th April 2011 the day he was convicted.

20. We so order.

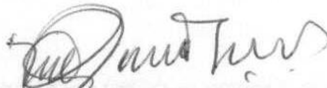
Signed, dated and delivered at Masaka this 31st day of July 2018.



Fredrick Egonda-Ntende
Justice of Appeal



Hellen Obura
Justice of Appeal



Stephen Musota
Justice of Appeal