THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 263 OF 2011

KABUYE ATANANSI :::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Arising from the judgment of Justice Elizabeth Ibanda Nahamya in Masaka Criminal Session Case No. 019 of 2010.)

CORAM: HON. JUSTICE EGONDA NTENDE, JA

HON. JUSTICE, HELLEN OBURA, JA

HON. JUSTICE, STEPHEN MUSOTA JA

JUDGMENT OF THE COURT

The appellant was indicted, tried and convicted of the offence of Rape C/S 123 and 124 of the Penal Code Act and sentenced to 22 years imprisonment.

Background

The background and facts as outlined by the learned trial Judge in her Judgment are based on the prosecution case was that on 24th October 2009, the victim Namujju Joyce aged 70 years was in her house sleeping with her grandchildren when they were woken by a loud bang on the door. The victim lit the lamp and woke up her grandchildren including PW3, Nassali Grace. The appellant broke the bedroom door and on entering, the victim identified him as Kabuye Atanansi who was wearing short jean trousers, was bare chested and had his shirt tied around his waist. He grabbed the victim, put her on the floor and blew off the lamp. After struggling with the victim for some time, the appellant left. A few minutes

later, he returned with a match box and was able to locate the victim under the bed where she was hiding and had sexual intercourse with her while squeezing her neck so that she does not make noise. After the act, the appellant pulled the victim out of the house and she sustained injuries on her knee and arm.

The appellant was later arrested, indicted, tried, convicted of the offence of rape and sentenced to 22 years imprisonment.

Being dissatisfied with the decision of the High Court, the appellant filed this appeal on the following grounds;

1. The learned trial Judge erred in law and in fact when he failed to properly evaluate the evidence on record as a whole and relied on hearsay, contradicting, insufficient, untruthful and unreliable prosecution evidence of identification which was not investigated and hence arrived at a wrong identification which was not investigated and hence arrived at a wrong conclusion that the appellant was guilty of the offence of Rape contrary to Section 123 and 124 of the Penal Code Act which caused a miscarriage of justice.
2. The learned trial Judge erred in law and in fact when he ignore the appellant's grudge with PW2 which he put before court and thereby occasioned a miscarriage of justice.
3. The learned trial Judge erred in law and in fact when he imposed a harsh and excessive sentence of 22 years upon the appellant and gave an ambiguous sentence without taking into account the period spent on remand which led to a serious miscarriage of justice to the prejudice of the appellant.

Representation

At the hearing of the appeal, Mr. Sserunkuma Bruno appeared for the appellant while Ms. Masinde Barbra (Senior State Attorney) appeared for the respondent.

Submissions of the appellant

Counsel for the appellant submitted in regard to ground 1 that the prosecution failed to squarely place the accused person at the scene

of crime. Counsel cited **Section 8** of the **Evidence Act** and the case of **Uganda vs George Wilson Simbwa Supreme Court Criminal Appeal No. 37 of 1995** which set out the law on evidence of identification. He referred to the cross examination of PW3 in which she testified that the appellant was wearing a cap to assert that that was a condition which did not favour correct identification of the attacker. Counsel argued that PW2, the victim did not properly identify the person or the attacker at her home because she was under the bed and was being pulled from there.

On ground 2, counsel submitted that the trial Judge ignored the existence of a grudge they both had since 2008 when the appellant made the victim compensate for her cattle's destruction of his ploughs. Counsel cited the case of **Hajji Musa Sebirumbi and Baguma Fred vs Uganda, S.C.C.A No. 10 of 1989** that the matter concerning this grudge should have been seriously taken into consideration by the trial court in light of the prosecution evidence before court.

In regard to ground 3, counsel cited the authority of **Jamada Nzabaikukize Vs Uganda, CACA No. 77 of 2007** on law upon which this court is to interfere with the sentence awarded by the trial court. He submitted that when the learned trial Judge was imposing the sentence of 22 years, she stated that the period of remand should be considered against this term and left it at that. He prayed that this court allows this appeal and the conviction, sentence and orders of the trial Judge be set aside and the appellant be acquitted of the offense.

Submissions of the respondent

In reply, Ms. Masinde counsel for the respondent opposed the appeal and submitted that there were factors favouring correct identification of the appellant which were considered by the trial court at pages 121 and 123 of the record. That the victim and her grandchildren were awake by the time the appellant entered into the house and they got up and lit a lamp which they used to

identify the appellant. Further, that there was moon light streaming in from the door which the appellant had kicked down.

He argued that there was close proximity, the appellant having fallen on top of the victim and also dragged her from under the bed where she was hiding. In addition, the victim knew the appellant prior to the incident since they were staying in adjacent villages. According to counsel, all those factors satisfy the requirements for proper identification and the trial court rightly found that the circumstances were favourable for correct identification of the appellant.

On ground 2, counsel submitted that PW2's complaint was not based on a grudge because if she had a grudge with the appellant, she would have reported him to police the first time he attempted to rape her. That the Judge based her conviction on other evidence which rightly placed the appellant at the scene of crime.

Regarding the sentence meted out on the appellant, counsel for the respondent conceded that the sentence is vague because the trial court neglected to take into account the period the appellant had spent on remand. She prayed that this court upholds the conviction of the lower court and appropriately sentences the appellant bearing in mind that the victim was a 70 year old woman who also sustained injuries from the incident.

The duty of a first appellate court

This is a first appeal and the duty of this Court as a first appellate court is to re-evaluate the evidence, weighing conflicting evidence, and to reach its own conclusion on the evidence, bearing in mind that it did not see the witnesses testify. (See ***Pandya v R [1957] EA p.336 and Kifamunte v Uganda Supreme Court Criminal Appeal No. 10 of 1997.*** In the latter case, the Supreme Court held that;

"***We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own***

consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."

We have kept these principles and the submissions of both counsel in mind in deciding this appeal. We shall resolve the grounds of appeal in the order in which the parties argued them.

Identification

The appellant argued that there were no conditions for proper identification while the respondent argue otherwise. The learned trial Judge found that the appellant was properly identified. PW2 testified in the trial court that she had known the appellant before the day the offence was committed and was also able to identify him with the use of a *tadooba* which she lit when she heard a bang at the door. The trial Judge held that;

> *"The accused and DW2 on the other hand allege that at the said time, he was at home sleeping. DW1's story did not seem plausible at all while DW2 did not impress me as a truthful witness. I am convinced that the accused was properly identified since the victim PW2 was quite familiar with him. I therefore find that the prosecution has proved the accused person's participation beyond reasonable doubt."*

We are of the considered opinion that the learned trial Judge's finding in this regard is fully supported by the evidence on the record. In the circumstances, we find no error on the part of the learned trial Judge in reaching the conclusion that she did, namely that it is the appellant who raped the victim. The prosecution evidence rightly placed the appellant at the scene of the crime. There were conditions favoring proper identification because as earlier stated, the appellant attacked the victim when the lamp was lit and he also managed to get a matchbox to look for the victim under the bed. The series of events seem to have occurred for quite

a while and as such, we cannot agree with the appellant that conditions for proper identification were not favorable. The trial Judge also rightly rejected the alleged grudge. Consequently, grounds 1 and 2 of appeal are dismissed accordingly. The appellant's conviction is upheld.

Consideration of sentence

An appellate court should not interfere with the discretion of a trial court in the determination of a sentence imposed by that court unless that trial court acted on a wrong principle or overlooked a material factor or the sentence is illegal or manifestly excessive. (See **Kyalimpa Edward v. Uganda SCCA No. 10 of 1995 and Kyewalabye Bernard v. Uganda Criminal Appeal No. 143 of 2001(S.C).**

The appellant's Counsel submitted that the sentence was harsh and excessive. Learned counsel for the respondent conceded that the sentence was only vague because the trial court neglected to take into account the period the appellant had spent on remand, but it is not excessive or harsh. She prayed that this court appropriately sentences the appellant.

The learned sentencing Judge took into account the fact that Rape is a grave offence for which a convict is liable to suffer death and that the victim was a 72 year old woman. She also took into account the defense's submission in mitigation that the appellant was intoxicated with *waragi* when he raped the victim, he had 2 wives and was a first offender. She then sentenced him to 22 years' imprisonment. She however handed down an ambiguous sentence when she stated that;

> "The period spent on remand should be considered against this term ".

It appears the Learned Judge intended someone else to take into consideration the remand period and deduct it from the term imposed by her. This was a misdirection rendering the sentence

illegal as she in effect did not comply with Art. 23(8) of the Constitution.

Article 23(8) of the Constitution provides 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."

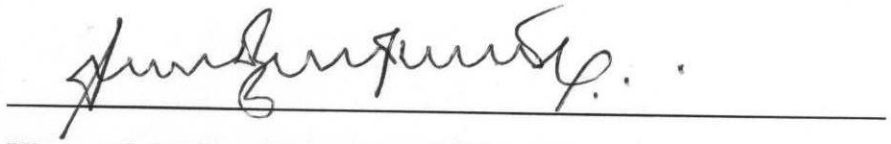
The Constitution provides that the sentencing court must take into account the period spent on remand. It was held in the Supreme Court decision of **Abelle Asuman Vs Uganda S.C.C.A No 66 of 2016** that *"it does not provide that the taking into account has to be done in an arithmetical way. The constitutional command in* ***Article 23(8) of the Constitution*** *is for the Court to take into account the period spent on remand."*

We now invoke our powers under s.11 of the Judicature Act to sentence the appellant afresh.

In sentencing the appellant, we shall consider that he was a first offender aged 35 years at the time the offence was committed. He is capable of reform and was intoxicated. We shall also take into account the period the appellant spent on remand of 2 years and 10 days before sentence and the gravity of the offence. We shall also consider that the victim was 70 years old, was raped in the presence of her grandchildren which was disrespectful of her dignity. We sentence the appellant to 10 years imprisonment from the date of conviction which was 14th November 2011.

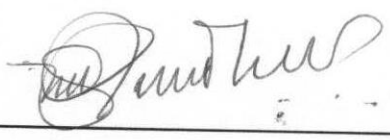
We so order.

Dated this ..30th..... Day of .....July..... 2018



Hon. Justice Egonda Ntende, JA

Hon. Justice, Hellen Obura, JA



Hon. Justice, Stephen Musota JA