THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 05 OF 2016

(***Coram:*** *Kisakye, Mwangusya, Mugamba, Buteera, JJ.S.C. Nshimye, Ag. JSC)*

Between

Kyamanyi Nicholas
Mubiru Ibrahim
Isabirye Bob
Kijjambu Jeremiah } ..... Appellants

Versus

Uganda ..... Respondent

(Arising from the decision of the Court of Appeal delivered on 13th April 2016 by Kasule, Bossa and Kiryabwire, JJA)

JUDGMENT OF COURT

Introduction

The appellants, namely Kyamanyi Nicholas, Mubiru Ibrahim, Isabirye Bob, and Kijjambu Jeremiah, were convicted by the High Court sitting at Kampala of the offences of aggravated Robbery contrary to Sections 285 and 286 (2) of the Penal Code Act and Rape contrary to Sections 123 and 124 of the Penal Code Act. They were sentenced each to thirty years imprisonment on the count of

aggravated Robbery and thirty five years on the count of rape. The sentences were to run concurrently.

Background

The background to this appeal is briefly that during the night of 17th October, 2012 Wambaka Hosea (PW1) was at home with his wife Namataka Sylvia (PW2) when four men entered their bedroom flashing torches.

The prosecution proceeded to tender the following evidence. One of the assailants whom the victims identified as A.1 was armed with an AK 47 rifle and was also carrying a rope and a stick. A2 was also carrying a stick. A.3 was carrying a small bag and was armed with a knife. A4 held a sellotape. The assailants tied up the victims and demanded for car keys from PW1 whom they ordered to disable the car alarm.

At that time the assailants demanded for money and one of the victims showed them where shs.500,000/= was kept. The assailants took this money together with another Shs.300,000= making a total of shs800,000/= . The car which was parked outside was vandalised and a number of spare parts were taken.

After they had vandalised the car the assailants returned to the house where A2 raped PW2 while A3 and A4 were holding her leg. A.1 was pointing a gun at PW2. At that time A3 put a knife on PW2's neck threatening to slice it if she resisted sexual intercourse.

After the sexual assault on PW2 the appellants collected an assortment of household property including a laptop computer,

five mobile phones, TV screen LG Plasma, a camera, two financial cards for Standard Chartered Bank and ATM cards for Stanbic and Centenary Banks. Although some of these items were recovered none was exhibited at the trial.

All the appellants denied participation in the alleged offences. They also denied knowing each other.

A.1 Kyamanyi Nicholas testified that at the time of the alleged rape and robbery he was at his home sleeping. He stated that his arrest was in connection with his alleged marriage to an underage girl and not the alleged offences of rape and robbery. He said that after his arrest he was tortured and forced to sign some papers whose contents he did not know. He said he was later taken to Court and remanded to Luzira.

A.2 Mubiru Ibrahim testified that on the night of 17th/18th October 2012 when he is alleged to have raped PW2 and robbed the complainants of their property he was sleeping at his usual residence. He stated that he was arrested on 23rd October, 2012 on his way from Kisugu to Namuwongo where he resided. He said that on arrest he was told that he was either an idler or a thief. He stated that he was taken to Kisugu Police Post where he spent two weeks before he was transferred to Katwe Police Station where he met PW1 and PW2. He testified that PW2 told him to sign some papers whose contents he did not know in order for him to be released. He concluded that he had never met PW2 before and denied ever having raped her or robbed her.

A.3 Isabirye Bob stated that he knew nothing about the charges. He said that he was arrested on 30th October 2012 without being

told why he was being arrested. He stated that PW1 who was with one Jamiru removed a silver Sonny TV, a DVD and Hoover, Phillips flat iron and six bars from his house. He went on to state that he was taken to Makindye Police Post where he was given papers to sign for his release but that instead of being released he was taken to Kibuye Police Post from where he was taken to Makindye Court where he was charged with rape and robbery . He added that later he was sent on remand.

A.4 Kijjambu Jeremiah stated that he was arrested in October, 2012 on a date he did not remember. He was at home with his wife when five men including PW1 arrived. One of them pointed a gun at him before he was handcuffed. He said his house was searched and a photo album, cash, his phone and his wife's phone were seized before he was taken to Kibuye Police Station. He stated that the following day he was taken to a place near Clock Tower where he was tortured and was asked to produce a camera. He said he did not have any camera. He added that during his detention he was tortured and was asked to sign a statement whose contents he did not know. He stated that from the Police he was taken to Makindye Court where he was charged with the offences of rape and murder which he knew nothing about.

Following their conviction and sentence by the High Court the four appealed to the Court of Appeal on two grounds. The grounds read:-

1. *That the learned trial Judge erred in law and fact in convicting the appellants for aggravated robbery when the property in*

issue was not exhibited at the trial which resulted into a miscarriage of justice.

2. *That the learned trial Judge erred in law and fact when he sentenced the appellants to 30 years and 35 years imprisonment for the respective offences which is deemed to be hash and excessive in the circumstances.*

The appeal was dismissed by the Court of Appeal which confirmed the conviction and sentence by the trial Court. Hence this appeal.

It's worth observing that while at the Court of Appeal all the four appellants filed a joint Memorandum of Appeal the first appellant filed his own memorandum of appeal in this Court raising five grounds. The rest of the appellants filed a separate Memorandum of Appeal raising two grounds.

The first appellant raises the following grounds in his memorandum of appeal:-

1. *The learned Justices of Appeal erred in law when they ignored the appellants' defence of alibi and hence arriving at a wrong decision of confirming his conviction.*

2. *The learned Justice of Appeal erred in law when they convicted the appellant of rape in absence of any medical evidence which is a mandatory requirement in law to corroborate a sexual offence thereby arriving at an erroneous decision.*

3. *The learned Justices of Appeal erred in law when they disregarded major contradictions, inconsistencies and gaps in the way exhibits were identified, recovered, handled and tendered or not tendered during investigation and at the trial thereby arriving at an erroneous decisions.*

4. *The learned Justices of Appeal erred in law when they convicted the appellant of robbery and rape without proper evidence of identification of the appellant at the scene of crime which occasioned a miscarriage of justice.*

5. *The learned Justices of appeal erred in law when they confirmed the appellant's sentence of 35 years imprisonment without considering the period he spent on pre-trial custody/remand which rendered the sentence illegal thereby occasioning a miscarriage of justice.*

On their part the 2nd, 3d and 4th appellants raised the following grounds:-

1. *The learned Justices of appeal erred in law and fact when they convicted the 2nd and 3rd and 4th appellants based on the unsatisfactory circumstantial evidence.*

2. *The learned Justice of appeal erred in law and fact when they imposed a sentence of 30 years each on count of*

robbery and 35 years each on count of rape both sentences to run concurrently against the appellants which are deemed to be illegal, manifestly harsh and excessive in the circumstances of the case without taking into account the appellants' age and other mitigating factors before sentencing.

Mr. Andrew Sebugwawo represented the first appellant on a private brief while Mr. Emmanuel Muwonge represented the second, third and fourth appellants on a state brief. Ms Josephine Namatovu, a Principal State Attorney in the Directorate of Public Prosecutions represented the respondent.

Submissions of Counsel for the 1st appellant

Mr. Sebugwawo submitted that neither the High Court nor the Court of Appeal bothered to find out whether the first appellant's defence that he was arrested on 14th October 2012 which was a Sunday and taken to various places before he was produced in Court was correct. According to Counsel the appellant's alibi was not checked by the investigation to ascertain whether or not he had been to the various places he mentions in his defence. Counsel asserted that it was a case of mistaken identity and that the first appellant was convicted for an offence he never committed. He added that finger prints should have been lifted from the scene of crime to show whether or not the appellant was ever there.

On ground three Mr. Sebugwawo submitted that both PW1 and PW2 testified that the type of TV stolen from their home was an LG

flat screen while that recovered by PW3 was a Sony TV Plasma 32 inch. He said that the two were different.

Secondly, Mr. Sebugwawo pointed out that while PW4 had stated that he had failed to identify the serial number of the gun PW6 testified that he was able to discern the number.

Thirdly, Counsel Sebugwawo submitted that the manner in which the exhibits allegedly recovered following the robbery and rape were handled left gaps in the prosecution case as did the failure to tender the exhibits as evidence. He submitted that the prosecution relied on photographs which were of no value to the prosecution case.

On ground four Mr. Sebugwawo submitted that the conditions under which the two victims of robbery and rape allegedly identified the assailants were not conducive to correct identification being made. He stated that whereas the appellants might have been in the room for about three hours, the victims were in fear, frightened and were further being intimidated. He said that as such they could not have been in position to identify the attackers who to them were strangers. He added that no identification parades were conducted for the witnesses to confirm the identifications.

On sentence Mr. Sebugwawo stated that the Justices of Appeal upheld the sentences without considering the period the appellants spent on remand.

Secondly, he submitted that the sentences be deemed to be harsh and excessive. He added that the appellant was a first offender, who was aged only twenty one years, that he was remorseful and

that he had with a young family to look after. Counsel prayed for a more lenient sentence.

Submissions of Counsel for the 2nd, 3rd and 4th appellants

Representing the 2nd, 3rd and 4th appellants Mr. Muwonge submitted that the appellants were convicted on the basis that some of the stolen items were recovered from their homes but hastened to add that none of the items in issue were recovered from the homes of the 2nd, 3rd and 4th appellants. According to Counsel the Courts below dealt with the case in an omnibus way without proving the participation of each of the appellants.

On alibi he submitted that the appellants' alibi was never investigated by the Police and that it was never disproved by the prosecution as required by the law.

On sentence Mr. Muwonge submitted that there was non-compliance with Article 23 clause 8 of the Constitution because the period spent on remand was not taken into account. He referred to the case of **Moses Rwabugande vs Uganda SCCA No. 25/2014** in this connection.

Submissions of Counsel for the respondent

Ms Josephine Namatovu for the respondent supported the findings of both the High Court and the Court of Appeal that all the appellants had been placed at the scene of crime. In response to the submissions of Counsel regarding the first appellant she handled grounds one and four together saying they are related to the identification of the appellant at the scene of crime and his claim that he had been arrested on 14th October, 2012 for a matter

unrelated to the offences charged following which he was taken to various places where he was tortured until the 9th November, 2012 when he was produced in Court.

The learned Principal State Attorney submitted that the Court of Appeal considered the evidence evaluated by the High Court and on re-evaluation rightly found that the first appellant participated in the offences of robbery and rape. She stated that the evidence connecting him to the offences included visual identification by the victims, recovery of some of the property from the appellant and recovery of the gun allegedly used by the assailants during the robbery.

On ground 2 Ms Namatovu submitted that the matter never arose at the Court of Appeal because it was never raised by the appellants. She added that in any case there was overwhelming evidence that a rape took place as testified to by PW1 and PW2 and that the first appellant pointed a gun at PW2 as the latter was being raped.

On ground three the learned Principal State Attorney submitted that the failure by the prosecution to tender the recovered items did not weaken the overwhelming uncontroverted and plausible direct evidence of the victims regarding the participation of the appellant. She said that in any case the Court of Appeal had considered the failure to adduce evidence of the recovered items a minor lapse especially when the victims had described the items including those that were not recoverable.

In respect of the 2nd 3rd and 4th appellants the learned Principal State Attorney submitted that the Court of Appeal never relied on

the recovery of any property from their homes because all the items recovered were from the home of the first appellant. She said that as such the conviction against them was based on direct evidence of identification and not circumstantial evidence. She submitted that it was not correct to fault the two courts as having considered the case in an omnibus way because the case was considered as a whole.

On sentence Counsel conceded that although the trial Court had considered the 8 months the appellants spent on remand failure to make a deduction as held in the case of **Rwabugande Moses Vs. Uganda (SCCA No. 25 of 2014)** made the sentences illegal. She agreed that the 8 months be deducted from the respective sentences.

Court's analysis

Of the five grounds of appeal raised by the 1st appellant only grounds three and five emanate from the grounds raised in the Court of Appeal.

On the other hand, as far as the second, third and fourth appellants are concerned only ground two emanates from the grounds raised at the Court of Appeal. In the recent case of **Nalongo Naziwa Josephine Vs Uganda SCCA No 35 of 2014** this Court emphasises that the grounds being framed in the memorandum of Appeal should emanate from the decision and proceedings of the lower Courts. It stated thus:-

> **"Before we proceed to consider the grounds of appeal on merit, we note that the issues raised in the grounds of appeal before this Court do not emanate from any of the**

proceedings in the lower Courts. They raise entirely new and fresh grounds. The law is that the grounds being framed on a Memorandum of Appeal should emanate from the decision and proceedings of the lower Court. This point was underscored in Ms Fang Min V. Belex Tours and Travel Limited SCCA, No. 6 of 2013 where the Supreme Court held thus:-

'... on appeal, matters that were not raised and decided on in the trial Court cannot be brought up as fresh matters. The Court would be wrong to base its decision on such matters that were not raised as issues and determined by the trial Court'

More particularly so, in a second appeal such as the instant one, an appellant is not at liberty to raise matters that were not raised and considered by the trial Court and the first appellate Court. Accordingly this appeal is incompetent and should be dismissed."

As regards their conviction the appellants raised only one ground relating to the manner in which the evidence of the exhibits allegedly recovered from them was bungled by the Police. In the process of resolving the issue of the exhibits the Court of Appeal re-evaluated the evidence in relation to the identification of the appellants at the scene of crime and the defence of alibi raised by the appellants.

In this regard ground two of the 1st appellant's memorandum of appeal and ground one of memorandum of appeal filed by the 2nd 3rd and 4th appellants stand dismissed because none of them

emanates from the grounds of appeal raised at the Court of Appeal. Those grounds are therefore, incompetent before this Court. We shall however clarify on the position of the law regarding proof of a sexual offence because of the misconception that a sexual offence cannot be proved without medical evidence.

On the remaining grounds of appeal, we have perused the judgments on record in both the High Court and Court of Appeal. Those grounds considered the submissions of Counsel together with their authorities. We are also mindful of our jurisdiction as a second appellate Court, a point that has been consideration in numerous decisions of this Court.

In the case of **Ongom John Bosco vs Uganda SCCA No. 21 of 2007** is was stated thus:-

"A second appellate Court is precluded from questioning the concurring findings of facts by the trial and first appellate Courts, provided that there was evidence to support those findings though it may think it possible or even probable that it would not have come to the same conclusion.

A second appellate Court can only interfere with such findings where there was no evidence to support the finding because this is a question of law.

Inference legitimately drawn from proved facts by the trial and first appellate Court must establish the guilt beyond reasonable doubt.

The above principles were echoed by the former Court of Appeal for East Africa in Okeno vs Republic [1972] E.A. 32 where it said:-

"It is appropriate on second appeal only to decide whether a judgment can be supported on the facts as found by the trial Court and first appellate Court as this is purely a question of law."

Having stated the legal position regarding the role of the second appellate Court, the sticking question to consider now is whether there was evidence in the instant case to support the concurrent findings of facts of the trial and first appellate Courts.

In the judgment of the trial Court the Judge meticulously evaluated all the evidence adduced before him before coming to the conclusion that all the appellants participated in the commission of the offences.

The Court of Appeal after a re-evaluation of the entire case came to the following conclusion:-

"We have ourselves re-evaluated the evidence that was before him and we are unable to say that the learned judge erred. The appellant broke into the house of the appellants (sic) using touches. Eventually they switched on electric lights. The spent a total of 3 hours in presence of the appellants in their house part of which was in bright electric light. They raped and plundered with impunity. They did not even care whether the victims recognised or not and they said so. They were in close proximity with the appellants (sic)."

On our part we see no reason for interfering with the concurrent finding of the Court as regards the identification of the appellants at the home of the victims. Before arriving at the conclusion that the appellants were properly identified their defences of alibi were weighed against the evidence adduced by the prosecution and properly rejected. The two Courts also considered the failure by the prosecution to produce recovered exhibits and we need not belabour the point that with or without the alleged exhibits the offence of Robbery was established. There was little value to be attached to the items allegedly recovered if the prosecution did not find it necessary to tender them as exhibits. For instance a television set of a make different from that robbed from the victims was recovered. It could not therefore serve as an exhibit in the case.

Counsel for the appellant also raised an issue relating to the failure of the Police to conduct an identification parade in respect of the suspects. It should be noted that all the suspects were arrested in the presence of the complainant and so an identification parade would not serve any purpose.

The appellant raised an issue about the failure by the prosecution to adduce medical evidence for the argument that the offence of rape was not proved. Although this is one of those issues raised in this Court, which were not raised in the Court of Appeal we wish to clarify the position of the law with regard to medical evidence because of the misconception that without medical evidence a sexual offence cannot be proved.

In the case of **Bassita Hussain Vs Uganda SCCA 35 of 1995** the Supreme Court of Uganda found as follows:-

"the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually sexual intercourse is proved by the victim's own evidence and corroborated by medical or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case. Such evidence must be such that it is sufficient to prove the case beyond reasonable doubt."

In the case of **Mujuni Apollo Vs Uganda, Court of Appeal Criminal Appeal No. 26/99** the Court of appeal made the following observation.

> **"it is clear to us that by basing this appeal on the absence of medical evidence, Mr. Bwengye is according medical evidence undue weight, overlooking the fact that it is merely advisory and goes to fact and not law. The Court has discretion to reject it – Rivell (1950) cr. App R 87; Matheson 42 Cr. App. R. 145. The Court can even convict without medical evidence as long as there is strong direct evidence or when the circumstances of the case are so cogent and compelling as to leave no ground for reasonable doubt, see Rv Omufrejczyk (1955) 1 QB 388; 39 Cr. App. R when the conviction though the body was never found."**

We cite the above case with approval. So from the two cases the position of the Law is that a sexual act can be proved without medical evidence. The type of evidence required to prove a sexual act should be cogent and compelling as described in **Mujuni Appollo vs. Uganda** (Supra). The finding of the trial Court which was not appealed against by the appellants was that given the demeanour of the victim who narrated the events of the night in an honest and composed manner and given that it was supported by her husband's testimony the prosecution had proved sexual intercourse beyond reasonable doubt. The evidence relied on by the trial Judge is the cogent and compelling type of evidence that would support a charge of rape with or without medical evidence.

In the circumstances and having addressed ourselves to the role of this Court which has been defined in a host of cases, we find that this is not one of those cases that would warrant interference with the concurrent findings of the two Courts. Each of the two Courts did everything required to be done before coming to the respective findings. The evidence that was evaluated by the trial Court and re-evaluated by the Court of Appeal was overwhelmingly in support of the findings and we find no basis for interfering with the conviction of the appellants. As a consequence the appeals against their respective convictions are dismissed.

As to the appeals against sentence the Court of Appeal referred to the authority of **Kyalimpa Edward Vs Uganda, SCCA No 10 of 1995** where the Supreme Court of Uganda held that:-

"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own fact

upon which a judge exercises his discretion. It is the practice that as an appellate Court, this Court will not normally interfere with discretion of the sentencing judge unless the sentence is illegal or unless Court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice."

The discretion of the sentencing judge was influenced by his consideration of both the mitigating and aggravating factors and the Court of Appeal considered the same factors. The Court of Appeal went even further and re-examined the antecedents of all the appellants and circumstances under which the offences were committed including the rape of PW2 in the presence of her husband before declining to interfere with the sentences imposed by the sentencing Court. We, too, do not consider the sentences to be manifestly excessive. Therefore we decline to interfere with the finding of the sentencing Court and the Court of Appeal confirming the sentences.

As to the illegality of the sentences the contention of both Counsel for the appellants was that the Court below did not follow the decision of this Court in the case of **Rwabugande Moses Vs Uganda SCCA 25/2014** where it was held that:-

"taking into account the period spent on remand by the Court is necessarily arithmetical. This is because the period is known with certainly and precision, consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence."

The judgment in **Rwabugande** was passed on the 3rd day of March 2017. The judgment acknowledges that before then this Court had in a number of cases which are cited in the judgment enunciated the principle to the effect that the words "**to take into account**" did not require the trial Court to apply a mathematical formula by deducting the exact number of years spent by an accused on remand from the sentence to be awarded by the trial Court. These authorities were **Kizito Senkula Vs Uganda SCCA No 24 of 2001, Kabuye Severeno Vs Uganda SCCA No. 2 of 2002, Katende Ahamed Vs Uganda SCCA No. 6 of 2004 and Bukenya Joseph Vs Uganda SCCA No. 17 of 2010**.

In spite of the clear direction by the Supreme Court some trial judges like the one who presided in the case of **Rwabugande** did not indicate that the period spent in lawful custody had been taken into account. Fortunately in others among which is the .instant case the Judge indicated that the period was taken into account. So quite clearly the sentence imposed by the trial Court in the case of **Rwabugande** was illegal while the one in this case where the trial Judge stated that the appellants had spent eight months on remand which was taken into consideration the sentence is not illegal. We are conscious of the fact that the judgment in this case by the Court of Appeal was passed on 13th April 2016 before the advent of the authority in **Rwabugande**. The applicable principle before **Rwabugande** was the one enunciated in the authorities cited earlier on. It was held then that provided at the time of sentencing Court indicated that it took into account the period spent on remand no illegality resulted. There was no need then for arithmetical precision. Obviously after **Rwabugande** the

position is more precise. The appeal against sentence is also dismissed.

In conclusion the appeal against both the conviction and sentence are dismissed because we find no merit in any of the grounds raised.

Dated this 11th day of January 2019

Kisaakye
Justice of the Supreme Court

Mwangusya
Justice of the Supreme Court

Buteera
Justice of the Supreme Court

Mugamba
Justice of the Supreme Court

Nshimye
Ag. Justice of the Supreme Court