THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. MR. JUSTICE C.M. KATO, JA.
HON. MR. JUSTICE J.P. BERKO, JA.
HON. LADY JUSTICE C.N.B. KITUMBA, JA.

CRIMINAL APPEAL NO. 91 OF 1999.

NDAULA JOHN ……APPELLANT

VERSUS

UGANDA …….RESPONDENT

(Appeal from the decision of the High Court (Akiiki Kiiza J.) dated 29/6/1999 in Criminal Session Case No. 130/1997 at Masaka)

JUDGMENT OF THE COURT:

The appellant, Ndaula John, was convicted by the High Court of rape, contrary to Sections 117 and 118 of the Penal Code Act and sentenced to 12 years imprisonment. He now appeals against the conviction and sentence.

The prosecution evidence as accepted by the learned trial judge was that the complainant, Nakafeero Magadalena, PWI, was a widow aged about 60 years and lived at Kyabiri village, in Masaka District. The appellant was her neighbour and both of them lived in the same compound. On the 28th day of September 1995 at around 8.00p.m., the complainant was in her house and was about to take her supper. There was fire burning in the fire place inside the house. The appellant entered the complainant's house and asked for fire to light his cigarette and she obliged. The appellant lit his cigarette three times and extinguished it. The complainant was surprised by his behaviour and asked the appellant what he meant by his conduct. The appellant stood up as if he was going away, closed the door and requested the complainant to have sex with him. She refused but the appellant insisted that it was their day to have sex. She rose up and started making an alarm but the appellant got hold of her two arms and they began to struggle.

The appellant overpowered her, threw her down on the floor and forcibly had sexual intercourse with her.

Ssenyonga Godfrey, PW2, answered the alarm. He found the door closed and heard the complainant saying that the appellant was raping her. PW2 feared to go inside the house because he knew that the appellant used to carry a panga with him. Nakabanjo Gorretti, PW3, also answered the alarm. The appellant got off the complainant and hid in a corner inside the house. The complainant went outside the house and informed the people who had answered her alarm that the appellant had raped her. Later the appellant got out of the complainant's house and went to his house. PW2 took the complainant to his home and the matter was reported to the Local Defence Unit. On the following day the complainant was medically examined by Dr. Ssekitoleko Jimmy, PW3. According to PW3's evidence the complainant was about 55 years old and her hymen was already ruptured. There were no injuries in her private parts. He found some soft tissue on multiple body parts, especially on the abdomen. He classified those injuries as harm. In his opinion those injuries might have originated from the struggle with the appellant. From the injuries he concluded that the complainant had either been raped or there was an attempt to rape her as she complained of having been raped.

The appellant was arrested by the Local Defence Unit Personnel and taken to Masaka Police Station, and charged with rape. His defence was a total denial. He stated that he had been framed up by Nakabango a sister of the complainant with whom he was on bad terms. The learned trial judge accepted the prosecution case, rejected the defence and convicted the appellant.

There are four grounds of appeal namely:

"1. The learned trial judge erred in fact and law when he failed to properly evaluate the evidence on record and therefore came to a wrong conclusion.
2. The learned trial judge erred in fact and law when he convicted the accused of the offence of rape on the uncorroborated evidence of the complainant without first warning himself of its dangers.
3. The learned trial judge erred in fact and law when he convicted the appellant of the offence of rape basing on insufficient evidence.

4. The learned trial judge erred in fact and law when he sentenced the appellant to 12 years imprisonment which was harsh and excessive in the circumstances."

Mr. Maxim Mutabingwa, learned counsel for the appellant, argued grounds 1 and 3 jointly and the rest separately.

Mr. Mutabingwa's complaint in grounds 1 and 3 is that the learned trial judge did not properly evaluate the evidence and came to a wrong conclusion that the offence of rape had been committed. He submitted that the evidence of the complainant was not sufficient to prove that sexual intercourse had taken place. She testified that the appellant put his penis in her private parts. According to counsel private parts do not necessarily mean the vagina. Counsel further contended that the evidence of PW4 does not support the complainant's testimony. PW4 carried out the medical examination only a day after the incident but did not find any injuries in the complainant's private parts. Counsel submitted that as it had not been proved that sexual intercourse took place, the appellant should have been convicted of a lesser offence.

Mr. Micheal Wamasebu, learned Principal State Attorney, supported the learned trial judge's finding that sexual intercourse had taken place. Mr. Wamasebu submitted that the complainant was a mature woman and a widow approximately 60 years of age and therefore knew what she was talking about. The learned trial judge found her truthful and believed her evidence.

In his judgment, the learned trial judge relied on the evidence of the complainant and found that the prosecution had proved that sexual intercourse had taken place. She was an old lady who was a widow and had had sexual intercourse previously. In that case her hymen could not have been intact. The complainant told those who answered the alarm and the doctor who examined her that she had been raped. The learned trial judge found that injuries on multiple body parts of the complainant especially on the abdomen were caused during the struggle with the appellant as she did not consent to have sexual intercourse with her. The complainant impressed the trial judge as a truthful witness.

We agree with the trial judge's finding. It was a question of fact whether the complainant had been raped or not. The judge who saw the complainant give her testimony in court was entitled to believe her. The judge found that the complainant had been consistent throughout as she toldto

to believe her. The judge found that the complainant had been consistent through-out as she told PW2, PW3 and PW4 that she had been raped by the appellant. We do not however agree that the report to PW2, PW3, and PW4 by the complainant amounted to a corroboration of her testimony. Grounds I and 3 fail.

Regarding the second ground, learned counsel for the appellant submitted that the learned judge erred En law to convict the appellant of rape on the uncorroborated evidence of the complainant without warning himself of the danger of convicting on such evidence. According to counsel failure by the judge to warn himself was fatal. In reply, learned Principal State Attorney conceded that the trial judge in his judgment did not warn himself of the danger of convicting on uncorroborated evidence. He submitted however, that the failure was not fatal to the conviction as the judge in his summing up to the gentlemen assessors had warned them of dangers of convicting on uncorroborated evidence. Mr. Wamasebu further submitted that there was some corroboration of the complainant's evidence.

The trial judge found that the fact of rape had been corroborated. We agree with that finding. The injuries found on her body indicated that force had been used and that negatived consent. The appellant was very well known to the complainant and it was not disputed in the lower court and on appeal that the appellant was seen getting out of the complainant's house at that time the complainant alleged that he had raped her. We appreciate that the learned trial judge did not warn himself of the danger of convicting on uncorroborated evidence. He however warned the gentlemen assessors about the point which indicates that he was alive to that legal requirement. Ground 2 must fail.

On ground 4 Counsel for the appellant submitted that the sentence of twelve years imprisonment was manifestly excessive. In his submission he contended that if the appellant had been given a lesser sentence he was more likely to reform and be a useful member of society as he was a young managed only 48 years. He did not quote any legal authorities in support of his submission. Mr. Wamasebu submitted to the contrary that the sentence was not excessive in the circumstances.

This court will only interfere with the sentence passed if it is either illegal or is manifestly excessive as to amount to a miscarriage of justice. See Section 137 of the Trial on Indictments Decree No. 26 of 1971. The maximum penalty for the offence of rape is death. Before passing sentence the trial judge took into account all mitigating factors which he was obliged to consider. The sentence of twelve years imprisonment is in our view neither illegal nor excessive. We do not agree that a 48 years old man is a young man in an African society where life expectancy is less than 50 years. Ground 4 therefore must fail.

Before we take leave of this appeal we feel we should comment on the following matters; Firstly, the record of proceedings' show that the gentlemen assessors were not sworn at the commencement of the trial as is required by Section 65 of The Trial On Indictments Decree. In our view this was an irregularity which did not occasion a miscarriage of justice and did not therefore invalidate the proceedings. This court held so in ***Mukiibi Emmanuel v Uganda*** Court of Appeal Criminal Appeal No. 43 of 1996 that assessors are public officers for the purposes of judicial proceedings. According to section 6 of the Oaths Act (Cap. 52) when an act is done by a public officer without taking the oath it is not invalid.

Secondly, with regard to the sentence the learned trial judge only said that he deemed a sentence of 12 years imprisonment to be sufficient and proper; but did not pass the sentence. This was irregular. This court has powers according to section 12 of The Judicature Statute 1996 and Rule 31(1) of the Court of Appeal Rules, 1996 to pass sentence which the trial Court ought to have passed. In view of what we have stated above the appellant ought to have been sentenced to 12 years imprisonment. He is accordingly sentenced to 12 years imprisonment.

As we find no merit in this appeal it is accordingly dismissed.

Dated at Kampala this 22nd of May 2000.

C.M. Kato
Justice of Appeal.

J.P. Berko

Justice of Appeal.

C.N.B. Kitumba

Justice of Appeal.