THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

SITTING AT GULU.

Coram **Hon Justice L.E. Mukasa-Kikonyogo, DCJ**
Hon Justice A. Twinomujuni, JA
Hon Justice A.S. Nshimye, JA

CRIMINAL APPEAL N0. 284/2003

N0. 10359 SGT CANBERA DICKSON :::::::::::::::::::: APPELLANT

VS

UGANDA :: RESPONDENT

JUDGMENT OF THE COURT

The appellant was indicated and convicted of rape c/s 117 and 118 of the Penal Code in the High Court of Gulu and sentenced to 15 years imprisonment. He appealed to this Court against both the conviction and sentence.

The following are the brief facts of the case as accepted by the trial court.

The appellant is an army sergeant attached to Angoko army guard Unit. On 2nd Feb 1999 armed with a gun, he came to Kinombe here in Gulu municipality and murdered one Olanya Romano his maternal uncle. He went back to Ongako which was also his village. He terrorised people who were living with his mother including the victim Akot Rose. She was a young widow of his late brother who had a young child. He forcefully led her on gun point, allegedly that he was going to show her where he was going to hide after killing his uncle so that she would supply her with food in his hiding place. Instead, he diverted her to an abandoned house and asked her to choose between death and giving in for him to have sexual intercourse with her. She choose

not to die and laid down. The appellant placed the gun near her head and raped her. Following a report she made, the appellant was arrested and the victim was medically examined after 3 days. Being formally a married woman who had recently produced, no noticeable injuries were seen by the doctor who examined her.

In his defence the appellant stated that while he went to inform his mother that he had accidentally shot Olanya, he did not go away with the victim whom he left standing near the hedge of the compound. The trial judge rejected his defence and found him guilty as charged and sentenced him to 15years, hence this appeal. There are three grounds of appeal namely:

(1) ***That the learned trial judge erred both in law and facts in convicting the appellant of the offence of rape without proof of penetration or any sexual act and thereby occasioning a miscarriage of justice.***

(2) ***That the learned trial judge erred in law and facts in failing to resolve contradictions in this case in favour of the appellant.***

(3) ***That the learned trial judge erred in law and facts in passing an excessive sentence against the appellant in all circumstances thereby occasioning a miscarriage of justice.***

Learned counsel Mr. Donge Sylvester who appeared for the appellant preferred to argue the 1st and 2nd grounds together and the 3rd one separately.

His main complaint was that, penetration, an essential ingredient in rape, was not proved by the prosecution. He submitted that for the learned trial judge to have relied on the medical report and the only word of the complainant was a serious error and it occasioned miscarriage of justice. He urgued that once one discounts the medical evidence which stated that the hymen was not recently ruptured and there were no injuries seen on her private parts, then her evidence needs corroboration. Instead of reporting immediately to her mother in law, she reported to other people the following day which was an after thought, counsel argued. He prayed that grounds 1 and 2 do succeed.

On ground 3 on sentence, he complained, that the appellant who was 30 years should have been given an opportunity to reform. In his view a sentence of 15 years was excessive and therefore called for our interference. He suggested that a sentence of 10years would have been appropriate in the circumstances.

In reply learned Counsel Damali Lwanga an Assistant Director of Public Prosecutions who appeared for the respondent, opposed both the appeal against the conviction and sentence. She too argued the grounds in the order they were argued by counsel for the appellant.

She conceded that there was not much to be found in the medical report. First of all, the victim was a young widow who had a baby recently. It would be abnormal for the doctor to find that her hymen was ruptured by the appellant. Secondly for such a married woman, it would be difficult to find noticeable injuries, because she was examined after 3 days and under fear of death by a gun, she would not be expected to have struggled. To her, what was important was that the trial judge found her to be truthful. Her evidence was believed. Therefore the prosecution proved penetration.

On failure to immediately report, which would provide corroboration to her testimony, counsel explained that the victim reported to her mother in-law who is also the mother of the appellant, but because of her love for her only surviving son (the appellant), she denied that the victim had reported to her. She referred us to the Supreme Court authorities in the cases of **Basoga Patrick Vs Uganda Cr. Appeal N0. 42/2002** and **Sam Buteera Vs Uganda Criminal Appeal N0. 21/1994** in which a Kenyan case of Mukunga was followed. It was held there that corroboration is not necessary and was unconstitutional.

On sentence she submitted that the case of **Kiwalabye Cr. Appeal N0. 143/2001** of this Court set Court circumstances under which an appellate court can interfere with sentence if suitable circumstances existed. She infact requested us to take it upon our motion to enhance the sentence. She submitted that, the appellant was entrusted with a gun to protect the people of Uganda and their property. Instead, he turned that gun against his own people, by killing his uncle and thereafter went and harassed those in

the homestead of his mother including raping the victim at gun point. He thought he could do all those acts with impunity. She prayed that we increase the sentence to 25 years. She referred us to a recent case of a catechist who defiled a young girl. **Mugasa Joseph Vs Uganda CA Cr. Appeal N0. 241/2003.**

We have heard the submissions of both counsel and appraised the evidence as we are required as a first appellate court.

We are also satisfied like the trial judge did that the complainant was telling the truth and that the appellant on gun point raped her.

We are equally satisfied with the evidence on record that the victim reported to her mother in law immediately after she was raped but her mother in law with held this information by telling lies to save her only son.

We can not fault the trial judge when he found corroboration of the victim's testimony and that penetration was proved. Grounds 1 and 2 would therefore fail.

On sentence our Constitution states that the power belongs to the people of Uganda. The representatives of the people who enact laws for this country (Members of Parliament) in the name of the people of Uganda provided a maximum sentence for rape to be death. Like the learned Assistant DPP submitted, the appellant was entrusted with the gun which was bought by the people of Uganda to guard them. Instead he abused with impunity the trust put in him. If the death penalty was intended to terminate a dangerous person from society, then where the court is reluctant to impose it to a young offender like the appellant, it must however impose such an appropriate custodial sentence so as to ensure that the society will be in peace for a reasonably long period of time. We are persuaded by the prayer of the Assistant DPP that on our own motion and section 11 of the judicature Act and section 132 of the Trial on Indictment Act, we should enhance the sentence. In the circumstances of this case, a sentence of 15 years was very much on the lower side.

We find no merit in the reply counsel for the appellant gave. He infact did not dissuade us from doing so.

In the result the appeal against both conviction and sentence is dismissed. We enhance the sentence from 15 years to 25 years.

Dated at **Gulu this 6th of June 2010.**

L.E.M MUKASA KIKONYOGO
DEPUTY CHIEF JUSTICE

AMOS TWINOMUJUNI
JUSTICE OF APPEAL

A.S. NSHIMYE
JUSTICE OF APPEAL