

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CRIMINAL APPEAL NO.20 OF 2006**  
**MUBOGI TWAIRU SIRAJI..... APPELLANT**  
**VERSUS**  
**UGANDA.....**  
**RESPONDENT**

*(Appeal from a conviction and sentence of the High Court of Uganda  
Holden at Mbale Before His Lordship JBA Katutsi given on the 26<sup>th</sup> day  
of June 2006 in Criminal Case No. MBA 00CR AA 95 of 2005)*

**CORAM: HON. MR. JUSTICE S.B.K. KAVUMA, Ag. DCJ**  
**HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA**  
**HON. MR. JUSTICE KENNETH KAKURU, JA**

**JUDGMENT OF THE COURT**

This appeal arises out of the Judgment of the High Court of Uganda at Mbale, of *J.B A Katutsi J*, dated 6<sup>th</sup> June 2006 in which the appellant was convicted of the offence of rape and sentenced to 18 years imprisonment.

Initially the appeal was against both conviction and sentence. However, when the appeal came up for hearing, learned counsel Ms. Jane Nakakande who appeared for the appellant on state brief sought and was granted leave to abandon the appeal against conviction.

This appeal therefore is against sentence only.

The sole ground of appeal reads as follows

***“The learned trial Judge erred in law and in fact when he passed a sentence that was very harsh and excessive punishment of 18 years imprisonment.”***

At the hearing of the appeal the appellant was present and Ms. Jennifer Amumpaire, Senior State Attorney, represented the respondent.

Learned counsel for the appellant submitted that while sentencing the appellant, the learned trial Judge stated that the victim would have to live under shame for the rest of her life yet there was no proof of this fact.

She also submitted that there was no proof that the victim of rape had been traumatized and as such a sentence of 18 years was not justified.

Counsel submitted further that the learned trial judge had not considered the fact that the appellant was a first offender which would have mitigated the sentence.

It was further submitted for the appellant that the learned trial judge, while sentencing the appellant, did not take into account the period he had spent on remand as stipulated under **Article 23 (8)** of the Constitution.

She asked court to allow the appeal.

Counsel for the respondent opposed the appeal and supported the sentence. She submitted that under Section 124 of the Penal Code Act the maximum sentence for the offence of rape is death. That in this case the appellant was sentenced to 18 years imprisonment.

She submitted that the trial Judge had observed that the victim had been exposed to unprotected sex and that she had been found crying and clearly traumatized. That the learned trial judge had taken into account all the aggravating and mitigating factors before passing the sentence. She submitted further that the sentence was neither harsh nor manifestly excessive. She called upon the Court to uphold it.

We have listened carefully to the submissions of both counsel and perused the court record.

Counsel for the appellant has raised the issue of noncompliance with **Article 23(8)** of the Constitution.

We shall resolve that issue first, since it relates to the legality of the sentence. We cannot determine the severity of the sentence before determining its legality.

Although the issue of non compliance with **Article 23 (8)** of the Constitution was not specifically set out in the memorandum of appeal, we are inclined to entertain it by invoking **Article 126 (2)**

**(e)** of the Constitution, as it is a question of law that relates to the legality of the sentence and to the bill of rights. An illegality once brought to the attention of court overrides everything else including pleadings. See:- ***Makula International Ltd versus Emmanuel Cardinal Nsubuga and another [1982] HCB 11.***

Learned counsel for the respondent contended that the learned trial judge failed to take into account the provisions of **Article 23 (8)** of the Constitution while sentencing the appellant.

This fact was conceded by the respondent's counsel.

**Article 23 (8)** of the Constitution states as follows;-

**23(8)**

***“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.”***

While passing sentence the learned trial Judge observed as follows;-

***“SENTENCE AND REASONS FOR THE SAME:-  
Accused now a convict violated the honour of an innocent woman. A woman's body is her treasure and anyone who violates it robs her of her pride and honour. In this case the convict exposed her to unprotected sex and no one***

***knows for sure how she will be in the future. She was traumatized and she might leave under shame till death. All this calls for a sentence that commensurates what a gravity of the offence (Sic). I deem a sentence of 18 years to be on the side of leniency."***

Cleary, the learned judge did not specifically mention or even allude to the period the appellant had spent on remand when passing sentence. The appellant had spent one year and one month on remand a fact that had been brought to the attention of the learned judge by the prosecution.

We find that the sentence was imposed without regard to the provisions **Article 23 (8)** of the Constitution and as such it is illegal and a nullity. See ***Kizito Senkula vs Uganda Supreme Court Criminal Appeal No. 24 of 2001*** (unreported).

We accordingly set aside that sentence.

Having set aside the sentence, we now proceed to impose a sentence we consider appropriate taking into account all the facts and circumstances of this case. In doing so we invoke **Section 11** of the Judicature Act (Cap 13) which states that:-

***11. "For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of***

***the original jurisdiction of which the appeal originally emanated.”***

In this case the appellant was convicted of rape, a serious offence that carries a maximum sentence of death.

At the time of the commission of the offence, the appellant was 27 years old. He is a young man capable of reform, he had been on remand for a period of one year and one month prior to his conviction. He had no previous criminal record.

Rape is a serious offence that has serious consequences on the victim and society in general. A deterrent sentence would send a strong signal to any would be offender.

Taking into account all the above especially the period the appellant had spent on remand before conviction, we sentence him to 17 years imprisonment from the date of conviction.

We so order.

**Dated** at Kampala this **3<sup>rd</sup>** day of **December** 2014.

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**HON. MR. JUSTICE S.B.K. KAVUMA, Ag. DCJ**  
**JUSTICE APPEAL**

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**HON. LADY JUSTICE SOLOMY BALUNGI BOSSA**  
**JUSTICE APPEAL**

.....  
**HON. MR. JUSTICE KENNETH KAKURU**  
**JUSTICE APPEAL**