THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: ODOKI C.J; KATUREEBE, KITUMBA, TUMWESIGYE AND KISAAKYE JJ.SC)

CRIMINAL APPEAL NO. 10 OF 2010

BETWEEN

MUGASA JOSEPH:: APPELLEANT

AND

UGANDA:: RESPONDENT

[Appeal from Decision of the Court of Appeal sitting at Kampala (Twinomujuni, Twinomujuni, Kavuma and Nshimye JJ.A.) dated 15th April 2009 in Criminal Appeal No.170 of 2010 in Criminal Appeal No. 241 of 2003]

REASONS FOR THE JUDGMENT OF THE COURT

Introduction

This is a second appeal from the decision of the Court of Appeal enhancing the sentence imposed by the High Court against the appellant from 17 years to 25 years imprisonment.

We heard the appeal against sentence and we allowed it. We set aside the sentence of 25 (twenty five) years and substituted it with a sentence of 17 (seventeen) years which had been imposed by the High Court. We reserved the reasons for our decision which we now give.

The Background

The background to the appeal is that the appellant was indicted in the High Court with the offence of defilement contrary to Sections 123(1) of the Penal Code Act. The appellant had found the complainant at home playing with her brothers and sisters and carried her to his house where he defiled her. The complainant's mother heard her crying from the house of the appellant who opened the door and let her out.

The mother examined her and found that there were watery fluids in her vagina. The appellant was arrested and taken to the Police Post. Medical evidence established that the victim who was between 5 and 6 years old had been defiled as her hymen was ruptured and vagina inflamed. He did not find any sexually transmitted diseases. The appellant denied the offence and pleaded a grudge between him and the victim's mother. The High Court accepted the prosecution case and convicted the appellant as charged.

On appeal to the Court of Appeal, the appellant did not contest the conviction, but appealed against the sentence on the ground, that

> ***"The sentence of seventeen (17) years imprisonment passed by the trial judge on the appellant was harsh and excessive in the circumstances of the case considering mitigating factors."***

During the hearing of the appeal, the Court of Appeal informed the counsel for both parties that it intended to enhance the sentence imposed against the appellant by the High Court. The Court heard arguments from both counsel and held that the sentence imposed by the trial court was too lenient and enhanced it to 25 years imprisonment.

The appellant appealed to this Court against the sentence on one ground framed as follows:

"The learned Justices of Appeal erred in law in enhancing the appellant's sentence of imprisonment to 25 years without considering his mitigating factors and in the absence of a cross-appeal."

The appellant prayed that this Court allows the appeal and passes an appropriate sentence.

Arguments of Counsel

Mr. Henry Kunya, learned counsel for the appellant, submitted that the learned Justices of Appeal did not consider mitigating factors advanced on behalf of the appellant, but considered only aggravating circumstances against the appellant. Secondly, learned counsel argued that the learned Justices of the Court of Appeal enhanced the sentence imposed against the appellant without a cross-appeal by the State.

Ms. Caroline Nabasa, Principal State Attorney, for the Respondent, supported the decision of the Court of Appeal. It was her submission that Section 11 of the Judicature Act gave the Court of Appeal power to enhance the sentence. She contended that there is no procedure for instituting cross-appeals.

Consideration of the Arguments and the Law

This being a second appeal, the appellant has, under Section 5(3) of the Judicature Act, a right of appeal to this Court against the sentence, on a matter of law, not including the severity of the sentence.

The appellant complains that the Court of Appeal did not consider both the mitigating factors in his favour but only considered aggravating factors. This is not entirely correct as the Court of Appeal recounted the submissions of counsel

for the appellant regarding the fact that he was a first offender and had been on remand for eight years and had prayed for a lenient sentence of ten years imprisonment.

It is true that the Court of Appeal observed that it was dismayed by the leniency of the sentence imposed by the High Court, considering the aggravating factors of the young age of the victim, and the fact that the appellant was related to the victim who should have protected her. We do not, therefore, find that the appellant's complaint in this aspect of the appeal is justified. It borders on appeal against the severity of sentence, not its legality.

The second complaint relates to the procedure the Court of Appeal adopted in enhancing the sentence imposed against the appellant.

In its judgment, the Court of Appeal stated,

> ***"We find that the sentence of 17 years was on the lenient side where the appellant was a church official and a relative of the child who should have protected her. Though the State did not appeal, the Court has powers to enhance the sentence as already stated. We accordingly, set aside the sentence of 17 years and substitute it with a sentence of 25 years imprisonment. We must inform the appellant that he has a right to appeal against this sentence to the Supreme Court."***

The Court of Appeal gave reasons for this decision which it stated as follows:

> ***"We think that it is high time Courts rose up with Parliament and society as a whole to deal with this continuing menace. We feel that it is now time that the Courts passed sentences that will send a message to society that enough is enough and violating rights of child/ females must stop."***

This Court associates itself with the views expressed by the Court of Appeal. However, proper sentencing procedure must be followed when varying sentences imposed by lower Courts.

The Court of Appeal relied on Section 11 of the Judicature Act and Section 132 of the Trial on Indictment Act when enhancing the sentence. Section 11 of the Judicature Act provides as follows:

> ***"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 originality emanated."***

This provision allows the Court of Appeal to impose any sentence which the lower Court could have imposed.

The second provision the Court of Appeal relied on is Section 132(1) of the Trial on Indictments Act. The Section states in part as follows:

> ***"(1) Subject to this Section –***
>
> ***(a) an accused person may appeal to the Court of Appeal from a conviction and sentence by the High Court in the exercise of its original jurisdiction as of right, on a matter of law, fact; or mixed law and fact; and the Court of Appeal may-***
>
> ***(d) confirm, vary or reserve the conviction and sentence;***
>
> ***(e) in case of an appeal against the sentence alone, confirm or vary the sentence."***

It should be noted that Section 34 of the Criminal Procedure Act also provides to the same effect as Section 132(1) of the Trial on Indictments Act, in that it

empowers an appellate Court with powers to ***"reduce or increase the sentence by imposing any sentence provided by law for the offence."***

It is therefore, clear that the Court of Appeal or any other appellate Court has power to vary a sentence imposed by the lower Court by reducing or increasing it. The substantial question in this appeal is whether the Court of Appeal followed the correct procedure before enhancing the sentence against the appellant.

It will be recalled that the State did not appeal against the sentence nor did it request for its enhancement. The Court of Appeal on its own volition indicated to the parties at the time of hearing the appeal that it intended to enhance the sentence which it considered too lenient. The Court then invited parties to address it on the proposed enhancement of sentence.

The issue is whether the Court of Appeal adopted the proper procedure. A similar issue was considered by the Kenyan Court of Appeal in the case of **JJW V. Republic**, Criminal Appeal No. 11 of 2011 [2013] i.e. KLR.

The appellant was convicted of manslaughter and sentenced to seven years imprisonment by the Chief Magistrate, in Kisumu. The appellant appealed to the High Court against both conviction and sentence. The appeal against conviction was dismissed but the sentence was enhanced to 10 years on the ground that it was too lenient. The appellant appealed to the Court of Appeal against sentence only.

The appeal was opposed by the State which neither filed a cross-appeal nor sought enhancement of the sentence during the hearing of the appeal. The Court did not warn the appellant that the sentence of seven years would be enhanced, but it did so in its judgment. The State did not support the enhancement, considering the procedure as unlawful.

In its judgment, the Court of Appeal observed,

> ***"We too think that the circumstances of the case called for more severe sentence than what was awarded. However, what we do not appreciate is the manner in which the learned judge enhanced the sentence. It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 554(g)(ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The Court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times, this information is conveyed by the prosecution filing a cross-appeal in which it seeks enhancement of the sentence and that cross-appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the Court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence, only by warning him that he risks enhanced sentence at the end of hearing of his appeal."***

In that appeal, the Court of Appeal held that the sentence imposed by the High Court was unlawful because the prosecution had not urged for enhancement of sentence, nor appealed against the sentence passed by the High Court, nor did the Court grant an adjournment to enable the appellant to prepare adequately for his defence.

Decision

In conclusion, we find that the Court of Appeal erred in enhancing the sentence against the appellant without following the proper procedures. We find that the sentence imposed by the Court of Appeal was unlawful, and must be set aside.

It was for these reasons that we allowed the appeal, set aside the sentence of 25 years ad substituted it with a sentence of 17 years imprisonment.

Dated at Kampala this .....6th.....day of ..December.....2013

B J Odoki
CHIEF JUSTICE

Bart M Katureebe
JUSTICE OF SUPREME COURT

C N B Kitumba
JUSTICE OF THE SUPREME COURT

J Tumwesigye
JUSTICE OF THE SUPREME COURT

E M Kisaakye
JUSTICE OF THE SUPREME COURT