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**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT JINJA**

**CRIMINAL APPEAL NO. 0189 OF 2010**

**MPASA SHABAN:.....APPELLANT**

**VERSUS**

10 **UGANDA:.....RESPONDENT**

*(Appeal from the decision of Hon. Lady Justice Elizabeth Ibanda Nahamya in the High Court of Uganda at Jinja in Criminal Session Case No. 034 of 2010)*

**CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA**

**HON. MR. JUSTICE STEPHEN MUSOTA, JA**

15 **HON. LADY JUSTICE PERCY NIGHT TUHAISE, JA**

**JUDGMENT**

20 This is an appeal from the decision of the High Court sitting at Jinja in Criminal Session Case No.034 of 2010 delivered on 31<sup>st</sup> August, 2010 by Elizabeth Ibanda Nahamya, J in which the appellant was convicted of the offence of rape contrary to sections 123 and 124 of the Penal Code Act and sentenced to 22 years imprisonment.

The facts as accepted by the trial Judge were that in Kinawampere Village, Bunyavu Parish, Namwendwa Sub-county, Kamuli District lived a one Mukoda

5 Merida married to Bakaki David, a brother to Bisasi Wilson, husband of Senza  
Eseza. On the 11<sup>th</sup> day of March 2008, the victim and her husband at around  
8pm escorted Bisasi Wilson and his wife to a native witch doctor one Aloni Gavola  
for treatment of Bisasi Wilson who was sick. At around 11pm, Aloni Gavola, the  
witch doctor advised Bisasi and his brother to stay in the shrine until morning  
10 hours. The victim, Mukoda Merida and Eseza Senza were advised to go back  
home but they decided to sleep together in the victim's house. While at the witch  
doctor's shrine the witch doctor advised that the women should sleep in separate  
houses because he was to bless them that night. David Bakaki moved back home  
and advised that they sleep separately which they did religiously.

15 That during the same night when Eseza Senza had left the victim's house, the  
appellant came to the house of the victim and ordered her to open for him so  
that he would inject medicine in her. That the appellant claimed to be instructed  
by the spirits. When the victim refused to have sexual intercourse with the  
appellant, the appellant threatened that the spirits would suck blood out of the  
20 victim. That after sexual intercourse the appellant told the victim not to alarm  
and that if she did, he would leave evil spirits in her house. The following day  
when the victim's husband came back, the victim informed him about what had  
transpired and eventually the matter was reported to Police. The appellant was  
arrested, tried and convicted.

25 Being dissatisfied with the decision of the High Court, the appellant with leave  
of this Court appealed only against sentence. The sole ground of appeal was that;

5            ***The learned trial Judge erred in law and fact when she failed to take into account essential mitigating factors and thus passed a sentence that is manifestly harsh.***

At the hearing of the appeal, Mr. Jacob Osilo appeared for the appellant while the respondent was represented by Ms. Josephine Namatovu, Assistant DPP.

10          Counsel for the appellant submitted that the sentence of 22 years imposed on the appellant was manifestly harsh considering the mitigating factors that were presented to Court on behalf of the appellant. Counsel invited Court to consider the authorities of ***Otema David V Uganda, Court of Appeal Criminal Appeal No.155 of 2008*** where Court found a sentence of 13 years to be harsh in light  
15          of the range of sentences of the offence of rape and substituted the same with 7 years' imprisonment and ***Nsamba Francis V Uganda, Court of Appeal Criminal Appeal No.0244 of 2009***, where this Court confirmed a sentence of 7 years where the appellant had been convicted of rape.

Counsel further submitted that the appellant was a first offender and being 25  
20          years of age, he was still a young man who ought to be given an opportunity to reform. He prayed that the appeal be allowed and the sentence of 22 years be quashed and substituted with 7 years' imprisonment.

Counsel for respondent opposed the appeal and submitted that the sentence of 22 years was neither harsh nor manifestly excessive. She relied on the case of  
25          ***Baraza Patrick V Uganda, Criminal Appeal No.106 of 2014*** wherein the

5 appellant was convicted on his own plea of guilty to the offence of rape and sentenced to 24 years and 7 months imprisonment. Counsel added that the trial Judge considered both the mitigating and aggravating factors and prayed that Court upholds the sentence of 22 years imposed on the appellant.

We have carefully considered the submissions of both counsel and perused the  
10 Court record. We are alive to the law that requires this Court as the first appellate Court to re-appraise all the evidence and come up with its own inferences of law and fact. **See Rule 30(1) of the Rules of this Court and Bogere Moses V Uganda, Supreme Court Criminal Appeal No.001 of 1997.**

The principles upon which an appellate Court should interfere with the sentence  
15 imposed by the trial Court were considered in **Livingstone Kakooza V Uganda, Supreme Court Criminal Appeal No.17 of 1993** where Court stated that;

*“An appellate Court will only alter a sentence imposed by the trial Court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the  
20 case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration.”*

Counsel for the appellant faulted the learned trial Judge for sentencing the appellant to 22 years imprisonment which was harsh and excessive considering the mitigating factors that had been presented on behalf of the appellant.

25 While sentencing the appellant, the learned trial Judge stated as follows;

5           *“Considering the aggravating factors as submitted by the learned State  
Attorney, Ms. Nalwanga that the woman in question is married, her personal  
privacy was violated causing psychological and physical torture to her and  
psychological torture to her husband. Taking into account the mitigating  
10           responsibilities, this Court must give a sentence which commensurate with  
the offence. I, therefore, hereby, sentence you Mpasa Shaban to a term of  
imprisonment of 25 years. The two years (2) and seven (7) months spent in  
prison almost three (3) years have been considered and should be computed  
15           against this sentence. You will therefore, serve twenty-two (22) years term  
of imprisonment.”*

We find that the learned trial Judge took into account the fact that the appellant was a first offender and a family man with other responsibilities. However, we also note that the appellant was 28 years at the time of conviction and sentence. He was a young man who should be given an opportunity to reform for he can  
20           be useful to society.

There is also need to maintain uniformity and consistence in sentencing by taking into consideration the sentences that the Supreme Court and this Court have imposed on offenders in similar circumstances.

In ***Otema David V Uganda, Court of Appeal Criminal Appeal No. 155 of***  
25           ***2008***, the appellant was convicted for the offence of rape and sentenced to 13

5 years of imprisonment. On appeal, this Court reduced the sentence to 7 years imprisonment.

In ***Lugi Sairus V Uganda, Court of Appeal Criminal Appeal No.50 of 2000,***

the appellant was convicted of rape and sentenced to 15 years imprisonment.

On appeal, the sentence was reduced to 10 years imprisonment on ground that

10 it was manifestly excessive.

In ***Boona Peter V Uganda, Court of Appeal Criminal Appeal No. 18 of 1997,***

the appellant was convicted of rape and sentenced to 10 years imprisonment.

On appeal, this Court confirmed his sentence of 10 years.

We find that the sentence of 22 years imposed on the appellant was manifestly

15 harsh in the circumstances, we set it aside. Given that the appellant did not

challenge his conviction we shall proceed to resentence him under Section 11 of

the Judicature Act.

Having taken the above factors into account, we now sentence the appellant to

12 years and 7 months. We deduct the period of 2 years and 7 months that the

20 appellant spent on remand. He will therefore serve a sentence of 10 years

imprisonment starting from 31<sup>st</sup> August 2010, the day he was convicted.

**We so order**

Dated at Jinja this ...17<sup>th</sup>..... Day of ...July..... 2019

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*[Handwritten signature]*

HON. MR. JUSTICE BARISHAKI CHEBORION  
JUSTICE OF APPEAL

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*[Handwritten signature]*

HON. MR. JUSTICE STEPHEN MUSOTA  
JUSTICE OF APPEAL

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HON. LADY JUSTICE PERCY NIGHT TUHAISE  
JUSTICE OF APPEAL

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17/7/19

Appelled parties  
Mr. Mzee of the Rep.  
Mr. Mzee of the Appellee  
Mr. Hester: Clerk.

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Case; Subject defined in presence of  
the above.

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17/7/19