THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

CRIMINAL APPEAL NO. 0266 OF 2017

(Coram: Buteera, DCJ, Mulyagonja & Mugenyi , JJA)

MUTESASIRA YASIN.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

(An appeal against the decision of J.W Kwesiga J in Kampala High Court Criminal Session Case No. 0509 of 2016 delivered on 7th July 2017 at Kampala)

JUDGMENT OF COURT

Brief background

The appellant was convicted of the offence of Rape contrary to **sections 123 & 124 of Penal Code Act, Cap.120**. It was alleged that on the 19th January 2013, the appellant had unlawful sexual intercourse with NM (herein referred to as the victim) without her consent at Kabanyoro Village, Nangabo Sub-County in Wakiso District.

It was the prosecution's case that on the alleged date, the victim was at the roadside heading to Gayaza at around 9:00 am. The appellant, a boda boda rider agreed to take her to Opportunity Bank at a fee of 1000/=. He decided

to wait outside for her. When the victim came out of the Bank, the appellant proposed to take her where she was headed, which was Kabanyoro and they agreed to a fee of 5000/=. It is alleged that on the way to Kabanyoro, the appellant branched off to a feeder road and stopped at a bush. That the appellant pushed the victim down, tore her knickers off and forcefully had sexual intercourse with her. The victim reported the matter to the police and upon medical examination on PF 3A, she was found to have bruises on the vulva, the probable cause being injuries by blunt trauma and rough force. The appellant was arrested and charged with rape. After a full trial, the appellant was convicted and sentenced to 20 years' imprisonment. Dissatisfied, the appellant now appeals to this court against both conviction and sentence basing on the following grounds:

Grounds

1. That the learned trial Judge erred in law and fact when he relied on the evidence on record of PW1 and PW2 as credible witnesses, which was full of contradictions and inconsistences thereby arriving at a wrong decision.

2. That without prejudice to the foregoing, the learned trial Judge erred in law and fact when he passed a sentence of 20 years' imprisonment upon the appellant, which is illegal, harsh and excessive thereby occasioning a miscarriage of justices.

Representation

At the hearing of the appeal, the appellant was represented by Ms. Sheila Kihumuro on State brief while the respondent was represented by Ms Sherifah Nalwanga Chief State Attorney, from the office of the Director of Public Prosecutions. The appellant appeared via video link from Upper Maximum Prison Luzira. Both counsel informed court that they filed their written submissions and prayed that court adopts them for the determination of the appeal. This was granted by court.

Submissions for the appellant

Ground one

Counsel submitted that prosecution presented two witnesses, NM who was PW1 and the Medical doctor PW2. Counsel argued that the evidence adduced by the prosecution contained contradictions on material issues and as such was insufficient to sustain a conviction. Counsel submitted that the first contradiction was in respect to the victim's medical examination. She contended that during cross examination, the victim PW1 indicated that she was examined either on the same day or the next day, whereas the medical report was dated 23rd January 2013, which the medical doctor PW2 confirmed. Counsel argued that this points to four 4 days from the date of 19th January 2013 on which the alleged act occurred.

Counsel added that PW1 testified that she did not remember whether the doctor's observation was a few hours after the incident or not and there was no clarification by PW1 in re-examination since the State did not re-examine her.

It was counsel's contention that PW2, the medical doctor testified that an HIV test for the appellant was carried out but they could not see the results yet on PF 24A the results were clearly indicated. Counsel submitted that PW2 stated that they did not take any materials for analysis yet they drew a conclusion that there was sexual activity. It was counsel's argument that there was no evidence of any traces of semen on record. She added that this was not a simple matter attributable to loss of memory due to lapse of time. Further, that the trial judge erred when he rejected the appellant's defence without giving it any consideration at all but had he done so, he would have observed that the chain of evidence should have been resolved in the appellant's favour.

Counsel cited **Candiga Swadick v Uganda CACA No. 23 of 2012 and Kyomukama Fred v Uganda CACA No. 542 of 2014** where the court noted that major contradictions and inconsistencies would usually result in the evidence of the witness being rejected.

Counsel submitted that the inconsistences and contradictions were so grave and only pointed to falsehood on the part of prosecution witnesses thus a

conviction arrived at without regard to these contradictions would ordinarily not stand.

Ground two

Counsel submitted that the trial Judge did not properly take into account the mitigating factors thereby arriving at a harsh and excessive sentence. Counsel also submitted on the need to maintain uniformity in sentencing and cited **Kalibobo Jackson v Uganda CACA No. 45 of 2001** where the appellant a 25 year old raped a 70-year-old lady and was sentenced to 17 years but on appeal, the sentence was considered harsh and excessive and it was reduced to 7 years imprisonment.

Counsel implored this court to set aside the appellant's sentence for being excessive or to reduce it to a sentence of 2 years' imprisonment.

Submissions for the respondent

Ground one

Counsel summited that the learned trial judge rightly relied on the evidence of PW1 and PW2 and accordingly found them credible witnesses even with the contradictions and inconsistences which were very minor and did not go to the root of the case. Counsel invited this court to consider that 4 years had elapsed between the occurrence of the incident and the time of trial and the witness was bound to forget some aspects as regards time.

Counsel referred to **Obwalatum Francis v Uganda SCCA NO. 30 of 2015** where the court held that; *"the law on inconsistency is to effect that where there are contradictions and discrepancies between the prosecution witnesses are minor and of a trivial nature, these may be ignored unless they point to deliberate untruthfulness."*

Counsel submitted that the inconsistences in the instant case were very minor and never pointed to any deliberate untruthfulness and that prosecution was able to prove the case beyond reasonable doubt. Counsel added that the victim placed the appellant at the scene of crime and that she proved that she knew the appellant very well and had observed him since it was at 9:00 am.

On the issue of not finding materials for analysis, counsel submitted that PW2 testified that he examined the victim and in his findings he stated that there was sexual activity at least within one week between 3 to 5 days. Counsel added that PW2's evidence corroborated the date of occurrence of the rape and date of examination and that was why he found no materials for analysis as 4 days had passed.

Counsel prayed that the appellant's conviction should be upheld and ground one dismissed.

Ground two

Counsel submitted that the sentence of 20 years' imprisonment was not manifestly harsh and excessive in the circumstances given that Rape carries a maximum sentence of death. Counsel submitted that the trial Judge considered the mitigation factors and also noted that he would give a sentence that would allow the appellant the opportunity to reform and return to society. Further, counsel argued that there was nothing to suggest that the trial Judge acted upon a wrong principle or overlooked any material factor in this case.

Counsel submitted that an appropriate sentence is a matter for the discretion of the sentencing Judge. He cited **Karisa Moses v Uganda SCCA No. 23 of 2016, Kiwalabye Bernard v Uganda SCCA No. 143 of 2001** and other cases, which we have considered to that effect.

Counsel cited **Biguraho Adonia v Uganda CACA No. 007 of 2017 where** this court upheld a sentence of 25 years' imprisonment for the offence of rape. **She also referred to Mubangizi Alex v Uganda SCCA No. 7 of 2015** where the court maintained a sentence of 30 years' imprisonment for the offence of rape.

In conclusion, Counsel urged this court to uphold the conviction and sentence of 20 years' imprisonment and accordingly dismiss the appeal for lack of merit.

The Decision of Court

This being a first appeal from a decision of the High Court, this court is required to review the evidence and make its own inferences of law and fact. **See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.1 13-10.** We do agree with and follow the decision of the **Supreme Court in Kifamunte Henry v Uganda SC Criminal Appeal No. 10 of 1997** where it was held that on a first appeal, this court has a duty to: *"... review the evidence of the case and to consider the materials before the trial Judge. The appellate court must then make up its own mind not disregarding the judgment appealed from, but carefully weighing and considering."*

The appellant in this case is appealing against both conviction and sentence. We have carefully studied the court record, considered the submissions for either side, the law and authorities cited therein.

Ground one

The appellant faulted the trial Judge for relying on the evidence of PW1 and PW2, which he alleges was full of contradictions and inconsistencies thus arriving at a wrong decision.

The position on contradictions and inconsistencies in evidence was well settled in **Alfred Tajar v Uganda EACA Criminal Appeal No. 167 of 1969 and cited with approval in Uganda v George Wilson Simbwa SCCA No. 37 of 1995** thus;

"The principles applicable to contradictions and inconsistencies were stated that in assessing the evidence of a witness, his consistency or inconsistency, unless satisfactorily explained will usually but not necessarily result in the evidence of a witness being rejected; that minor inconsistencies will not usually have the same effect, unless the trial judge thinks they point to some deliberate untruthfulness."

In **Candiga Swadick v Uganda, CA Criminal Appeal No. 23 of 2012** this court held that;

"The law on contradictions and inconsistencies is well settled. Major contradictions and inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained away. Minor ones, on the other hand, will only lead to rejection of the evidence if they point to deliberate untruthfulness on the part of the witness.

In the present case, the appellant alleged that PW1's evidence indicated that she was examined on the same day of the rape while the medical report noted that the examination was done four days after. Further, that PW2 the medical doctor testified that the HIV test was carried out but the results were not seen yet the results were clearly indicated on PF 24.

We have weighed the above assertions by the appellant and in our view, the incident occurred in 2013 and the witnesses testified in 2017 after 4 years had elapsed which explains the discrepancy on the date the victim was medically examined. PW1 stated that she was examined on the same day or next day while the medical report indicates that she was examined on 23rd January, four days after.

In our view this inconsistence on the date does not point to any untruthfulness on the victim's part. In analyzing her entire evidence, PW1 clearly narrated how she met the appellant and the time they had together while interacting. She clearly placed him at the scene of crime. Further, the evidence of the medical doctor, PW2 was clear that the rape occurred between 3-5 days before the examination hence he could not find any traces of semen for examination but he noted that the victim had some injuries on the vulva and a blood discharge. He concluded in his report that there was sexual activity with some physical assault. PW2 in cross examination explained that an HIV test was carried out on the appellant but that the results are written on another form which explains why they didn't have them on police form 24.

In our conclusion, the inconsistencies and contradictions pointed to by the appellant are minor and they do not go to the root of the case. This court cannot rely on them to reject the evidence of the prosecution witnesses.

The appellant also alleged that the trial Judge did not consider his defence. We have analyzed the appellant's defence and find that he clearly aligned with the evidence of PW1, that they met that fateful day and interacted for some time on a business basis since he was a boda boda rider. The appellant however, stated that he lent the victim money and left her at the shop and on returning; she was nowhere to be seen. We do not find that piece of evidence truthful, that the appellant lent money to a stranger, left her at a shop and came back to demand for it. It is on record that the two met for the first time. We find that the trial Judge correctly rejected the

appellant's defence. In the premises, we reject ground one of the appeal and dismiss it.

Ground two

Counsel for the appellant alleged that the sentence of 20 years' imprisonment was harsh and excessive and that the trial Judge did not consider the mitigating factors.

As an appellate Court, we are constrained not to interfere with a sentence imposed by the trial Court, merely because we would have imposed a different sentence had we been the trial Court. We can only interfere with sentence where it is either illegal, or founded upon a wrong principle of the law, or as a result of the trial court's failure to consider a material factor, or where the sentence is harsh and manifestly excessive in the circumstances of the case - **(see Kizito Senkula v Uganda SCCA No.24 of 2001 and Bashir Ssali v Uganda -SCCA No.40 of 2003).**

We shall consider the issue of excessiveness of sentence first. Counsel for the appellant argued that the sentence of 20 years' imprisonment meted out by the trial Judge was excessive in the circumstances.

The Supreme Court in **Aharikundira v Uganda** underlined the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts.

A comparison of the sentence contested in this case with other similarly decided cases would be useful in assessing the severity. **Paragraph 6 (c) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions No. 8/2013** enjoins courts to practice the principle of consistency while passing a sentence on a convict.

In **Anguyo George v Uganda CACA No. 044 of 2014;** this court upheld a sentence of 40 years' imprisonment for rape and indicated that the trial Judge had taken into account all the requisite factors before arriving at his decision.

In **Biguraho Adonia v Uganda (supra)** this court upheld a sentence of 25 years' imprisonment for the offence of rape.

Further in Mubangizi Alex v Uganda SCCA (supra) the Supreme Court maintained a sentence of 30 years' imprisonment for the offence of rape.

In the present case, the appellant was sentenced to 20 years' imprisonment, which we do not find excessive, based on the authorities above.

Further, the appellant's counsel submitted that the trial Judge did not consider the mitigating and aggravating factors before passing his sentence.

In **Aharikundira Yustina v Uganda SCCA No. 27 of 2015,** the Supreme Court found that:-

"The holding of the trial court did not reflect consideration of any of the mitigating factors but rather only the aggravating factors. The appellant mitigated her sentence before the trial judge however when giving his

decision, the learned Judge did not weigh the mitigating factors against the aggravating factors. These included the fact that the convict was a first offender, of advanced age and had children who needed her attention as the surviving spouse. The trial judge therefore ignored putting in consideration the mitigating factors raised by the appellant while passing the sentence.

The same trend prevailed in the Court of Appeal when it failed in its duty to re-evaluate the mitigating factors. We disagree with the respondent's argument that the Court of Appeal does not have to handle mitigation and that mitigation process is done only in the trial court as was done in the instant case."

In the trial court, during mitigation, it was submitted for the appellant that he was a first time offender, aged 40 years with family responsibilities and had demonstrated a character of a reformed man. For the respondent, it was submitted that the offence of rape carries a maximum sentence of death, and that the appellant had betrayed other boda boda operators, which would create fear in the clients who use boda bodas. The trial Judge had to balance the mitigating and aggravating factors.

We have heard time to re-appraise the sentencing notes of the trial Judge.

We note that the trial Judge did consider the mitigating factors when he stated that he would give the appellant a sentence that would allow him to reform and return to society and that he was a middle aged man of 40 years.

The trial Judge passed a sentence of 20 years and stated that 4 years and 6 months spent on remand would be deducted with effect from 27th July 2017.

We do not find the sentence imposed by the trial Judge to be harsh or excessive.

We confirm the sentence imposed by the trial Judge.

The appellant will serve a sentence of 15 years and 6 months' imprisonment with effect from 27th July 2017, the date of conviction.

We so order

Dated at Kampala this 7th day of NOV 2023.

Richard Buteera
Deputy Chief Justice

Irene Mulyagonja
Justice of Appeal

Monica Mugenyi
Justice of Appeal