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**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT GULU
CRIMINAL APPEAL NO. 169 OF 2009**

OKELLO BONIFACE.....APPELLANT

10

VERSUS

UGANDA.....RESPONDENT

(Arising from Criminal Session Case No. 226 of 2008 delivered on 10/08/2009 at Gulu before his Lordship Hon. Mr. Justice P.K Mugamba)

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

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HON. MR. JUSTICE F.M.S EGONDA-NTENDE, JA

HON. LADY JUSTICE HELLEN OBURA, JA

JUDGMENT OF THE COURT

20 This appeal is against sentence only in respect of the decision of the High Court sitting at Gulu delivered on 10th August, 2009 by Hon. Justice P.K.Mugamba (as he then was) 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 15 years imprisonment after a full trial.

Background to the appeal

25 The facts giving rise to this appeal as accepted by the trial Judge from the prosecution case are that the appellant and Angee Daudi Lakora, an 80 year old victim were neighbors and residents of the same area. On the night of

5 21st May, 2008 appellant went to the house of the victim who lived alone and
dragged her by the neck from her house to a nearby place where he had
sexual intercourse with her. The appellant was caught in the act with the
victim and was arrested and taken to the police. They were later both taken
for medical examination and afterwards the appellant was indicted, tried and
10 convicted of the offence of rape.

Being dissatisfied with the decision of the trial Judge, the appellant appealed
to this Court against sentence only. The single ground of appeal is set out
as follows;

15 *“That the learned trial Judge erred in law and fact when he sentenced
the appellant to imprisonment for fifteen years, which is manifestly
harsh, excessive, unreasonable, unfair and unjust in the circumstances
of this case.”*

Representations

At the hearing of this appeal, learned counsel Mr. Geoffrey Boris Anyuru
20 represented the appellant on state brief while Mr. Moses Onencan learned
Principle State Attorney from the Office of the Director Public Prosecutions
represented the respondent.

Case for the appellant

Counsel for the appellant sought leave for extension of time and validation
25 of the notice of appeal that was filed out of time which was granted. He also
sought leave to appeal against sentence only and it was granted.

5 Counsel for the appellant submitted that he was aware that it is the discretion
of the trial court to impose an appropriate sentence and that a 15 year
sentence for the offence of rape is not illegal. However, he contended that
in the circumstances of this case, the sentence was too harsh and manifestly
excessive. He referred this Court to the decision of this Court in ***Bikanga***
10 ***Daniel vs Uganda, Court of Appeal Criminal Appeal No. 38 of 2000***, in
which a sentence for rape was reduced from 17 years imprisonment to 7
years imprisonment. Counsel submitted that in that case, the court found that
a sentence of 17 years imprisonment was so manifestly excessive as to
cause a miscarriage of justice. The appellant in that case was 25 years old
15 at the time of the commission of the offence. Counsel asked this Court to
apply the same principle to this appeal.

He further contended that the trial Judge in this appeal sentenced the
appellant to a harsh and excessive sentence of 15 years imprisonment.
While passing the sentence, he stated thus;

20 *“The convict, a young man, fit to be grandchild of the victim, acted in a
beastly manner when he set upon her and raped her. That is not an
act expected of a person fit to live in a community...”*

Counsel contended that in so doing, the trial Judge did not give the appellant
an opportunity to reform.

25 He prayed that the appeal be allowed, the sentence be set aside and a more
appropriate sentence in parity with the decision in ***Bikanga Daniel vs***
Uganda (supra) be imposed.

5 **The respondent's reply**

Counsel for the respondent opposed the appeal and supported the sentence imposed on the appellant. He submitted that the victim was an 80 year old woman and the appellant who was staying with the victim's son, and young at the time was fit to be her grandchild. Counsel further submitted that the trial Judge instead of imposing the maximum sentence of death imposed a lenient sentence of 15 years. He also relied on ***Bikanga Daniel vs Uganda (supra)*** at page 4 paragraph 2 where the court pointed out the discretionary power that lies with the trial court. He concluded that the sentence was appropriate and asked this Court to confirm it.

15 **Court's consideration**

We have carefully studied the court record and considered the submissions of both counsel. We shall now proceed to determine the appeal. We are alive to the requirement of the law, that as a first appellate Court, we have a duty to re-evaluate the evidence at the trial and come up with our own inference on all issues of law and fact. ***See: Father Narsensio Begumisa and others vs Eric Tibebaga SCCA 17/2002.***

In the instant appeal, it was contended for the appellant that the sentence of 15 years imprisonment imposed on him was harsh and manifestly excessive in the circumstances and warrants the interference by this Court.

25 The principles upon which an appellate court may interfere with a sentence of the trial Judge were stated by the Supreme Court in ***Kiwalabye Bernard vs Uganda, Supreme Court Criminal Appeal No.143 of 2001 (unreported)*** as follows:

5 *"The appellate court is not to interfere with the sentence imposed by a
trial court where that trial court has exercised its discretion on
sentence, unless the exercise of that discretion is such that it results in
the sentence imposed to be manifestly excessive or so low as to
amount to a miscarriage of justice or where the trial court ignores to
10 consider an important matter or circumstance which ought to be
considered while passing sentence or where the sentence imposed is
wrong in principle".*

We are enjoined to apply the above principles to the instant case and we shall do so. We have perused the record of sentencing proceedings. We
15 have also carefully studied the authorities cited to us and others that were not.

While sentencing the appellant in the instant case, the trial Judge stated thus:

*"The convict, a young man, fit to be grandchild of the victim, acted in a
beastly manner when he set upon her and raped her. That is not an
20 act expected of a person fit to live in a community. He does not express
remorse for what he did. While I am sorry for the children he says he
took care of, I have to impose punishment on him for the nefarious act.
I take the period of over one year he has spent on remand into account
and deduct it from the sentence I would otherwise have handed down.
25 He is sentenced to 15 years imprisonment."*

We note that the words which the trial Judge used when imposing the sentence were ambiguous. By saying I take the period of over one year the appellant has spent on remand into account and deduct it from the sentence

5 I would otherwise have handed down, we find that the trial Judge did not
comply with Article 23 (8) of the Constitution as applied by courts at the time
following the guidance given by the Supreme Court in the cases of **Kabwiso**
Issa vs Uganda SCCA No. 7 of 2002 and Katende Ahamad vs Uganda
SCCA No. 6 of 2004 that the trial Judge or Magistrate when sentencing a
10 person to imprisonment should say;

*“Taking into account the period of.....years (months or
weeks whichever is applicable) which the accused has already spent
in remand, I now sentence the accused to a term of....., years
(months or weeks, as the case maybe)”*

15 The trial Judge did not specify the period the appellant had spent in lawful
custody prior to conviction that he had taken into account and deducted from
the sentence. In the circumstances, we find that the sentence imposed
without complying with Article 23 (8) was illegal and we thus set it aside and
we invoke **section 11 of the Judicature Act** to impose an appropriate
20 sentence.

We shall consider the factors which were presented in mitigation of sentence
namely that, the appellant was a first time offender, a young man aged 26
years who is likely to reform and has 3 children and 8 dependants. He had
been in prison for a period of 1 year and 2¹/₂ months, prior to his conviction.

25 We have also taken into consideration the aggravating factors presented by
the respondent, namely that, the appellant is a first offender. The offence
carries maximum death sentence. The convict humiliated the 80 year old
victim who was fit to be his grandmother.

5 It should be noted that rape is a serious offence and the maximum sentence to be imposed according to section 124 of the Penal Code Act is for the offender to suffer death. We also take note of the sentencing range for the offence of rape handed down by this Court on similar offences.

10 In *Yebuga Majid vs Uganda, CACA No. 303 of 2009*, this Court upheld a sentence of 15 years imposed upon the appellant by the trial court for the offence of rape. It held that the sentence of 15 years imprisonment befitted the circumstances of the case.

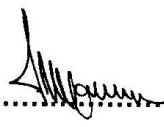
15 Similarly, in *Oyek Charles vs Uganda, CACA No. 126 of 1999*, in which the victim, a mother who was walking back to her home together with her daughter was raped on a public path by the appellant. The appellant was convicted of rape and after taking into account the period of 4 years he had spent in lawful custody prior to his conviction, he was sentenced to 15 years imprisonment. On appeal to this Court, his sentence was upheld.

20 Also, in *Bizimana Jean Claude vs Uganda, CACA No. 143 of 2010 [2014] UGCA 62*, this Court sitting at Fort Portal reduced a sentence of 18 years imprisonment for the offence of rape imposed by the trial court to a sentence of 15 years imprisonment.

25 In the instant case, we find that a sentence of 16 years would meet the ends of justice. However, since the appellant had spent a period of 1 year and 2 1/2 months in lawful custody prior to his conviction, we deduct that period from the 16 years and sentence the appellant to 14 years 9 months and 2 weeks imprisonment from the date of his conviction, that is 10/08/2009.

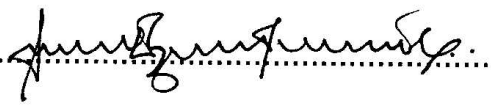
We so order.

5 Dated at Gulu this.....29th.....day of.....September.....2017



Hon. Mr. Justice Kenneth Kakuru

JUSTICE OF APPEAL



Hon. Mr. Justice F.M.S Egonda-Ntende

JUSTICE OF APPEAL



Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL