THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 068 OF 2011
[Coram:Bamugemereire , Gashirabake, Kihika, JJA]

1. OMOLLO BEN
2. ECUDO PATRICK ::: APPELLANT
3. ELOMUNAIT GABRIEL

VERSUS

UGANDA ::: RESPONDENT

(Appeal against the decision of Margaret Oguli J, in High Court Criminal Session Case No. 0053 of 2011 dated 4th February 2011 at Kumi)

JUDGMENT OF THE COURT

The appellants were charged with the offence of rape contrary to sections 123 and 124 of the Penal Code Act Cap. 120. It was alleged that on the 14th day of March 2010 at Kaler village, Mukura subcounty in Kumi District, the appellants had unlawful carnal knowledge of AS.

Background

This is a case of gang rape in which the appellants were sentenced to 50 years' imprisonment. The facts as accepted by the lower court were that on the night of 14th March 2010, AS, a nursing student at the Jinja School of Nursing and Midwifery who also helped out with an NGO, was one of the guests at a traditional marriage ceremony at Kaler village, Mukura subcounty in what is now Ngora District. She left her company of girlfriends to go ease herself. Just as she was in the process of answering nature's call, A1 and A3 surfaced from nowhere and stood over her. She asked them to leave. They declined and watched her ease herself and still

watched as she pulled up her pants. She attempted to negotiate herself out of their trap, by offering them money but they declined the offer for money and insisted they had to have sex with her, even if it was against her will. She recalls that the appellants acted in concert with each other. One held her back while two pulled her down her pants. They raped her in turns with one saying he was eager to have sex with a girl from town. They also momentarily prevented her from returning to join the other guests at the ceremony and held her hostage, forcing her to join their 'malwa' or 'ajon', drinking joint. The victim was able to escape after over twenty minutes. She found her way back to the ceremony where she narrated the ordeal to her friends. They reported the matter to the relevant authorities and the accused persons were arrested and charged. The appellants denied the charges and were subsequently tried, convicted and on the 4th day of February 2011 were each sentenced to 50 years imprisonment. The appellants being aggrieved by the judgment of the High Court, appealed to this court against conviction and sentence on 5 grounds.

The grounds of appeal as raised in the amended memorandum of appeal are as follows:

1. **The learned trial Judge erred in law and fact when she relied on the improperly conducted identification parade leading to a miscarriage of justice.**
2. **The learned trial Judge erred in law and fact when she relied on the prosecution evidence, which was marred with inconsistences and discrepancies.**

3. **That the learned trial Judge erred in law and fact when she failed to take into account other co-existing facts which caused doubt, hence leading to a miscarriage of justice.**
4. **The learned trial Judge erred in law and fact when she relied on hearsay evidence.**
5. **The learned trial Judge erred in law and fact when he sentenced the appellants to 50 years' imprisonment, which was manifestly excessive in the circumstances**.

Wherefore the appellants prayed that the appeal is allowed, conviction quashed, and the sentence set aside or varied.

Representation

At the hearing of the appeal, Faith Luchviya appeared as counsel for the appellants, on State Brief, while Ms Immaculate Angutoko, Chief State Attorney, holding brief for Ms Caroline Nabaasa Principal Assistant DPP, appeared for the respondent. The appellants were present in court.

Submissions for the Appellants

The appellants were jointly represented by one counsel. The appellants' counsel argued grounds 1, 2, 3 & 4 together and ground 5 separately.

Grounds 1, 2, 3 and 4

Counsel for the appellants submitted that the prosecution evidence was full of major contradictions which ought to have been resolved in favour of the appellants. Counsel submitted that **PW1** did not know the appellants. He submitted that with the help of counsel she did a dock

identification of them during trial but hardly new their names. Counsel argued that she never recognized them at the scene. He submitted that since, PW1 testified that it was dark and that she identified the accused persons because of the height and that A1 was a bit fat, the identification was unreliable.

Counsel submitted that **PW2** contradicted herself when she stated that she saw PW1 talking to someone, on her way to pick up her jumper. Counsel added that PW2 further contradicted herself again when she stated that she called their uncle Steven who is a doctor to check if PW1 had been raped. Counsel argued that these facts were not in the testimony of PW1.

It was counsel's submission that the evidence of PW2 was hearsay given her admission that everything she said, she heard from PW1. Counsel invited court to evaluate PW2's evidence and in the event of any doubt, the same be resolved in favour of the Appellants.

Counsel submitted that PW3's evidence was equally hearsay given his testimony that he heard the news of what had happened to PW1 from another young man. Counsel contended that the evidence was contradictory, since PW1 never mentioned talking to a boy in her testimony. She cited **Apea v Uganda; Criminal Appeal 65 of 2015 [2021] UGCA 4** where the court found that in cases where the victim of a sexual offence is not brought to testify in court, evidence by persons called as witnesses, to whom the victim disclosed that the accused defiled her, is

hearsay evidence, and is inadmissible at common law and that such evidence ought to be rejected.

Counsel for the appellants further submitted that neither PW1 nor PW2 ever mentioned the music and when it had stopped playing and that PW3 went to the police station. She further contends that its illogical for PW3 to have put A2 under surveillance when it was his duty to oversee security.

Counsel submitted that PW1 identified the 3 people. One *'had a red cap, was medium and was in a sweater and canvas and one had a jacket'* and they called people in the village who mentioned the names. It was counsel's contention that it was illogical how the alleged villagers were able to identify the appellants using such a generic description.

Regarding PW4's testimony counsel submitted that PW1 was able to identify the appellants due to the amount of time she had spent with them after they gang-raped her. Counsel contended that in her evidence, PW1 did not mention that A1 had a red cap on his head.

Further, that PW5's evidence that she escorted PW1 to hospital contradicts what PW1, PW2 and PW3 stated. They never mentioned going to the hospital with the police. Counsel prayed that these contradictions be resolved in favour of the appellants.

Counsel for the appellants urged this court to expunge the testimony of PW6 from the record for reason that he was not the medical doctor who made the report, **PF3A (Exhibit P1)** and that no application was made to allow him to tender the evidence on behalf of another doctor. He argued

that such application should have been brought under Section 30 of the evidence Act and the same would have been on the record, replete with a ruling made. Furthermore, the report indicated that the victim, *"was allegedly raped and sustained the above injuries..."* The appellants' counsel submitted that even the doctor who made the report could not tell whether PW1 was raped. Counsel relied on the case of **Kyomukama v Uganda; Criminal Appeal 53 of 2014 [2016] UGCA 55 (26 October 2016)** and invited this court to expunge PW6's testimony from the record which would then leave the evidence of PW1 uncorroborated.

It was counsel's submission that the trial Judge relied on the medical examination report (Exh P1), and also considered the fact that A3 was HIV Positive yet PW1 was not tested for HIV. Counsel submitted that although A3 retracted his confession, the learned trial Judge failed and or neglected to conduct a trial-within-a-trial.

He prayed that this court be pleased to acquit the appellants for lack of evidence and due to the inconsistences and gaps in the prosecution evidence.

Ground Five

Counsel submitted that should this court find that the Appellants cannot be acquitted on the earlier grounds discussed above; then the sentence of the Appellants be reduced since the one meted on them was harsh and excessive.

She contended that the trial Judge did not take into account the mitigating factors while passing sentence. Counsel prayed that the

appellants should be sentenced to an appropriate sentence which is similar to the previously decided cases for consistency in sentencing and relied on **Adiga Adinani v Uganda; Consolidated Criminal Appeal 637 of 2014 [2021] UGCA 13.** She prayed that court allows the appeal and varies the sentence of the High Court.

Respondent's Submissions

Ground One

The learned trial Judge erred in law and fact when she failed to properly evaluate the evidence thus arriving at a wrong decision occasioning a miscarriage of justice.

Counsel for the respondent submitted that the appellants counsel did not demonstrate how the trial Judge failed to evaluate evidence against the appellants. That the trial Judge stated the ingredients of the offence of rape in her judgement. Counsel submitted that the trial Judge relied on the testimony of PW1 corroborated by PE 7 (Police Form 3) which revealed inflammation on the labia minora, vaginal bruises which injuries were sustained by a blunt object. PE7 was exhibited by PW6, a medical doctor.

Counsel admitted that Exhibit P7 was tendered by someone other than the maker, a situation exceptional to section 30(b) of the Evidence Act. She, however, submitted that this was not against the law. She prayed that court finds PF3A properly admitted by the trial Judge as required by sections 30 and 45 of the Evidence Act. She argued that in the event that court finds the procedure of admissibility of PF3A flawed, then the

court should find the evidence of PW1 sufficient to prove rape against the appellants. Counsel cited **Ntambala Fred v Uganda; Supreme Court Criminal Appeal No. 34 of 2015,** which dealt away with corroboration in sexual offence.

On the ingredient of sexual intercourse without consent of the victim, counsel submitted that prosecution relied on the testimony of the victim who testified that she was intercepted by the appellants from behind the house. Her evidence was that A2 and A3 removed her pants, before the appellants took turns to sexually assault her. She drew attention to the fact that PW1 's evidence was never challenged in cross examination. She testified that she *"did not willingly have sex with them".* This evidence was relied upon by the learned trial Judge to find that the sexual act was indeed performed on the victim without her consent.

On the third ingredient of participation of the accused, the respondent's counsel relied on the evidence of PW1 which was that A2 and A3 approached her first while she was behind the house. A3 got hold of her and assaulted her. A2 and A3 removed her pants and the sexual assault lasted about 30 minutes.' Counsel contended that although the appellants were unknown to PW1, she was able to identify them by moonlight. Counsel argued that the appellants were familiar since the victim had spent over 20 minutes together with them.

Further, that immediately PW1 was let loose she narrated the ordeal to PW2, who in turn told other people, and a search for the appellants, ensued. Counsel further submitted that PW1's evidence at cross-

examination details the participation of each of the appellants in sexually assaulting her.

Regarding the appellant's counsel's submission faulting the learned trial Judge for relying on the Police Statement of A3(Exhibit D1), and also for admitting A3's police statement without conducting a trial within a trial, counsel contended that Exhibit D1 was a plain police statement and not a confession statement to warrant a trial-within-a-trial. He invited this court to find that the prosecution correctly proved the element of participation against the appellants in sexually assaulting the victim.

Regarding the identification of the appellants by the victim, counsel submitted that PW1 had the opportunity to observe her assailants for more than 30 minutes and identified them with help of a moon lit sky. Counsel relied on the evidence of PW2 who testified that there was electricity and bright light from the bulbs at the party. She submitted that from her evidence, PW1 spent more than 20 minutes seated with the appellants after the rape which implied that she had enough time to identify them. PW4 who conducted the identification parade, noted that the victim was able to identify each of the appellants. Counsel for the respondent invited this court to find that the appellants admitted that they were at the introduction ceremony and that the victim properly identified them on the fateful night.

Regarding the contradictions and inconsistences, counsel submitted that while counsel for the appellants abandoned ground 3, throughout her submissions, she argued that the prosecution evidence was marred by numerous contradictions and inconsistencies.

She submitted that the ambiguities, if any, do not amount to contradictions and inconsistences sincere they were not deliberated untruthfulness. She added that each witness had a different personal account and recollection of the events that occurred on the fateful night. Counsel argued that such difference in ocular variations do not go to the root of the case as to cast doubt on the evidence as a whole.

Ground Two

The Learned Trial Judge erred in law and fact when she relied on the evidence improperly conducted identification parade leading to a miscarriage of justice.

Counsel submitted that the appellants did not demonstrate how the identification parades were improperly conducted leading to a miscarriage of justice. Regarding the contradiction in the evidence of PW1 and PW4 (Gabriel John) who conducted the identification parade he submitted that looking at the Identification Parade Report (Exhibit P1) in respect of A1, PW4 noted that victim was able to identify A1 during the parade because the **"the victim had enough time with the suspect before and after rape and she could identity him by the small beard (goatee)."**

Counsel contended that the victim did identify A1, but not based only on the red cap won by A1 as alleged by the appellants' counsel. He submitted that the witness was able to identify A1, and indeed the other two appellants, owing, largely, to the fact that she was held hostage and forced to hang out with this group for an extended period after the rape

and there was bright moonlight. His submission was that the victim finally picked out the appellants easily during the identification parade, based on the above factors. Counsel for the respondent concluded that the identification parades in respect of the appellants were properly conducted.

Ground Three

That the trial Judge erred in law and fact when she relied on hearsay evidence.

Counsel for the respondent submitted that the appellants' counsel is misguided on what constitutes hearsay evidence. He relied on **Apea Moses v Uganda; Criminal Appeal No. 0653 of 2015** and counsel invited this court to be persuaded by the Canadian Supreme Court Case of **R *v* Khelawon, [2006] 2 S.C.R. 787** where it was held as follow:

> *Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence. Because hearsay evidence comes in a different form, it raises particular concerns. The general exclusionary rule is a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination. The fear is that untested hearsay evidence may be afforded more weight than it deserves. The essential defining features of hearsay are therefore*

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the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant. I will deal with each defining feature in turn.

Counsel for the respondent submitted that the above description of the hearsay rule clearly proves that the facts relied on by the appellant to allege hearsay vary significantly from what the law envisages hearsay to be. He added that from the elaborate definition of hearsay evidence in **Apea Moses** (supra), the evidence of PW2 based on what she was told by PW1 does not amount to hearsay evidence since PW1 testified, and the defence had the opportunity to cross examine her. Further, PW3's evidence was what PW1 told him as regards her encounter with the appellants. As already stated, PW1 was cross-examined during the trial. Counsel for the respondent asked court to find that the said evidence as alluded to by counsel for the appellant does not amount to hearsay.

Ground Five

That the sentence was manifestly harsh and excessive: Counsel submitted that the appellants did not, in any way, demonstrate how the sentence of 50 years was harsh and excessive when the maximum sentence prescribed by law for the offence of rape is death. She cited **Othieno John v Uganda; Criminal Appeal No. 174 of 2020** to submit that the learned trial Judge properly exercised her discretion within the precincts of the law and invited court to consider the 50 years' imprisonment handed to the appellants was lenient. Considering the fact that the appellants ganged up on the victim; and raped her; exposing her

to the risk of contracting HIV/AIDS; the sentence was lenient. In light of the above arguments, the respondent's counsel prayed that court dismisses the appeal, and upholds the conviction and sentence of the trial court.

Consideration of the Appeal

We have cautiously studied the Court record and given due consideration to the submissions for either side and are grateful to both counsel for the authorities cited and supplied. We also took the liberty to look beyond authorities not cited but applicable and relevant to this appeal.

This being a first appeal from the decision of the High court in the exercise of its original jurisdiction we are abundantly aware that our duty as set out in rule 30 of the Rules of this court is to retry, re-appraise and re-examine the matter by subjecting the evidence to a fresh and exhaustive scrutiny and to arrive at our own conclusions on fact (see rule 30 of the Rules of this court). In evaluation of evidence, we have borne in mind that we neither saw nor heard the witnesses testify and have made due allowance for that fact. (See **Pandya v R [1957] EA 336, Sette and Another V Associated Motorboat Company; [1968] EA]23 and Kifamunte Henry v Uganda; SCCA No. 10 of 1997).**

Ground One.

The learned trial Judge erred in law and fact when she relied on the improperly conducted identification parade leading to a miscarriage of justice.

The law on the conduct of Identification Parades is clearly laid down in **Sgt. Baluku Samuel and Anor v Uganda; [2018] UGSC 26 (24 May 2018);** where the Supreme Court reiterated the rules governing how an identification parade should be conducted as first enunciated in **R v Mwango s/o Manaa; [1936] 3 EACA 29** and emphasized in **Ssentale v Uganda; [1968] EA 365** and **Stephen Mugume v Uganda, Criminal Appeal No. 20 of 1995(SC)**. For clarity we shall proceed to restate these rules.

1. *That the accused person is always informed that he may have a solicitor or friend present when the parade takes place.*
2. *That the officer in charge of the case, although he may be present, does not carry out the identification.*
3. *That the witnesses do not see the accused before the parade.*
4. *That the accused is placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself.*
5. *That the accused is allowed to take any position he chooses, and that he is allowed to change his position after each identifying witness has left, if he so desires.*
6. *Care to be exercised that the witnesses are not allowed to communicate with each other after they have been to the parade.*
7. *Exclude every person who has no business there.*
8. *Make a careful note after each witness leaves the parade, recording whether the witness identifies or other circumstances.*
9. *If the witness desires to see the accused walk, hear him speak, see him with his hat on or off, see that this is done. As a precautionary measure it is suggested the whole parade be asked to do this.*

10. See that the witness touches the person he identifies.

11. At the termination of the parade or during the parade ask the accused if he is satisfied that the parade is being conducted in a fair manner and make a note of his reply.

12. In introducing the witness tell him that he will see a group of people who may or may not contain the suspected person. Don't say, "Pick out somebody", or influence him in any way whatsoever.

13. Act with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably."

The Supreme Court held that every police officer conducting an Identification Parade should abide by the above rules and should inculcate in himself or herself the practice of always abiding by them to the letter. This would ensure that both the accused person and the court are satisfied with the conduct of the identification parade even if the accused may agree or not agree with the outcome of the conduct of the identification parade.

The identification parade in this particular case raises two concerns; one whether the parade was properly conducted and two; whether the complainant was able to identify the appellants at the scene of crime.

Critical scrutiny of the Identification Parade Report (Exhibit P1) which relates to A1 and the testimony of PW4; the parade was conducted with 8 other persons of the same appearance. It was stated that the officer kept changing clothes and positions of A1 who did not object to the parade. It is not disputed that at all times, PW1 identified him as one of the men who ravaged her based on the fact that she had ample time and distance with the suspect before,

during and after the rape and could identify him by the beard on his chin (aka goatee). There is no evidence to show that PW1 was exposed to the appellant before the parade nor that PW1 was allowed to communicate with the appellants. PW1 identified A1. When A1 was asked for his comment on the manner in which the parade was conducted he made no comment neither did he contest the report (Exhibit P1) nor challenge this piece of evidence.

As regards A3, PW4 testified that an identification parade was conducted and PW1was able to point out the persons who had sexually assaulted her. The Identification Parade Report marked Exhibit P2 states that A3 was the suspect. A3 was informed by IP Ekichu John that he was to be put up for identification by witnesses. He was further informed that eight other persons were to appear with him at the parade. They were of similar height, skin tone, similar appearance and A3 was to be placed in no particular order to the rest. The report revealed that four people witnessed the parade.PW1 was able to identify A3 although on the fateful day they were in a group. and he was putting on a sweater. It is recorded in Exhibit P2 that the suspects were changed in position and clothing and each time PW1 was able to identify A3 and A3 did not give any response to the question as to whether he was satisfied with the manner in which the parade was conducted.

With regard to A2, PW4 testified that an identification parade was conducted in respect of A2 by PW1 in his presence. PW4 testified that PW1 was able to identify A2 and others after they had raped her and had

enough time to identify them. A2 was informed by IP Ekichu John that he was to be put up for identification by witnesses in a case of rape with other 8 people of similar appearance and A2 did not object. PW1 stated that she was able to identify A2 after they had raped her and had enough time with them. It can also be deduced from Exhibit P3 and the testimony of PW4 that the positions of suspects were changed when the suspects paraded changed clothes and A2 did not give a response to his satisfaction with the conduct of the parade.

We have laboured to go through the testimony of PW4 and Exhibits P1, P2 and P3, the identification parade reports, and we find that proper identification parades were conducted in line with the procedure laid out in **R v Mwango s/o Manaa (supra)** and emphasized in **Ssentale v Uganda (supra).**

The appellants' counsel's argument that PW1 did not mention the red cap holds no merit since it was not relevant and was not the only requirement for PW1 to identify him. His beard is what PW1 identified him by.

Accordingly, this aground of appeal fails.

Grounds Two and Three

The learned trial Judge erred in law and fact when she relied on the prosecution evidence which was marred with inconsistences and discrepancies and **she also erred in law and fact when she failed to take into account other co-existing facts which caused doubt, hence leading to a miscarriage of justice.**

We shall resolve ground two and three together. Counsel for the appellants submitted that the prosecution evidence was marred by inconsistences and discrepancies which the trial Judge ought to have considered and that any account that caused doubt ought to have been resolved in the appellant's favour.

Counsel for the appellant submitted that the testimony of PW2 and PW3 contradicted the testimony of PW1 when they testified that PW1 took them to the place where she had gone for a short call before being attacked yet PW1 did not mention this in her testimony. Further, that PW3 testified that music was stopped yet again, ***PW***1 & PW2 did not mention this, and they were at the function that day. Counsel contended that the evidence of PW1 and PW2 contradicted PW3's testimony and that PW5 contradicted PW1, PW2 and PW3's testimonies, when they made no mention of going to the hospital with the police.

Counsel for the respondent submitted that there were no contradictions or inconsistences in the evidence but rather each witness gave an account according to their recollection of events of the night. Counsel proffered that the differences in their statements do not go to the root of the matter.

Black's law dictionary sixth Edition defines "*contradict to mean to disapprove. To prove a fact contrary to what has been asserted by a witness.*"

Inconsistent is defined as "*mutually repugnant or contradictory. Contrary, the one of the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other...*"

The law on the effect of contradictions and inconsistencies in the prosecution evidence was articulated in **Obwalatum Francis v Uganda, Criminal Appeal No. 30 of 2015,** where the Supreme Court held that:

> "***The Law on inconsistency is to the effect that where there are contradictions and discrepancies between prosecution witnesses which are minor and of a trivial nature, these may be ignored unless they point to deliberate untruthfulness. However, where contradictions and discrepancies are grave, this would ordinarily lead to the rejection of such testimony unless satisfactorily explained.***"

In **R v A.M, 2014 ONCA 769,** the Ontario Court of Appeal in Canada, commenting on the significance of inconsistencies in evidence stated:

"*...Inconsistencies vary in their nature and importance. Some are minor, others are not. Some concern material issues, others peripheral subjects. Where an inconsistency involves something material about which an honest witness is unlikely to be mistaken, the inconsistency may demonstrate a carelessness with the truth about which the trier of fact should be concerned.*"

The Supreme Court of Uganda in **N00875 Pte Wepukhulu Nyuguli v Uganda (Criminal Appeal 21 of 2001) [2002] UGSC 14 (04 March 2002), held that;**

> "*It is trite law that minor inconsistencies, unless they point to deliberate untruthfulness on the part of prosecution witnesses, should be ignored and that major ones which go to the root of the case, should be resolved in favour of the* accused **(See Alfred Tajar v Uganda Cr. Appeal No. 167 of 1969 EACA)** (unreported). *But each case must be decided on its facts.*

Further, in **Sgt. Baluku Samuel and Anor v Uganda [2018] UGSC 26 (24 May 2018)** the Supreme Court noted: -

> *"We are aware that in assessing the evidence of a witness and the reliance to be placed upon it, his or her consistency or inconsistency is a relevant consideration.* This Court in **Sarapio Tinkamalirwe v Uganda, Criminal Appeal No. 27 of 1989 (SC)** held as follows:
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> > *"It is not every inconsistency that will result in a witness testimony being rejected. It is only a grave inconsistency, unless satisfactorily explained, which will usually, but not necessarily result in the evidence of a witness being rejected. Minor inconsistencies will not usually have the effect unless the Court thinks they point to deliberate untruthfulness."*

In criminal law and the law of evidence, there is no specific number of witnesses required to testify on a fact and for court to believe the fact. (See **section 133** of the Evidence Act).

One credible witness can attest to a matter and if court finds that witness credible and truthful then his or her evidence can be taken by court to be truthful. Consequently, a conviction can be solely based on the testimony of the victim as a single witness, provided the court finds her to be

truthful and reliable. The fact that other witnesses did not mention the same fact does not disqualify her testimony.

The Supreme Court in **Ntambala Fred v Uganda; Criminal Appeal No. 34 of 2015,** held that:

"...a conviction can be solely based on the testimony of the victim as a single witness, provided the court finds her to be truthful and reliable".

In other words, for a testimony to be contradictory there must be a prior testimony it disapproves and for a testimony to be inconsistent, there must be another testimony to compare it with and they do not match, or they are at variance. With the above principles in mind, we shall consider the alleged inconsistencies in the prosecution evidence referred to by counsel for the appellant.

What counsel for the appellant noted as inconsistences and contradictions are but different accounts of events by different persons. What the evidence of PW1 PW2 and PW3 prove is that each immediately heard about the rape. This means PW1 contemporaneously reported the rape. The evidence of the three witnesses goes to show the perception and level of detail they each received and retained about what was reported. This is by no means contradictory. Failure by one of them to mention an incident or detail in testimony does not necessarily render it inconsistent or contradictory. It lends credence to the fact that these are individual story lines. They are not simply parroting what they heard.

In the present case, PW1 took oath and gave her evidence. The trial Judge who had the opportunity to see her testify and scrutinize her

demeanour, believed her to be truthful, credible and articulate about the persons that had attacked and raped her. A Medical report confirmed that PW1 was raped, she was able to identify the rapists in court and at the identification parade without difficulty. A2 was arrested at the party. It is immaterial whether PW1 took PW 2 and PW3 to the spot from whither she was raped. It is equally immaterial as to how many villagers identified the appellants or not and whether the music was stopped or not to make an announcement. These details do not go to the core of this matter. What is material is that the appellants had unlawful carnal knowledge of PW1 without her consent. The prosecution had a duty to prove that PW1 was raped. On her part PW1 identified her attackers and placed them at the scene. She identified them at a properly conducted identification parade. The trial court believed her testimony and also relied on the testimonies of other witnesses. Additionally, the evidence implicating the appellant in the commission of the offence, and which corroborated PW2's evidence can also be found in the evidence of PW3, PW4, PW5, PW6 and in the medical evidence adduced by PW6. We are inclined to agree with the submission of learned counsel for the respondent that there was no contradiction between PW1's evidence and that of PW2, PW3, PW4, PW5, PW6.

Regarding the arrest of the appellants, counsel queried the evidence of PW 2 who testified that she saw A2 *running when she pointed at him to be arrested. Counsel faulted PW2 for changing her statement during cross-examination when she stated that A2 was at home.*

Our re-appraisal of the record and the testimonies of PW1, PW2 and PW3 proves that A2 was arrested at the venue of the party where the rape took place. PW4 testified that by the time they got to the scene of the crime, A2 had been arrested at the venue and he revealed who his partners in crime were. A2 in his testimony also confirmed that he was at the party until morning when he was arrested at the party and taken to police.

Counsel for the appellant invited this court to re-evaluate the prosecution evidence with regard to the police statement relied on and marked (Exhibit D1). His submission was that the trial Judge ought to have conducted a trial within a trial since A3 had retracted his statement.

The purpose of a trial-within-a-trial was laid down in **Amos Binuge & ors v Uganda, Criminal Appeal No. 23 of 1989,** where court propounded that the purpose of a trial-within-a-trial is to decide upon the evidence of both sides, and whether a confession made by an accused can be admitted. A trial within trial is conducted so as to prove beyond reasonable doubt that a confession was indeed made by the free-will of the maker. It follows that the only circumstance in our criminal trials where the procedure is used is for the test as to the voluntariness of the confession made by an accused person. It is, therefore not required in law, to hold a trial within a trial to test a confession unless the issue of voluntariness is clearly raised.

It is noted from the record of appeal that the police statement being referred to does not form part of the record of appeal and court has not heard the opportunity to look at it. However, the law on the missing part of the record has been set out by this court in various authorities.

In Ephraim Mwesigwa Kamugwa v The Management Committee of Nyamirima Primary School; Court of Appeal Civil Appeal No. 101 of 2011, [5th August 2019] UGCA, Fredrick Egonda – Ntende JA analysed the law on incomplete record of appeal thus:

> *"...The law on the missing record of proceedings has long been established. Where a record of trial is incomplete by reason of some parts being omitted or gone missing or where the entire record goes missing, in such circumstances the appellate court has power to order a retrial or a reconstruction of the record by the trial court.* **(See Fast African Steel Corporation Ltd v Statewide Insurance Co. Ltd [1998-2000] HCB 33)** *and in this matter concluded that the materials that were available were sufficient to bring the matter to its logical conclusion rather than ordering a retrial.*

In Jacob Mutabazi v Seventh Day Adventist Church; Court of Appeal Civil Appeal No. 088 of 2011, court held;

> *"That where reconstruction of the missing part is impossible for whatever reason but the court forms an opinion that all the available material on record is sufficient to take the proceedings to a logical end, the court may proceed with the partial record as long as none of the parties to the appeal is prejudiced."*

The court has found that the data available on the record is sufficient to arrive at a verdict without recourse to a missing police statement and

that failure to rely on it will neither prejudice the appellants nor the respondents.

In **Chemonges Fred v Uganda; Criminal Appeal 12 of 2001, (19 February 2003)** the Supreme Court held that:

"*It is well established that where a police statement is used to impeach the credibility of a witness and such statement is proved to be contradictory to his testimony, the court will always prefer the witness' evidence which is tested by cross-examination."*

In **Mureeba and Others v Uganda; Criminal Appeal 13 of 2003, (21 July 2006)**; the Supreme Court noted thus about police statements:

> "*It is trite that for a police statement to be treated as evidence, it must be properly proved and admitted in evidence unless the authenticity of that statement is not challenged. If it is not proved, it cannot be acted upon by any Court".*
> *Generally speaking, it is insufficient for counsel for the accused to merely require the witness to confirm if he or she signed the statement. It should also be ascertained whether the statement was read back to the witness and he or she confirmed it to be correct before appending his or her thumbprint. Once the witness disputes the contents (or some of them) in the statement, the party seeking to rely on the statement has to call the recording officer to prove the statement. In the instant case, our finding is that the police statements of PW1 and PW2 were not properly proved although they were admitted in evidence. In the result, they cannot be acted upon to discredit the testimonies of the two witnesses."*

A3 testified that he made a statement after he had been arrested by police, which he signed; the document was presented to him and he acknowledged that it was his signature which appeared on the police statement, written in English. However, he stated that he does not speak

English. The prosecution presented the police statement to court during trial which A3 had made, he acknowledged making it but alleged that it was not read back to him when he made it, the victim was at police. The contents of the police statement contradict the evidence given in examination in chief at the trial. The question then is when there are contradicting testimonies from the same person which one will the court rely on? The evidence adduced in examination-in-chief is to the effect that A3 did not rape the victim and during cross-examination he admits to making a statement which tells the story that A1 and A2 indeed raped the victim.

Whereas counsel for the appellant submitted that it was a confession, the same is not on court record for this court to establish whether it was a confession or a plain police statement. The trial Judge made reference to this document on page 5 of her judgment that A3 admitted knowing A1 and A2. From the record it seems to have been a plain police statement.

Be that as it may, there is still overwhelming evidence to prove that the appellants raped PW1. The testimony of PW1, the medical report, the testimony of PW2 that PW1 informed her immediately after the rape about who and where the rape was done and her being visibly distressed is still sufficient to prove that the appellants raped PW1.

Grounds 1 and 2 are therefore without merit and must fail.

Ground Four

The learned trial Judge erred in law and fact when she relied on hearsay evidence.

The Appellants' counsel submitted that PW 2 and PW3 's testimony was hearsay and therefore inadmissible.

The law of evidence is clear. All evidence relied on by parties to support their matters before the courts of law should fall under the rule of best evidence and where it is oral evidence it ought to, as much as possible be direct evidence as required under section 59 of the evidence Act which states:

> **59. Oral evidence must be direct.**
>
> Oral evidence must, in all cases whatever, be direct; that is to say—
>
> (a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it;
>
> (b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he or she heard it;
>
> (c) if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he or she perceived it by that sense or in that manner;
>
> (d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

Hearsay is evidence of a statement that was made other than by a witness while testifying at the hearing in court and that is offered to prove the truth of the matter stated.

In **Apea v Uganda; (Criminal Appeal 653 of 2015) [2021] UGCA 4 (25**

February 2021) hearsay was defined as:

> *"Hearsay evidence refers to any statement, whether a verbal statement, written document or conduct, which is made, generated or which occurred out of court involving a person who is not produced in court as a witness, and where the statement is presented as testimony to prove the truth of the facts which they assert."*

In **APEA v Uganda (supra)** the court observed that hearsay evidence is on the whole inadmissible, subject to certain exceptions. The rationale for the hearsay rule is to guard against the dangers of the miscarriage of justice which may result owing to the lack of the opportunity to produce a key witness. It is also trite that the right to confront the witness against the accused in cross-examination helps to test the reliability and credibility of the witness's evidence and promotes a fair trial.

In **Lee v Illinois; 476 US 530,** the US Supreme Court held:

> *"On one level, the right to confront and cross-examine adverse witnesses contributes to the establishment of a system criminal justice in which the perception as well as the reality of fairness prevails. To foster such a system, the Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial."*

In other words, during examination-in-chief the party lays out its evidence in the best way possible. This evidence is thereafter subjected to cross-examination and rigorously tested. Where the witness is pinned down in cross-examination, the evidence of that witness fails. Where the witness withstands cross-examination, his or her evidence stands. A party who first led the witness is equally entitled to re-examination. This

is the final part of questioning of a witness at trial following their cross-examination. It enables the party who first called them to ask further questions, but only if those questions relate to a matter which has arisen during the cross-examination of that witness.

As a rule of general application, only direct evidence will be admitted in court save for where there are exceptions which are either those provided for in the law or have sprung up as a matter of judicial decisions. Exceptions to the hearsay exist. An example is statements spurred by excitement or extreme stress. For example, dying declarations, where they are admissible, are an exception to the hearsay rule. See **Wabomba Namonyo alia Musamali v Uganda; 194 of 2020; Ntirenganya v Uganda, Court of Appeal, Criminal Appeal No. 109 of 2017; Jasinga Akum v R (2) 1954 21 EACA at page 334** When a person blurts out a statement during the stress of the moment, anyone who hears the statement may testify about it. It is hard to ignore the stressful statement of a person who confesses that their body has been sexually violated by another. In **Mayombwe Patrick v Uganda, Criminal Appeal No. 17 of 2002,** this court held that "*a report made to a third party by a victim in a sexual offence where she identifies her assailant to a third party is admissible in evidence.*" It should be noted that hearsay is admissible in sexual offences in certain circumstances. In **Badru Mwindu v Uganda, Criminal Appeal Case No. 15 of 1997 (1998) UGSC 23**, a girl of 5 years was defiled by a **boda-boda** man and as soon as he dropped her home, the victim told the house girl what had happened to her. She confronted the suspect who denied. The house girl examined the victim and confirmed that she was

defiled and informed the mother and the girl was subsequently taken to hospital for examination. The matter went for trial and the victim did not testify but the house girl and the mother of the victim testified. The accused was convicted. He appealed to Court of Appeal, which confirmed the conviction and sentence. He then appealed to the Supreme Court, which upheld the decision. The house girl's evidence, which was hearsay, was admitted but was corroborated with the proper identification of the appellant and further corroborated with blood-stained knickers. This goes to show that the contemporaneous report of the minor to responsible adults was not hearsay especially where it was corroborated by medical and other evidence.

Further, in **Silage Buroro v Uganda, Criminal Appeal No. 102 of 1999 (2000) UGCA 42;** the appellant was convicted of defilement of a child basing on the statement of the child to her mother of the defilement. This court has variously held that the victims immediate report to the mother of what had befallen her and her crying while touching her private parts was evidence of the conduct of a visibly distressed victim. This corroborates the evidence of the child's mother and another prosecution witness. This reliance on victim's contemporaneous reports has roots from cases of rape.

In **Okiror Robert v Uganda, Court of Appeal Criminal Appeal No. 19 of 2019** this court found that the appellant was positively identified by the victim who also promptly informed her grandmother immediately thereafter and also informed Local Council One chairperson in the morning. His conviction for rape was upheld. **Aharizire Siliverio v**

Uganda; Court of Appeal Criminal Appeal No. 129 of 2002 is relevant in so far as the court of appeal accepted the contemporaneous reporting of the allegation of rape as evidence of an accusation for rape never mind that he was convicted of attempted rape. In **No. 10359 Sgt Canbera Dickson v Uganda; Court of Appeal Criminal Appeal No. 283 of 2003** the court of appeal accepted the evidence of the complainant when she testified that she told the mother of the appellant that he had raped her even where the mother of the appellant for love of her son had chosen to remain silent.

In the instant appeal, PW2 testified that she was told by the victim (PW1) that she was raped by three men. PW3 and PW2 testified and were subjected to cross-examination. Their evidence of what they heard from the victim about the rape is admissible as they provided further proof of the rape, even though the victim's evidence alone is sufficient. The testimony of PW2 and PW3 are not hearsay evidence.

The appellants also challenged the admissibility of PW6 Doctor Johnson Opolot's evidence for reason that he was not the author of Police Form 3A (Exhibit P7) which was a report by Dr. Oluka. The argument for the appellant was that the content of the report in relation to the rape was hearsay and they faulted the trial Judge for admitting the exhibit without stating the procedure she followed nor the law under which prosecution applied to have the exhibit tendered and admitted. The relevance of documents whose makers cannot be found is provided for under section 30 of the Evidence Act, provides as follows:

"Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves relevant facts ..."

Section 45 of the evidence Act provides thus:

"When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person is a relevant fact."

Article 126 enjoins courts to do substantive justice instead of majoring on minor technicalities. In **Uganda v Guster Nsubuga & Robinhood Byamukama; Supreme Court Criminal Appeal No. 92 of 2018**, The Supreme Court noted that:

"This is one of the cases where substantive justice requires that the anomaly be pointed out in the process of plea taking to be overlooked in favor of the wider cause of substantive justice. There is no denying the fact that we would not be here had the respondents would be asked to take plea after the amendment. It would have been neater. It would have removed any excuses. However, it would be expecting too much to demand that all trials must run like clockwork, short of which they would result in nullification of the entire trial. We do not live in a perfect world so we have to evaluate the impact of any particular imperfection on the entire trial."

In **Mobarik Ali Ahmed v The State of Bombay; [1957 AIR 857, 1958 SCR 328] The Supreme Court of India held,**

> "*We are, however, unable to see any objection. The proof of the genuineness of a document is proof of the authorship of the document and is proof of a fact like that of any other fact. The evidence relating thereto may be direct or circumstantial. It may consist of direct evidence of a person who saw the document being written or the signature being affixed. It may be proof of the handwriting of the contents,* or of the signature, *by one of the modes* provided in ss. 45 and 47 of the Indian Evidence Act. It may also be proved by internal evidence afforded by the contents *of the document...*"

In **R v E Venkatachala Gounder v Arulmigu Visweswaraswami; (2003) 8 SCC 752** the supreme court of India held that:

> *"In this case it was held that, if there is any objection to the evidence, it should be taken before the evidence is tendered. Once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by this failure, the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence. There are two reasons for this. Firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there. Secondly, in the event of a finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking the indulgence of the court for permitting a regular mode or method of*

proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties."(emphasis ours)

In the instant case, PW6 stated that he knew the author of the document Exhibit P7 having worked with him and that he had subsequently left the hospital without trace. PW6 testified that the examination was carried out when they were both at that hospital though he did not participate in the examination of PW1. He confirmed that he was familiar with the handwriting of Dr. Oluka and that the report was authored by the latter.

The essence of section 30 of the Evidence Act is to ensure that the court admits relevant facts made by a person who cannot be produced in court on account that they are dead, cannot be found or cannot be procured without an amount of delay or expense. Other witnesses that can attest to the reliability of evidence are allowed under section 45 of the Evidence Act which affords a person familiar with the handwriting of the author to tender in the document as evidence on the basis that the author made the questioned document. The validity or the findings of the exhibit tendered are another issue all together. PW6's major task was to tender the document as a person that knew or was familiar with Dr. Oluka's handwriting and that he (Dr. Oluka) authored Exhibit P7. The content may not be conclusive proof of a fact.

At trial counsel for the appellants appeared to have not objected to the admission of the above exhibits. It is not indicated anywhere on the record of appeal that the appellants contested the admission of the exhibit P7 and yet the appellant now seeks to discredit it on appeal.

Irregularities or errors in the mode or manner of proof of documents of tendering the said document should always be scrutinised closely during the trial particularly at the tendering in of such documents into evidence. It does not help to come up at a later stage and contest their existence. The document cannot be assailed at a later stage on the ground that the mode or manner of proof was incorrect unless there is overt proof to the latter statement.

We are bound by the above-mentioned Supreme Court decisions of Uganda and persuaded by the decisions from India and agree that as a rule of fair play, the ultimate test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. We find that during trial, the documents were properly tendered without objection.

This ground also fails.

Ground Five

The learned trial Judge erred in law and fact when he sentenced the appellants to 50 years' imprisonment which was manifestly excessive in the circumstances.

It is trite that this Court can only interfere with the discretion exercised by the lower Court in imposing sentence where the sentence is manifestly excessive or so low as to amount to a miscarriage of justice or where the court ignores to consider an important matter or circumstances which ought to be considered while passing sentence or where the sentence

imposed is wrong in principle. (See **Kiwalabye Bernard v Uganda, SCCA No.143 of 2001).**

In **Kyalimpa Edward v Uganda, SCCA No 10 of 1995,** the court held that

> "*an appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. The court will not normally interfere with the discretion of the sentencing judge unless the sentences passed is illegal or unless the court is satisfied that the sentence imposed was manifestly so excessive as to amount to an injustice.*

We have carefully looked at the reasons given by the learned trial Judge in sentencing, the record of appeal and counsel's submissions. We find that the trial Judge took into consideration the aggravating factors raised against the appellant, however she did not seem persuaded to consider the mitigating factors. The appellants are young and have a chance to reform and return to society. A3 is already condemned living with HIV given the conditions in prison. All three are first offenders.

The trial Judge remarked that the appellants had condemned the victim AG and themselves to death when they had exposed her and other persons to HIV/Aids. The prosecution did not, however, adduce evidence to show that AG had indeed contracted HIV/Aids. We find the punishment meted out on the appellants excessive and harsh.

Therefore, taking into consideration the appellant's mitigating factors, we are inclined to agree with counsel for the appellant that the learned trial Judge ought to have considered the mitigating factors such as the youthful age of the appellant. In the circumstances, we hereby set it aside the sentence of 50 years' imprisonment.

Counsel for the appellants invited court to give an appropriate sentence in light of the already decided case of this court. She relied on **Adiga Adinani v Uganda, Court of Appeal, Consolidated Criminal Appeal 637 of 2014, [2021] UGCA 13 (30 March 2021).**

In **Yebuga Majid v Uganda, CACA No. 303 of 2009**, the 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.

In **Oyek Charles v Uganda, CACA No. 126 of 1999**, the appellate was convicted of rape and after taking into account the 4 years he had spent in lawful custody prior to his conviction, he was sentenced to 15 years' imprisonment. On appeal this court upheld the decision.

In **Ssemaganda Benard v Uganda, CACA No. 142 of 2012**, the appellant was convicted of rape and sentenced to 30 years' imprisonment. On appeal the court set aside the sentence for being harsh and excessive and substituted with the sentence of 17 years' imprisonment.

In **Okello Boniface v Uganda**, **CACA No. 169 of 2009,** the appellant was convicted of rape and sentenced to 15 years after considering time spent on remand. The court of appeal imposed a sentence of 16 years on the appellant.

We are satisfied that a sentence of 30 years' imprisonment from the date of conviction on the count of rape will meet the ends of justice in this case.

Under section 11 of the Judicature Act we now pass a fresh sentence of 30 years' imprisonment against each appellant. From this we deduct the 11 months and 2 weeks' period spent on remand. The appellants will now

serve a sentence of 29 years and 2 weeks' imprisonment W.E.F 4th February 2011.

Ground 5 succeeds.

We so order.

Dated at Mbale this 9th day of May, 2023

Catherine Bamugemereire
JUSTICE OF APPEAL

Christopher Gashirabake
JUSTICE OF APPEAL

Oscar Kihika
JUSTICE OF APPEAL