THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO. 0143 OF 2012

(CORAM: F.M.S Egonda-Ntende, JA, Hellen Obura, JA, and Stephen Musota, JA)

SSEMAGANDA BENARD::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of Hon. Justice Akiiki-Kiiza holden at Masaka High Court in Criminal Session Case No. 030 of 2012 delivered on 29/3/2012)

JUDGMENT OF THE COURT

Introduction

The appellant was indicted, tried and convicted of the offence of rape contrary to sections 123 and 124 of the Penal Code Act in the High Court at Masaka before Akiiki-Kiiza, J. He was sentenced to 30 years imprisonment. He has now appealed to this Court against both conviction and sentence.

Background to the Appeal

The facts of this case in so far as we could ascertain from the court record are that on 8/02/2010 the victim Edisa Nbaweesi (PW1) returned home very drank at around 10:00pm and went straight to bed. Her husband Kakooza Daniel (PW2) had gone to her co-wife's home. In that night PW3, Geoffrey Kityamuwesi and the other children in the house slept in PW1's bedroom. At around 2:00am PW3 heard people hitting the door. It fell down inside and he woke up. He saw the appellant with a lit tadoba, and another person (appellant's co-accused) enter the house. The appellant put the tadoba on the floor, undressed PW1 and

started raping her, while she was deep asleep. Appellant's co-accused fell on PW3 and another child and laid between them. Then PW3 and the other child went out and informed the neighbors who accompanied them to PW2. They narrated the incident to PW2 who went to his 1st home where PW1 was and found the appellant standing at the door. When PW2 pushed the door it fell on him then the appellant's co-accused) who was inside ran out and fled. He reported the matter to police and the appellant and his co-accused were arrested and charged with the offence of rape. They both denied the offence. They were tried and the appellant in his unsworn statement, while denying participation in the offence, said he had gone to PW2's home on the fateful night because he had heard the children of PW2 crying and PW2 even found him there. The trial Judge found that the case against the appellant's co-accused was mere suspicion that could not sustain a conviction and thereby acquitted him. As regards the appellant, the trial Judge found that the offence of rape had been proved beyond reasonable doubt and found him guilty of the offence of rape. He was convicted and sentenced to 30 years imprisonment, hence this appeal. The two grounds of appeal as set out in the memorandum of appeal are as follows;

> *"1. That the trial court erred in law and fact when it did not properly evaluate the evidence as a whole thus occasioning a miscarriage of justice*
>
> *2. That the trial court erred in law and fact when it passed a harsh sentence to the appellant without calculating his period spent on remand thus occasioning a miscarriage of justice against him."*

Representations

At the hearing of this appeal, Mr. Jurugo Isaac represented the appellant on state brief while Ms. Ann Kabajungu a Senior State Attorney from the Office of the Director Public Prosecutions represented the respondent.

Arguments for the Appellant

Counsel for the appellant submitted that the evidence of PW3 regarding the participation of the appellant is wanting. He faulted the learned trial Judge for believing PW3 yet he was not a truthful witness. Further, that the trial Judge did not consider the possibility that actually the 2nd accused person could have been the person who participated in this rape. He implored this Court to exercise its powers and duties as the 1st appellate court to subject the record to a fresh scrutiny and duly re-evaluate the evidence on record.

On ground 2, counsel sought leave from this Court to amend it, which was granted. The amended ground stated as follows:

> *"The trial court erred in law and fact when he passed a harsh sentence against the appellant thereby occasioning injustice to him."*

Counsel submitted that the sentence of 30 years imprisonment is harsh. He implored this Court to consider the mitigating factors on record and exercise its powers to interfere with the sentence of the trial court and reduce the said 30 years to a period of 20 years imprisonment.

Arguments for the Respondent

On ground 1, counsel for the respondent submitted that the evidence of PW3 was believable and free of error. He added that the trial Judge was right in finding that the appellant had been positively identified and placed at the scene of crime. She prayed that court upholds the conviction of the appellant on this ground.

On ground 2, counsel submitted that the sentence is neither harsh nor excessive considering the maximum penalty for rape which is death. She added that in the event that this Court is inclined to interfere with the sentence, the appellant be sentenced to 18 years imprisonment in accordance with the sentencing range for such offences.

Decision of the Court

We have carefully studied the court record and considered the submissions of both counsel and the issues they raised. We are alive to the duty of this Court as the first appellate court to review the evidence on record and to re-consider the materials before the trial Judge, and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. See: ***Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, SI 13-10*** **and** ***Kifamunte Henry vs Uganda, SCCA No 10 of 1997.***

In this appeal, the appellant contends that the last ingredient on participation in the offence was not proved. He specifically challenges the evidence of PW3, who was the single identifying witness contending that PW3 was not a truthful witness and that there is a possibility that the 2nd accused person was the person who participated in this rape.

The law on evidence of a single identifying witness was well settled in ***Abudala Nabulere & 2 ors vs Uganda, Court of Appeal Criminal Appeal No. 9 of 1978*** which the learned trial Judge relied on to arrive at his decision. The law was stated in that case as follows:

> *"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger..."*

In the instant case, PW3 gave a detailed account of what transpired in the fateful night when PW1 was raped. The learned trial Judge who observed PW3's demeanor as he testified expressed in his judgment that PW3 impressed him as a truthful and sincere witness. We have no reason to doubt that observation since we ourselves did not have the opportunity to observe the witness as he testified.

On the basis of the evidence adduced, the learned trial Judge was satisfied that the prosecution had proved the ingredient of participation of the appellant and the other ingredients of the offence. He found the appellant guilty of the offence of rape and convicted him.

Counsel for the appellant contended that had the trial Judge properly evaluated the evidence as a whole, she would not have convicted the appellant. We have re-evaluated the evidence on record as a whole to find out whether the trial Judge came to the right conclusion.

PW1, who had been pregnant at the time of the incident stated that on 8/02/2010 she went drinking and returned home drank at about midnight. She slept and did not know what happened. In the morning, when she woke up she realized that the door had been broken and its frame was also taken out. She also saw the pants that she had been wearing at the doorway and there were fluids and blood in her private parts and on the bed sheets. She also found the dress she was wearing lifted up her body and felt a lot of pain in her private parts. She was informed by her husband that she had been raped by the appellant and his co-accused. They reported the matter to police the following day and the appellant and his co-accused were arrested while she was examined in Masaka Hospital.

PW2, Kakooza Daniel the victim's husband testified that on that fateful night at around 2:00am he was in his 2nd wife's home when he heard his children crying. They were in the company of a one Kityamuwesi and Nantale Jamira. They informed him that the appellant and his co-

accused had kicked the door open. PW2 rushed to his home where PW1 was and found the appellant at the door way with a lighter which was not lit. His co-accused was inside the house but when he (PW2) pushed the door and it fell, he (appellant's co-accused) ran out and fled the crime scene in an underwear. PW2 lit a tadoba and he saw the victim sleeping on her back with her clothes folded up on her chest and her legs were apart. Her private parts had some liquid. He woke her up by splashing water on her head and informed her that she had been raped. They reported the matter to police and the appellant and his co-accused were arrested while PW1 was taken to hospital for medical examination.

PW3, Geoffrey Kityamuwesi testified that on that fateful night at around 2:00am, he heard people hitting the door and he woke up. His bed was 1 $^{1}/_{2}$ meters away from that of PW1. He then saw the appellant whom he knew by face lighting a tadoba whose light enabled him to see what was happening. He added that he saw the appellant removing PW1's clothes as she was deep asleep. Further that the appellant also removed his underpants which were yellow in color and started raping PW1. After about 40 minutes, PW3 woke up the other child in the house and they went to the neighbor, a one Nalumu to whom they narrated what had happened. They then went to PW2's 2nd home and also told him. They returned home and found the appellant still at the scene of crime while PW1 was still sleeping.

In his defence, the appellant stated that on that fateful night, while he was at his shop, he heard children crying and he went to find out from them what the problem was. One of them informed him that there was a person who had fallen on them. He asked him to light a tadoba but PW3 told him there was no paraffin. He then asked PW3 to take the tadoba to the shop for paraffin and as he gave him the tadoba a person he (appellant) did not recognize rushed out of the house, fell on the children and knocked him on his left elbow. The neighbors then took the children to PW2, who came to the house where PW1 was and found him still there. The following day at around 3:00 pm he was taken to police to make a statement.

The learned trial Judge found that the conditions for correct identification were unfavorable since the crime took place at night. He therefore warned himself and the assessors of the dangers of mistaken identity on the part of PW3 and having done so, he proceeded to evaluate the evidence. He believed the evidence of PW3 and found him to be a truthful witness. He stated as follows:

> *"I find that the prosecution witnesses, especially PW3, the small child, spoke the truth, but on the other hand, I find A1 as a mere liar…it is a small boy, PW3, who implicates the accused in the crime. He was present at the scene and he witnessed what A1 had done to the victim. It would be imaginable for this small boy to involve himself in adult wrangles and collude with his father to frame A1 with such heinous crime. I believe him when he said that he actually saw the accused rape his mother (PW1). I dismiss A1's claim of being a good samaritan on that night who had come to assist the children. I instead find that he was a villain who had come to sexually ravage the victim. I dismiss his defence as a mere pack of lies and I reject it as such. I believe the prosecution evidence as representing the truth. The assessors are of the same view."*

We have considered the principles stated in ***Abudala Nabulere & 2 ors vs Uganda (supra)*** as we re-appraised the evidence on record above. It is not disputed that the crime was committed very late in the night and as we have earlier noted, the trial Judge found the conditions unfavorable.

Be that as it may, upon our own re-evaluation of the evidence, we find that firstly, the appellant was well known to PW3. Secondly, PW3 saw the appellant at a very close range as his bed was 1 ½ meters from PW1's bed where the appellant was. Thirdly, the appellant had a lit tadoba whose light enabled him to see what was happening. These three factors favored correct visual identification of the appellant.

We are therefore in agreement with the trial Judge that much as the offence took place very late in the night, PW3 was able to identify the appellant as the person who raped his step-mother (PW1). In ***R vs Turnbull (supra),*** court held that identification by recognition may be more reliable than identification of a stranger. We must also observe that the appellant was found at the scene of the crime by PW1 on that fateful day and in his unsworn evidence he (the appellant) corroborated that evidence. It should also be noted that during mitigation proceedings, the appellant's counsel informed court that the appellant told him that he committed the offence because he was drunk and he regretted it. His counsel who argued this appeal also urged this Court to consider that factor in mitigation to give him a lesser sentence. With this overwhelming evidence on record, we cannot fault the learned trial Judge for finding that the appellant was the one who raped PW1. In the result, we find no merit in this ground and it therefore fails.

On ground 2, the appellant faults the trial Judge for imposing a harsh sentence against him thereby occasioning injustice to him. His counsel implored this Court to consider the mitigating factors and reduce the sentence. We note that during sentencing, the trial Judge took into account both the mitigating and aggravating factors and the period the appellant had spent on remand. However, we shall ourselves re-consider both the mitigating and aggravating factors in order to come to our own conclusion as to whether the sentence is harsh as contended.

The mitigating factors presented for the appellant were that; he is 36 years old. He has no wife but has 3 children, the youngest being 2 1/2 years old. He was on remand for 2 years and 5 months. His children are in custody of his father, who is 92 years old. Their grandmother died. He is repentant having told his counsel that he did commit the offence due to the fact that he had taken alcohol and he regrets it. A lenient sentence was prayed for. In aggravation, it was presented that; the offence attracts a maximum sentence of death. Rape is a brutal act

and the convict had no remorse. The victim was known to him. He violated the children's mother in their presence. A maximum sentence was prayed for.

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.

In ***Boona Peter vs Uganda, CACA No. 16 of 1997***, the appellant was convicted of rape and sentenced to 10 years imprisonment. On appeal against sentence on the ground that it was manifestly excessive, this Court dismissed the appeal and confirmed the sentence.

In ***Onaba Razaki vs Uganda, CACA No. 327 of 2009,*** this Court set aside the sentence of 15 years imprisonment for the offence of rape and substituted it with 14 years. The appellant had attacked the victim at 11:00 p.m. on her way from work and raped her in the grass.

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.

We note that the sentencing range in the above similar cases is between 10-15 years. We therefore find the sentence of 30 years imposed on the appellant in the instant case harsh and excessive. We accordingly, set it aside.

Having taken into account both the aggravating and mitigating factors set out above and the range of sentences for the offence of rape in the above cited authorities, we find a sentence of 17 years imprisonment appropriate in the circumstances of this case. However, since the appellant had spent a period of 2 year and 3 months in lawful custody prior to his conviction,

we deduct that period from the 17 years and sentence the appellant to 14 years 9 months imprisonment from the date of his conviction, that is, 4/05/2012.

In conclusion, the appeal against conviction is dismissed and the conviction is upheld. The appeal against sentence is allowed in the above stated terms.

Dated at **Masaka** this.....30th.....day of.....July.....2018

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Hon. Justice F.M.S Egonda-Ntende

JUSTICE OF APPEAL

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Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL

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Hon. Justice Stephen Musota

JUSTICE OF APPEAL