THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CONSOLIDATED CRIMINAL APPEALS NOS. 0380 OF 2014 AND 0725 of 2015

KAMAGARA NICHOLAS :: APPELLANT

VERSUS

UGANDA :::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Rukungiri before Bashaija, J, delivered on the 13th day of January, 2014 in Criminal Session Case No. 0059 of 2013)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA.
HON. MR. JUSTICE STEPHEN MUSOTA, JA.
HON. MR. JUSTICE REMMY KASULE, AG. JA.

JUDGMENT OF THE COURT

The two consolidated appeals, albeit filed separately by the appellant are from the same decision of the High Court (Bashaija, J.) wherein the appellant was convicted of the offence of Rape contrary to **Section 123** of the **Penal Code Act, Cap. 120,** and thereafter sentenced to 27 years and 6 months imprisonment.

Background.

The appellant was charged and tried for the offence of Rape. Upon conclusion of the trial, the facts as found by the learned trial Judge were that on the 6th day of July, 2011 at around 1:00 am at night, the victim, one Kyasiimire Beatrice together with Mathias Nuwabaine went out to collect grasshoppers at the washing bay opposite a coffee factory in Rukungiri town.

At about 3:00 am, they decided to go home to sleep, but they left other people still collecting grasshoppers. As they approached a spot near the premises which were formerly a bakery, they were met by six men hiding in the nearby eucalyptus trees. The men grabbed the victim and one of the men encouraged by the others started to undress her. All the six men

participated in the events which followed; they removed the victim's sweater, laid it on the ground and forced the victim to lie down on it. The men forcefully removed the victim's knickers and took turns to have sexual intercourse with her.

The victim's efforts at resisting were subdued. Even when she tried to make an alarm, the attackers covered her mouth and silenced her. However, Mathias Nuwabaine, who was with the victim when she was attacked by the six men managed to escape from the scene. He went and informed one Gareeba Betty, their aunt about the incident.

After the rape incident, the victim picked up her sweater from the ground and was escorted by of one of the rapists up to a place near home.

The next morning, the victim was taken on a boda boda to Rukungiri Police Station to report the incident. The victim was medically examined on Police Form 3 and found to have been subjected to sexual intercourse.

On the way back, the victim had identified the appellant to the boda boda rider, as one of the people who had raped her. The boda boda rider informed the police leading to the arrest of the appellant.

Subsequently, the appellant was duly charged and tried. He pleaded not guilty and the prosecution called witnesses to prove its case. The appellant set up the defence of alibi. The learned trial Judge convicted him nonetheless and sentenced him accordingly.

The appellant does not wish to contest the decision of the trial Court to convict him of Rape. He is, however, dissatisfied with the sentence imposed on him upon his conviction by the trial Court. With leave of this Court, the appellant has appealed against sentence only, on the sole ground that:

> **"The learned trial judge erred in law and fact by imposing a sentence of 27 years imprisonment on the appellant which sentence was harsh and excessive in the circumstances of the case."**

We must state that on 31st December, 2015, the appellant filed a Notice of Appeal, which was given the Appeal Number 725 of 2015. The appellant

had earlier filed a notice of appeal, which was given the Appeal Number 380 of 2014. Both the stated appeals are from the same decision of the High Court. Therefore, this decision concerns both appeals.

Representation.

At the hearing of the appeal, Mr. Muhanguzi Bruno represented the appellant on State Brief. Mr. Peter Mugisha, Learned State Attorney from the Office of the Director of Public Prosecutions represented the respondent. By the time this appeal was called for hearing, Uganda, like the rest of the world was dealing with a public Health Emergency put in place to reduce the transmission of the Covid-19 virus. The Government of Uganda had put in place restrictions on movement, including the movement of inmates from Government Prison facilities. Thus, the appellant who was an inmate at the Mbarara Government Prison Facility, could not be present in Court, but was able to follow the appeal from the Prison Facility via Zoom Video Conferencing Technology.

Appellant's Submissions

Counsel for the appellant relying on the Supreme Court decision of **Kiwalabye Bernard vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001** where it was held that an appellate court is not to interfere with the sentence imposed by the trial court which has exercised its discretion unless the exercise of that discretion is such that it results into a sentence which is manifestly excessive or so low so as to amount to a miscarriage of justice, or when the said sentence is based on a wrong principle, contended that the sentence of 27 years and 6 months imprisonment the trial Court imposed upon the appellant was harsh and excessive in the circumstances.

This is because the appellant was a first offender aged only 19 years at the time when he committed the offence, and at such a tender age, he had the capacity to reform and contribute positively to society. Further, the appellant was a family man with children whom he was looking after. Counsel contended that the stated mitigating factors had not been

considered by the learned trial Judge while sentencing the appellant.

Learned counsel for the appellant further urged this Court to interfere with the sentence of the learned trial Judge so as to ensure that there is consistency in sentencing, a factor the learned trial Judge had not taken into consideration while sentencing the appellant. He submitted that the sentence imposed on the appellant ought to have been within the range of sentencing in previously decided cases but it was not within such a range. In support of his submission, counsel cited **Mbunya Godfrey vs. Uganda, Supreme Court Criminal Appeal No. 4 of 2011** where it was stated that:

> **"We are alive to the fact that no two crimes are identical. However, we should try as much as possible to have consistency in sentencing."**

Counsel for the appellant referred to previously decided cases of rape where the range of the sentences imposed was between 12 to 16 years imprisonment.

In **Sam Buteera vs. Uganda, Supreme Court Criminal Appeal No. 21 of 1994,** the Supreme Court confirmed a sentence of 12 years imprisonment for defilement of a victim of 11 years by an adult herdsman.

In **Katusi Alisamu Alias Kahima vs. Uganda, Court of Appeal Criminal Appeal No. 218 of 2011**, where the appellant who was convicted of aggravated defilement had been sentenced to 14 years imprisonment by the trial High Court. However, on appeal this Court reduced the sentence to 12 years imprisonment. The victim in that case was 10 years old.

Counsel also referred the Court to **Muyambi Laban vs. Uganda, Court of Appeal Criminal Appeal No. 671 of 2014**, where this Court set aside a sentence of 22 years and substituted it with 15 years imprisonment for defilement of a victim aged 6 years who was a pupil.

In view of the above submissions, counsel for the appellant prayed this Court to reduce the sentence imposed on the appellant to 12 years imprisonment.

Respondent's Submissions

Mr. Mugisha, learned State Attorney, opposed the appeal and supported the sentence passed upon the appellant by the High Court. Counsel for the respondent pointed out, quite rightly in our view, that sentencing is at the discretion of the trial court and the appellate court could only interfere with the sentence if the trial court acted on wrong principles.

Counsel contended that the learned trial Judge had been lenient as the maximum sentence for rape was death. He pointed out that the learned trial Judge had passed a lawful sentence after being guided by the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013**, which provide for 35 years imprisonment as the starting point for the offence of aggravated defilement. In the present case, the appellant was convicted of rape and not aggravated defilement. Counsel further submitted that the learned trial Judge had taken into account the aggravating and mitigating factors in this case.

Counsel urged this Court not to interfere with the decision of the trial Court because it was arrived at without any of the principles laid down in the **Kiwalabye vs. Uganda case (supra)** being violated, and to dismiss the instant appeal.

Resolution of the appeal.

We have considered the submissions of Counsel on either side, perused the court record and the law and authorities cited to us.

This Court notes that the appellant was sentenced to 27 years and 6 months imprisonment, and not to 27 years imprisonment as stated in the single ground of appeal. The wording of the said ground is thus incorrect to that extent.

We are alive to the duty of this Court as a first appellate Court, to re-appraise all the evidence and to come up with our own inferences of law and fact. **See Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions S.I 13-10,** and **Bogere Moses versus Uganda, Supreme Court Criminal Appeal No. 001 of 1997.**

The principles upon which an appellate Court should interfere with the sentence imposed by the trial Court were considered in **Bernard Kiwalabye versus Uganda, Supreme Court Criminal Appeal No. 143 of 2001**, the court had this to say,

> **"The appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the 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 a trial court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."**

Further, in **Kizito Senkula versus Uganda, Supreme Court Criminal Appeal No. 024 of 2001** the Supreme Court observed:

> **"...In exercising its jurisdiction to review sentences, an appellate court does not alter a sentence on the mere ground that if the members of the appellate court had been trying the appellant they might have passed a somewhat different sentence; and that an appellate court will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in James vs. R (1950) 18 EACA 147, it is evident that the judge has acted upon some wrong principle or over-looked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case."**

While passing sentence on the appellant, the learned trial Judge stated as follows:

> **"The offence is a grave one which attracts a maximum death penalty. The State has however not prayed for the same. In arriving at sentence, court has taken into account the gravity of the offence, the manner of commission and the demeanor of convict (not repentant). The period spent on remand. All these put together, the convict is sentence to 27 ½ (TWENTY SEVEN YEARS AND SIX MONTHS IMPRISONMENT)".**

It is very clear to us from reading the above extract that in sentencing the appellant, the learned trial Judge did not take into account any of the mitigating factors in favour of the appellant. The learned trial Judge only

considered the aggravating factors and the period spent by the appellant on remand.

We note that the appellant was only 19 years at the time he committed the offence. He was a first offender and a family man with children to look after.

In **Kabatera Steven vs. Uganda, Court of Appeal Criminal Appeal No. 123 of 2001** (unreported), it was emphasized that the age of the convict is a material factor to be considered in sentencing. In that case, the appellant was convicted of defilement and sentenced to 10 years imprisonment. On appeal to this Court, it was argued that the learned trial Judge failed to take into account the age of the appellant before imposing the sentence. In allowing the appeal on sentence this Court said:

> **"The only factor that he did not take into account was the age of the appellant. We are of the opinion that the age of an accused person is always a material consideration that ought to be taken into account before a sentence is imposed".**

In that case, owing to the omission of the trial Court to take into account the age of the appellant, among other mitigating factors, the sentence of 10 years imprisonment imposed on the appellant was substituted with one of 5 years imprisonment.

In our view, since the learned trial Judge omitted to take into account the mitigating factors pointed out above, the sentence he imposed shall be interfered with by setting it aside.

Pursuant to **Section 11** of the **Judicature Act, Cap 13,** which gives this Court the jurisdiction to impose a fresh sentence where it has set aside the sentence of the trial Court, we shall proceed to determine an appropriate sentence.

In arriving at the appropriate sentence, we have considered the mitigating factors for the appellant, namely: the appellant was a first offender, and he was a relatively young man of the age of 19 years at the time of the commission of offence. The appellant had also been on remand for a period of 2 ½ years prior to his trial and conviction.

We have also considered the aggravating factors. The appellant committed a very serious offence which attracts the maximum death penalty. We have considered the degree of psychological injury and other negative effects inflicted on the victim when she was raped and introduced to sex at such an early age of 14 years.

Having noted the above, we are also conscious of the need for courts to maintain consistency in sentencing. The sentencing range for the offence of rape under **the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** is stated to be 30 years up to death. This Court and the Supreme Court have imposed lesser sentences for the offence of rape in cases of similar circumstances as those in the instant case.

In **Umar Sebidde versus Uganda, Supreme Court Criminal Appeal No. 23 of 2001**, the Supreme Court reduced a sentence of 11 years for the offence of rape upheld by this Court to a sentence of 8 years.

In another decision of **Kalibobo Jackson versus Uganda, Court of Appeal Criminal Appeal No. 45 of 2001,**the Court allowed the appeal against sentence in respect of the offence of rape for being manifestly harsh and excessive. The sentence of 17 years was reduced to 7 years imprisonment.

This Court in **Ssebandeke Ronald versus Uganda, Criminal Appeal No. 128 of 2013,** upheld a sentence of 13 years imprisonment for the offence of rape and stated that it was within the range of sentences for the offence of rape.

In yet another decision of **Naturinda Thompson versus Uganda, Supreme Court Criminal Appeal No. 025 of 2015,** a sentence of 18 years imprisonment for the offence of rape was substituted with a sentence of 10 years imprisonment by this Court and confirmed by the Supreme Court.

Having taken into account both the aggravating and mitigating factors set out above and the range of sentences in cases of rape, we are of the considered view that a sentence of 14 years will be appropriate in the circumstances of

this case. From that sentence, we shall deduct the 2 years and 6 months the appellant spent on remand. The appellant shall, therefore, serve a sentence of 11 years and 6 months imprisonment from 13th January, 2014, the date of his conviction in the trial Court.

We so order.

Dated at Mbarara this.....13th.....day of .....October.....2020.

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Elizabeth Musoke

Justice of Appeal.

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Stephen Musota

Justice of Appeal.

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Remmy Kasule

Ag. Justice of Appeal.