

UGANDA / JUDGMENT

Jumba v Uganda (Criminal Appeal No. 94 of 2011) [2018] UGCA 57 (30 July 2018)

[2018] UGCA 57

COURT

Court of Appeal of Uganda

BEFORE

Egonda-Ntende, JA, Obura, JA, Musota, JA

CASE / FILE NUMBER

Criminal Appeal No. 94 of 2011

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA CRIMINAL APPEAL NO. 94 OF 2011

JUMBA RICHARD ::::::::::::::::::::::::::::::::::

VERSUS

UGANDA ::::::::::::::::::::::::::::::::::

(Arising from the judgment of Justice Mike Chibita in Masaka Criminal Session Case No. 94 of 2009.)

CORAM: HON. JUSTICE EGONDA NTENDE, JA 10 HON. JUSTICE HELLEN OBURA, JA
HON. JUSTICE STEPHEN MUSOTA JA

JUDGMENT OF THE COURT

The appellant was indicted, tried and convicted of Rape contrary to 15 sections 123 and 124 of the Penal Code Act and sentenced to life imprisonment.

Background

The background to this appeal is that on the 28th of April 2009 at Kanaraki village in Rakai District, the victim, one Nyinandegeya 20 Bafakuleka/(PW3) aged 80 years and her husband Sengoma Petero were asleep when they heard a bang at the door. They lit a candle and saw the appellant. The appellant pushed Petero Sengoma aside and pulled the victim out of the house and had unlawful sexual intercourse with her there and in the banana plantation. The 25 appellant warned the victim not to reveal what had happened even though she had already identified him.

The prosecution produced 6 witnesses. PW2, Benard Richard Kakeeto, a medical Doctor testified that on carrying out a medical

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examination on the victim. He found that she had forceful sexual intercourse, multiple soft tissue injuries, bruises on the neck, right knee and elbows. Being of old age, the forceful sexual intercourse resulted in bruises.

PW3 Nyinandegeya Bafakuleka aged 80 years at the time testified S that on the day the offence was committed, she was asleep with her husband (who was 100 years then) when the appellant kicked the door. They sat on the bed and she lit the candle and saw the appellant. The appellant then blew out the candle and pulled her off the bed and raped her. He hit her husband and threw him in the fire 10 place after which he fainted. The appellant dragged PW3 out of the house and raped her again.

The victim dressed up and went and told her unnamed son who went and reported to the LC Mr. Mubiru. Mr. Mubiru wrote a letter referring them to police. The police came and arrested the appellant.

The appellant denied the offence. However at the conclusion of the trial, the learned trial Judge found the appellant guilty and convicted him of the offence of rape c/ss 123 and 124 of the penal code Act. He was sentenced to life imprisonment.

- The appellant was dissatisfied with both conviction and sentence and 20 appealed to this court on the following grounds;
- 1. The learned trial Judge erred in law and in fact when he failed to properly evaluate the evidence on record as a whole and relied contradicting, on hearsay, insufficient, untruthful and unreliable prosecution evidence of identification which was not investigated and hence arrived at a wrong conclusion that the appellant was guilty of the offence of Rape contrary to Section 123 and 124 of the Penal Code Act which caused a miscarriage of justice.

- 2. The learned trial Judge erred in law and in fact when he failed to sum up to the assessors the law and ingredients of the offence charged and to give them appropriate directions as to what they should consider in giving their opinions leading to wrong opinions and thereby occasioned a miscarriage of justice.

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- 3. The learned trial Judge erred in law and in fact when he ignored and or failed to evaluate and to give due consideration to the appellant's defense of alibi thereby occasioning a miscarriage of justice.

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- 4. The learned trial Judge erred in law and in fact when he imposed an illegal and ambiguous sentence of life imprisonment upon the appellant which led to a serious miscarriage of justice to the prejudice of the appellant.

Representation

At the hearing of the appeal, Mr. Sserunkuma Bruno appeared for 10 the appellant while Mr. Ndamurani David Atenyi Senior Assistant DPP appeared for the respondent.

Submissions of the appellant

Counsel for the appellant surprisingly abandoned grounds 2 and 4 and only argued grounds 1 and 3. 15

In regard to ground 1, counsel submitted that there was no sufficient evidence before the trial court to prove that the appellant committed the offense he was convicted of. That from the testimony of PW3, she told court that the attack took place at night, at about 2am and she was the only identifying witness. Counsel referred to Section 8 of the Evidence Act on evidence of identification and submitted that there were no conditions which favoured PW3 to identify the appellant as the attacker because she was frightened and the light had been blown

On the evidence that the appellant met PW7 and PW8 and went to 25 the home of PW3 to ask for forgiveness, counsel submitted that the trial judge did not properly evaluate that evidence. That the appellant did not go to PW3's home to ask for forgiveness but had heard a rumour that they were looking for him so he went there to specifically

find out what was alleged against him. That the learned trial Judge 30 had a duty to evaluate the testimony of PW7 and PW8 in light of the testimony of the appellant.

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In conclusion, counsel prayed that this court be pleased to allow the appeal.

Submissions of the respondent

In reply, counsel for the respondent submitted that the prosecution proved all the essential ingredients of the offence. That the evidence of PW3 clearly states that she knew the appellant as somebody who had lived in the neighbourhood from birth and therefore there was no possibility of wrong identification. According to the evidence of PW6 Kyamanywa John, he states that after visiting, the appellant told PW6 that it is true he raped the victim but asked to be forgiven. 10 In addition, when he was going to be arrested, he ran into a swamp and hid from the police which points to his guilt.

The duty of a first appellate court

The duty of a first appellate court has been stated by the East African Court of Appeal in the case of *Pandya v R* [1957] EA 333 and *Oketh 15 Okale v. Republic* [1965] EA 555 and has since been restated by the Supreme Court in various cases namely; *Kifamunte Henry v. Uganda*, SC Cr App No. 109 of 1997 and *Bogere Moses v. Uganda*, Cr. App. No. 1 of 1997, among others. A first appellate court must re-evaluate the evidence, and make its own conclusion on the facts, 20 taking into account that it did not see the witnesses, and making deference to the trial court on demeanor, unless there is a patent error of law on record or application of the wrong principle.

We have been guided by the above principles in resolving this appeal. We have also taken into consideration all the submissions made by the parties and the authorities cited and the Law applicable.

Having abandoned grounds 2 and 4 of the appeal, the appellant argued ground 1 mainly on proper identification of the appellant.

Unfortunately the record of appeal is incomplete. It lacks the summing up notes to the assessors, the assessor's opinion and the 30 Judge's ruling on the assessor's opinion. Under Section 67 of the Trial on Indictments Act, assessors are required to take oath after the preliminary hearing has been concluded.

At the end of the evidence for both the prosecution and the defence, the judge is required to sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his or her opinion orally and shall record each such opinion under S. 82(1) Trial on Indictments Act. S.82 states that;

"82. Verdict and sentence.

- (1) When the case on both sides is closed, the judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his or her opinion orally and shall record each such opinion. The judge shall take a note of his or her summing up to the assessors."

Whereas the assessors' opinions are not binding on the judge, where the judge doesn't conform to the opinions of the majority of assessors, she/he shall state her/his reasons for departing from their opinions in her/his judgement under S. 82(3) Trial on Indictments Act. Section 82(1) above makes it mandatory for the trial Judge to sum up the evidence in the case to the assessors. Failure to do so renders the trial a nullity.

In the case of Byaruhanga Fodori Vs Uganda, COA Criminal Appeal

No. 24 of 1999, it was held that "we must hasten to add that we do not condone the failure of trial courts to strictly adhere to the provisions of the Trial on Indictments Act regarding the assessors."

In the instant appeal, the record does not have the summing up notes to the assessors by the trial Judge. That irregularity cannot be ignored by this court once detected even if counsel for the appellant did not argue it. That omission vitiated the entire trial rendering the trial a nullity. With this finding, we cannot go ahead to consider the grounds of appeal.

The appellant's appeal is therefore allowed on ground of procedural irregularity which rendered the trial a nullity. The conviction and sentence of the trial court are hereby set aside.

We however note that the appellant was first arraigned before the magistrates on this charge on or about 6 May 2009 and was

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convicted on 14th day of April 2011. He has spent 9 years and several months, almost 10 years in custody over these charges. Even if it turns out that he committed the offence, it is our considered view that this period is sufficient time to serve a possible sentence. Consequently, we order the immediate release of the appellant unless he is held on any other lawful ground.

We so order

Dated this ... 30th... Day of ... July..... 2018

Hon. Justice Egonda Ntende, JA

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Hon. Justice Hellen Obura, JA

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Hon. Justice Stephen Musota JA

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