

UGANDA / JUDGMENT

Misanvu v Uganda (Criminal Appeal No. 65 of 2019) [2023] UGCA 390 (1 August 2023)

[2023] UGCA 390

COURT

Court of Appeal of Uganda

BEFORE

Buteera, DCJ, Gashirabake, JA, Kihika, JA

CASE / FILE NUMBER

Criminal Appeal No. 65 of 2019

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THE REPUBLIC OF UGANDA

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IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

CRIMINAL APPEAL NO.65 OF 20-19

(Coram: Buteera, DCJ, Gashirabake & Kihika, JJA)

MISANVU JOHN BOSCO..... ApPELLANT

VERSUS

UGANDA . RESPONDENT oaoooooooooo oooaoaoaoao aaoaoaoaoaoao
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(An appeal against the decision of Jane Frances Abodo, J, in High Court Criminal Case No. 1274 of 2016 at Kampala dated 20th December 2018)

JUDGMENT OF COURT

Introduction

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The appellant was convicted of the offence of rape contrary to sections 123 and 124 of the Penal Code Act, Cap 120, and sentenced to 17 years, 7 months and 10 days' imprisonment.

¹⁵ Background

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The facts accepted at trial were that the appellant in the month of June 2016 at Nalyamagonja Village in Nangabo Sub County in Wakiso District, had carnal knowledge of N. R., without her consent. That on the fateful day, the appellant had gone to pick a tile cutting machine from the victim's fiancé's residence and was ushered in by the victim as the owner of the house was away. That while the two were in the house which was quite isolated, the appellant complained about having not been paid and shortly thereafter pulled the victim by force, asking her for a hug and when the victim resisted, he held her by the hands, pulled up the victim's skirt and

forcefully had sexual intercourse with her while she was in her menstrual period. The appellant then picked the machine and went away.

The victim immediately called the owner of the residence (her fiancé) while crying and narrated what had happened. The matter was reported to police, and after investigations, the appellant was charged with rape. The appellant pleaded not guilty and was put on a full trial. He was convicted and sentenced to 17 years, 7 months and 10 days' imprisonment. He had spent a period of 2 years, five months and 20 days on remand. This period was deducted from the sentence awarded to him. The appellant being dissatisfied with the decision, he appealed to this court on the following grounds of appeal;

Grounds

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1. The learned trial Judge erred in law and fact when she failed to adequately evaluate, appraise uncorroborated falsehood prosecution evidence alongside the appellant's defence evidence occasioning a miscarriage of justice thereby wrongly convicting the appellant of rape.
2. The learned trial Judge erred in law and fact when she imposed upon the appellant a harsh and excessive custodial sentence of 22 years without deducting the remand period.

Representation

At the hearing of the appeal, the respondent was represented by Ms. Immaculate Angutoko, Chief State Attorney from the office of the Director of Public Prosecutions. Mr. Seth Rukondo represented the appellant on state brief. The appellant was present in court. 25

Counsel for the parties applied and were allowed to adopt their written submissions. The written submissions have been considered by court in writing this judgment.

Submissions for the appellant

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Ground ¹

Counsel submitted that the indictment upon which the appellant was charged is illegal. He submitted that Section 22 of the Trial on Indictments Act provides that every indictment shall contain a sufficient statement of the offence with which the accused is charged, but in this case, the appellant was charged with rape and attempted rape making it difficult for him to know with precision the offence he was being tried for.

Counsel referred to *Sebuzukira v Uganda* [1965] EA 6A4 for the submission that a trial court has the discretion to direct separate trials for any one or more offences charged in the same charge sheet if it thinks the accused person may be embarrassed in his defence, by reason of being charged with more than one offence in the same charge sheet, which the learned trial Judge did not do.

20 Counsel contended that the prosecution did not adduce sufficient evidence to prove the case of rape beyond reasonable doubt. Counsel argued that the victim and a one Enock Nagoya (PW2) were in a relationship, and there was a possibility that on that fateful day, the two had consensual sexual intercourse for the evidence in the medical report to show that the victim had been sexually assaulted.

25 Counsel further submitted that PW1 was a prosecution witness to serve her own purpose. He cited the case of *R v Prater* [1960] 1 ALL ER 298

where it was held that where a witness for the prosecution in a criminal case is regarded as having some purpose of her own, it is desirable for the judge to warn the jury of the danger of convicting on that witness' evidence. He added that the prosecution evidence did not place the appellant at the scene of crime. Counsel argued that the trial Judge erred by selectively considering the prosecution evidence instead of taking into account the prosecution and defence evidence as a whole and that the same should be re-evaluated for court to draw an appropriate conclusion.

Counsel referenced *Kipkeriing Arap Koske v R* [1949] 16 EACA 135 for the proposition that the evidence as adduced by the prosecution required corroboration for it to be relied on to convict the appellant which corroborative evidence was not adduced. Counsel urged this court to allow ground one of the appeal.

Ground 2

¹⁵ Counsel submitted that the trial Judge acted illegally by not deducting the period spent on remand and thus imposed a manifestly harsh and excessive sentence. Counsel cited various authorities where the courts have given lesser sentences for the offence of rape. We have looked at the said authorities. o

²⁰ The respondent's submissions

Counsel for the respondent raised two preliminary objections to wit;

1. That pursuant to rule 67 III of the Judicature (Court of Appeal Rules) Directions, the appellant required leave of court prior to lodging a supplementary memorandum of appeal; a requirement which counsel did not comply with.
2. Counsel submitted that the first ground of appeal offends the provisions of rule 66 I2I of the Court of Appeal Rules in so far as it fails to specify the point of law or fact or mixed law and fact that the appellant contends was wrongly decided and that it is quite argumentative.

Ground ¹

Counsel submitted that the appellant's submissions were not clear in regard to the illegality of the two sections of the Penal Code he was referring to. Counsel contended that the relevant provision of the Penal Code Act that provides for the offence of Rape is section 123 and the punishment under section 124. She argued that there was neither an illegality nor any defect in the indictment as alluded to by the appellant's counsel.

Counsel submitted that the appellant in his submissions averred that the evidence relied on by prosecution was purely circumstantial. That according to appellant, there were neither eyewitnesses nor corroborative evidence. Counsel submitted that the victim testified as PW1 and narrated how the appellant raped her. Counsel submitted that the victim's evidence was truthful and any disparities were satisfactorily explained.

Counsel further contended that whereas there is a possibility that the victim could not exactly recall the date, she vividly recalled the month and year in which the offence was committed as seen in the last paragraph of page 20 and she clearly identified the appellant as the person who committed the offence.

Further, it was the respondent's argument that the learned trial judge properly evaluated the evidence as shown at pages 72 to 77 of the record of appeal and came to a correct conclusion that the appellant was placed at the scene of crime by the victim through her testimony and other

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corroborative evidence. Counsel invited this honourable court to uphold the finding of the trial judge.

Ground 2.

5 Counsel submitted that it is trite that sentence is at the discretion of a trial judge and an appellate court will only interfere with a sentence imposed by trial court if it is evident that it acted on a wrong principle or overlooked some material fact or if the sentence is manifestly harsh and excessive in view of the circumstances of the case as was held in *Kiwalabye Benard v Uganda SCCA NO 143 OF 2001*.

oro 15 Counsel submitted that the victim in the present appeal was traumatized as a result of the actions of the appellant who forcefully had sexual intercourse with her at her fiancde's house. Counsel argued that there was no illegality in the sentencing as alluded to by counsel for the appellant. Further, that a sentence of 17 years, 7 rnorths and 10 days is not only consistent with but way below the maximum sentence of death stipulated under section L24 of the Penal Code Act, as well as sentences upheld/meted by this honourable court in similar cases as demonstrated in *Mubangizi Alex v Uganda SCCA No. 07 of 2015*.

Counsel invited this honourable court not to interfere with the discretion of the learned trial Judge, disallow the appeal and dismiss it accordingly.

Decision of the Court

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We have carefully studied the court record, considered the submissions for either side, the law and authorities cited therein. This being a first appeal from a decision of the High Court, this court is required to review the evidence and make its own inferences of law and fact. See: Rule 30 (lf (a) of the Judicature (Court of Appeal Rulesf Directions S.1 13-10. We do agree with and follow the decision of the Supreme Court in *Klfamunte Henry v Uganda SC Criminal Appeal No. 10 of 1997* where it was held that on a first appeal, this court has a duty to:

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"... rGView the evidence of the case and to consider the materials before the trial Judge. The appellate court must then make up its own mind not disregarding the Judgment appealed from, but carefully weighing and consldering.tt

We shall handle the two preliminary objections raised by counsel for the 10 respondent before we delve into the merits of the appeal.

- The first preliminary objection was in respect of the amended memorandum of appeal. The appellant in this appeal liled his first memorandum of appeal on 10th February 2023. On 22nd February 2023, the appellant filed his amended memorandum of appeal.

- 1s The appellant's counsel did not seek leave of this court to file an amended memorandum of appeal neither did he seek to validate the same. It is trite that where pleadings have been closed, parties ought to seek leave of court to amend the pleadings. In this case, the respondent filed its submissions on 13th March 2023. The appeal came up for hearing on 14th March 2023. 20 The appellant's counsel did not seek leave of court at the hearing to validate his amended memorandum of appeal, which rendered the amended memorandum of appeal incompetent. o
- 25 However, Article L26 l2l (e) of the Constitution requires courts to administer justice without undue regard to technicalities. (See also *Stephen Mabosi v Uganda Revenue Authority* SCCA No. 16 of 19951. We noted that counsel for the respondent was served with the amended memorandum of appeal together with the appellant's submissions on 13th

March 2023 and she filed her reply on 14th, March 2023. In our view, counsel for the respondent was not prejudiced in the circumstances. We have also considered that it was a mistake of counsel, which should not be visited on the innocent appellant who in this case is in prison serving sentence. For those reasons, we shall exercise substantive justice in this case to validate the amended memorandum of appeal, which was filed without leave of this court.

The second preliminary objection was on framing of the grounds of appeal.

Counsel for the respondent submitted that ground one was contrary5l to rule 66 l2l of the Rules of this court. We have, with difficulty, studied the ground as drafted. We were able to comprehend the ground of appeal although it was not drafted well.

We shall overrule the preliminary objections in order to do substantive justice and proceed to appraise the grounds of appeal. 15

Ground one

Counsel for the appellant faulted the trial Judge for not adequately evaluating the evidence before her and as a result wrongly convicting the appellant.

Counsel for the appellant alleged that the appellant was wrongly indicted for two offences to wit; rape and attempted rape contrary5l to sections 123 and L24 of the Penal Code Act respectively. We have studied the lower court record. The charge sheet and the Indictment clearly show that the appellant was charged with rape contrary5r to sections 123 and L24 of the

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Penal Code Act. The arguments advanced by the appellant's counsel on attempted rape are misleading and without merit.

Counsel further contended that the evidence that the trial judge relied on was purely circumstantial and there was no direct eyewitness to corroborate the evidence of the victim.

The law on corroboration in sexual offences was well settled by the Court of Appeal for East Africa in *Chila & Anor v Republic* Criminal Appeal No. 80 of 1967 in the following terms;

> "The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of Justice."

Further in *Livingstone Sewanyana v Uganda*; s.c. Criminal Appeal No. 19 of 2006, the Supreme Court had this to say in regard to corroboration of the victim's evidence in sexual offences; 15

> 6r...[0 are of the considered view that even if such corroboration was not there, as the Court of Appeal held, it is the quality and not the quantity of evidence that matters and the learned trial judge was aware of that. The learned trial Judge found that PW1 was a truthful witness and believed her..."

It is clear from the above authorities that a conviction can be entered in sexual offences even if there is no corroboration so long as the court is satisfied with the evidence and there has not been a miscarriage of justice.

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In the instant case, the trial judge did not solely base his conviction on the evidence of the victim but also looked at the medical report, PF 3A, which indicated that; 'the membranes had ruptured long ago [the] victim had menstrual blood with painful fouchette. T?w ccluse was indicated as penetration or ang other external force.'

PW3, the doctor who examined the victim on PF 3A, stated that the victim had menstrual blood with a painful couchette, with the probable cause being penetration or any other external force.

PW2, the victim's fianc6, also stated that the victim called him after the incident and informed him that the appellant tried to rape her but later stated that the appellant had actually raped her.

PW4, the D/AIP, stated that the victim while making her statement appeared scared and was crying and told him that the appellant attempted to rape her but when he ordered other male officers to go out, and counselled her, she opened up and confirmed that the appellant had raped her.

The appellant in his defence confirmed that he visited the victim's fiancée's residence where he found the victim that fateful day. He alluded to the fact that he was demanding the victim's fiancée some money amounting to 950,000 f : and this could have been the reason they were framing him up. Further, that he had just returned from Sudan thus the victim and the fiancée may have wanted to defraud him of his money.

Osborne's Concise Law dictionary 8th Edition at page 90 defines corroboration evidence as:

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"independent evidence which implicates a person accused of a crime by connecting him with it; evidence which confirms in some material particular not only that the crime has been committed but also that the accused committed it."

5 Having re-evaluated the evidence of the trial court above, we find that the prosecution put up a strong case against the appellant, and the appellant's defence was just mere excuses without cogent belief whatsoever. It is trite that a convicted person is convicted on the strength of the prosecution case, and not on the weakness of the defence. (See *Akol Patrick & Ors v Uganda CACA No. 60 of 2002*).

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We find that ground one of the appeal has no merit and we therefore dismiss it.

Ground 2

Counsel for the appellant submitted that the trial Judge sentenced the appellant to a harsh sentence of 17 years 7 months and 10 days without deducting the period on remand.

The law as to when an appellate court can interfere with a lower court sentence was stated by the Supreme Court in *Kamya Johnson Wavamuno v Uganda*; SCCA No. 16 of 2000 and *Livngstone I (akooza v Uganda)*; SCCA No. 17 of 1993.

- We are cognizant of the fact that we cannot interfere with the sentence imposed by the trial court which exercised its discretion unless the sentence is illegal or is based on a wrong principle or the court has overlooked a material factor or where the sentence is manifestly excessive or so low as to amount to a miscarriage of justice. 20
- We have had the opportunity to reappraise the sentence passed by the learned Trial Judge. She noted thus: - 25

"it is mandatory under Article 23 (8) of the constitution of the Republic of Uganda 1995 to take into account the period spent on remand while sentencing a convict. From the earlier proposed term of twenty years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been on remand since 29th June 2016, I hereby take

into account and set off two years and five months and twenty days as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of seventeen (17) years and seven months (7) and ten (10) days, to be served starting from today..."

Having studied the sentencing notes of the trial Judge above, it was very clear to us that the period spent on remand was considered and the trial Judge proceeded to deduct it from the sentence of 20 years thus arriving at the final sentence of 17 years, 7 months and 10 days. We find no illegality whatsoever in the sentencing by the trial Judge.

We have also observed that the maximum sentence for the offence of rape according to section 24 of the Penal Code Act is death. The trial Judge did not impose the maximum sentence. In her sentencing notes above, she considered the aggravating and mitigating factors and sentenced the appellant to 20 years' imprisonment. She thereafter proceeded to deduct the period the appellant had spent on remand. Counsel for the appellant did not provide sufficient grounds to convince us that the trial Judge relied on any wrong principle or that she omitted to consider a factor that she should have considered. We cannot fault the trial Judge.

Ground two of the appeal also fails. In conclusion, this appeal entirely fails and it is dismissed

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Dated at Kampala this

Richard Buteera $\text{\textit{S}}$

Deputy Chief Justice

$\text{\textit{w}}^{\text{\textit{r}}}$ $\text{\textit{c}}$

Christopher Gashirabake $\text{\textit{10}}$ Justice of Appeal

Oscar John $\text{\textit{15}}$ Justice of Appeal

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