

UGANDA / JUDGMENT

**Tusingwire v Uganda (Criminal Appeal
493
of 2017) [2024] UGCA 230 (30 August 2024)**
[2024] UGCA 230

COURT

Court of Appeal of Uganda

BEFORE

Buteera, DCJ, Obura, JA, Mulyagonja, JA

CASE / FILE NUMBER

Criminal Appeal 493 of 2017

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASINDI

Coram: Buteera, DCJ, Obura, & Mulyagonja, JJA

CRIMINAL APPEAL NO. 493 of 2017

BE'TWEEN

TUSINGWIRE BENON APPELLANT

AND

UGANDA:RESPONDENT

10 (Appeal against the decision of Rugadga Atutoki, J., delivered on 29th June 2017 at Hoima, in High Court Criminal Session Case No. 135 of 2011)

JUDGMENT OF THE COURT

Introduction

15 The appellant was indicted for the offence of rape contrary to section 723 of the Penal Code Act. After a full trial, he was convicted and sentenced to 24 years' imprisonment.

Background

The facts that were accepted by the trial Judge were that on 28th January 2012, at around 5:00pm, ND (hereinafter referred to as Dinah or the victim) was walking to a neighbour's place on an errand to find labourers for her farm. Along the way, she met the Appellant who grabbed her and pulled her into a sugarcane plantation. Being pregnant at the time, she could not continue in a struggle with him so he subdued

her and was able to have his way and had forceful sexual intercourse

with her. She reported the incident to the LC1 Chairperson, immediately thereafter, who caused his arrest

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Shortly after his arrest, the appellant escaped but was re-arrested two days later. The victim miscarried her child five months later and she attributed this to trauma she suffered from the rape.

5 When the appellant was indicted, he denied that he committed the offence. He claimed that at the time the victim was raped, he was at the home of a friend. That while he was in a conversation with his neighbour, he was surprised when the Chairperson LC1 went to them and informed him that he was accused of raping Dinah.

The trial Judge found sufficient evidence and convicted him of rape as indicted. He found that 30 years' imprisonment was appropriate in the circumstances, but after consideration of the period spent on remand, he sentenced him to 24 years' imprisonment. 10

Dissatisfied with both conviction and sentence, the appellant now appeals to this court on four grounds as follows:

- ¹. The learned trial Judge erred in law and fact when he convicted and sentenced the appellant when there was no evidence to corroborate the evidence of the victim thereby reaching an erroneous decision which occasioned an injustice. 15
- 2. The learned justice erred in law and fact when conducting the plea taking of the appellant.
- 3. The learned trial justice erred in law and fact in disregarding the appellant's alibi and found (sic) that the offence of aggravated defilement (sic) was proved beyond reasonable doubt.
- 4. The learned justice erred in law and fact when he imposed ^a manifestly harsh and excessive sentence against the appellant.

Representation

When the appeal was called on for hearing on 26th March 2024, Ms. Zemei Susan represented the Appellant on state brief. The Respondent

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was represented by Mr Kyomuhendo Joseph, Chief State Attorney, and Ayikoru Judith, State Attorney, from the Office of the Director of Public Prosecutions.

5 Ms Zemei's prayer to have the Notice and Memorandum of Appeal validated was granted, but with hindsight, it ought not to have been granted with the grounds as they stood. We observed that in ground 3, counsel referred to a conviction for the offence of aggravated defilement, yet the Appellant was convicted of the offence of rape. Strangely, in the whole of the Memorandum of Appeal, counsel did not mention the offence of which the Appellant was convicted, but she ought to have done so. This is a requirement of rule 66 (21 of the Court of Appeal Rules which provides that grounds of appeal should be concise, stating the point of law or fact wrongly decided by the trial court. 10

Nonetheless, the Appellant should not be penalised for the errors of his Advocates. We therefore considered that the statement of the offence for which the Appellant was convicted as aggravated dehlement was an error of counsel. We disregarded it and proceeded to dispose of the appeal on the basis that it was against a conviction for rape. 15

The prayers of both counsel to have their written submissions to be 20 adopted as their hnal arguments in the appeal were granted. The appeai was thus disposed of on the basis of written arguments only.

Duty of the Court

The duty of this Court as a first appellate court, is stated in rule 30(i) of the Rules of this Court (SI 1 0- 13). It is to reappraise the whole evidence adduced before the trial court and reach its own conclusions on the facts and the law. But in so doing the court should be cautious that it did not observe the witnesses testify.

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Counsel for the Appellant addressed each of the grounds of appeal separately and counsel for the Respondent replied in similar vein. We therefore addressed the grounds of appeal chronologically and reviewed the submissions on each ground before we resolved each of them.

Analysis and Determination S

Ground 1

Submissions of Counsel

The appellant's grievance in this ground was that the trial Judge erred when he convicted and sentenced the appellant when there was no evidence to corroborate that of the victim.

Ms. Zemei for the appellant referred to **Kifamunte Henry v. Uganda**, SCCA No. 10 of 1997, on the duty of this court as a first appellate court. Counsel referred to the alleged errors in the proceedings and asserted that the trial Judge took sides while making his decision because in her view, at no point did he consider the evidence adduced by the Appellant. Counsel further faulted the trial Judge for relying on the evidence of a single identifying witness without corroboration. She asserted that the Judge did not consider the evidence as a whole. She referred to **Abudala Nabulere & 2 Others v. Uganda**, Criminal Appeal

- **No. 9 of 1978**, where it was held that the testimony of a single witness must be tested with the greatest care. She referred to the judgment where the trial Judge relied on evidence of the prosecution that reporting the sexual act to the authorities corroborated the evidence of the victim that it took place. She further opined that it was an error of
- fact for the trial Judge to use the alibi advanced by the Appellant, with regard to time, to corroborate the evidence of the time stated by the victim.

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Counsel further complained that the trial Judge disregarded the evidence in the medical report and instead referred to the decision in **Bassita Hussein v. Uganda**, Criminal Appeal No. 35 of 1995. She further referred to **Uganda v. Opio** [1986] HCB f9, where it was held that complainants in sexual offences ought to be subjected to medical examination and section 43 of the Evidence Act which provides that when court has to form an opinion on a point of science, the opinions of a person specifically skilled in such a science are relevant. She further asserted that the Judge chose other inconclusive evidence to prove the sexual act. That he chose evidence based on the mere standing of time and pregnancy of the victim and that by this, the court risked setting a precedent that people in such trouble can allege such acts and the court will at any time be on their side. 10

Counsel then pointed out the contested results in the medical report (PrcA) admitted in evidence as PEI. First, that there was some form of penetration. She asserted that the complainant was pregnant and a married woman. That because of this, more evidence was required to prove that the penetration was by the Appellant and not her husband or any other person. 15

20 Secondly, that the victim's genitalia was ruptured but this was many years ago. Counsel argued that there was need to establish whether it was really the Appellant who ruptured it and if it was not so, why he ended up before court charged with the offence. She opined that the court had to be certain about this or rely on other evidence, not the 2s medical report.

Counsel further drew it to the attention of court that the report indicated that there were no injuries or inflammation around the victim's private parts. She argued that the trial Judge's conclusion that the victim was a pregnant woman and did not struggle was not sufficient w

to justify the absence of vaginal injuries. She added that the fact that women have natural lubrication in their vagina, as it was opined by PW1, did not justify the finding that there were no injuries, which tend to happen with forceful penetration during rape when the body of the victim rejects the efforts of the assailant to forcefully penetrate her.

Counsel also pointed out that the doctor who examined the victim found no injuries or bruises on the thighs, legs or elbows and back. That the court relied on the inference that there was a soft place to land on during the rape to justify this. Counsel then argued that there was no corroboration of this evidence. She went on to assert that a report about the scene of the crime would have helped to explain this, but there was none.

Counsel for the Appellant further submitted that the court should have sought corroboration before disregarding the medical report. That the victim testified that she was roughed up, strangled, kicked to the ground and dragged to the sugarcane plantation by the Appellant. Counsel contended that this evidence should have been corroborated by a police report and the testimony of the Investigating Officer but the prosecution chose not to adduce this evidence, though the victim stated that the police visited the scene of crime. 15 20

Counsel further pointed out that no police officer testified in these proceedings despite the fact that the victim stated that they went to the scene of the crime and took pictures. She referred to *Rwaneka v. Uganda* 11964 EA 768, where it was held that it is the duty of the prosecution to ensure that the police officer who investigated and charged the accused appears and testifies about the role they played and the circumstances under which they decided to arrest and charge the accused. Further, that various questions would have been answered by the police report but the court relied on the victim's evidence and 25

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ignored all other evidence. She also pointed out that Police Form 244 was not adduced in evidence. She wondered why the prosecution neglected such a vital step. She concluded that the trial Judge convicted the appellant on incomplete evidence and prayed that this court finds that in this regard, the trial Judge erred.

In reply, Ms Ayikoru in her written submissions for the respondent referred to section 133 of the Evidence, which provides that no particular number of witnesses shall in any case be required for the proof of any fact. Counsel further referred to *Vunduru v. Uganda*, CACA

- No. 156 of 2011, where it was held that a conviction can be entered in a sexual offence even if there is no corroboration as long as the court cautions the assessors and itself of the danger of convicting without it. She relied on *Ntambala Fred v. Uganda*, SCCA No. 34 of 2015, for the ratio that a conviction for a sexual offence can be solely based on the 10
- testimony of a single identifying witness provided the court finds her truthful and reliable. That what matters is the quality of evidence and not the quantity. She asserted that in this case, there was sufficient corroborative evidence. Relying on *Uganda v. George William Simbwa*, SCCA No. 37 of 1995, counsel further submitted that the test applicable to

determine the nature or extent of corroboration is the same, whether it falls within the rules of practice at common law or within the class of offences for which corroboration is required. 15 20

Counsel then referred to the evidence adduced before the trial court and submitted that the victim's testimony of the sexual act was corroborated by her report to the LC 1 Chairman, immediately after it happened. To support this argument, she relied on section 156 of the Evidence Act which provided that any former statement made by the witness relating to the same fact, at or about the time when the act took place, can be used to corroborate their testimony. She further referred to Katende 25

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Muhammed v. Uganda, SCCA No. 32 of 2001, where a seven-year-old victim of defilement reported the incident to her mother, immediately the assault happened, and her statement to her mother was found to have corroborated her testimony about the identity of her defiler.

- 5 She then submitted that the testimony of the victim was corroborated by the fact that she reported the offence immediately after it happened, in spite of the possible repercussions to her marriage and her standing in society. That the testimony of PW2, the LC Chairman, therefore corroborated the victim's statement.
- Counsel for the Appellant finally pointed out that when he was arrested, the Appellant escaped and run away from the village and was only rearrested two days later, charged and arraigned. She relied on Mibulo Edward v. Uganda, SCCA No. 17 of 1995 and Uganda v. George William Simbwa (supra) where it was held that the disappearance of the suspect from the place where the offence was committed after the offence is inconsistent with innocence. 10 15

In reply to the appellant's complaint that the trial Judge erred when he chose to rely on other evidence instead of PF3A to prove the sexual act, counsel for the respondent referred to Bassita Husseln v. Uganda,

- Supreme Court Criminal Appeal No. 35 of 1995, where it was held that the fact of sexual intercourse was proved beyond reasonable doubt through the testimony of the victim. Further, that this was corroborated by the fact that she reported the incident to the LC 1 Chairman immediately after it occurred. 20
- With regard to the complaint that the trial Judge ignored the fact that the prosecution did not produce the Investigating Officer as a witness, counsel for the respondent relied on Mulikiriza Badru v. Uganda, CACA No, 28 of 2018, where it was held that the absence of the evidence of an Investigating Officer may not be fatal if other evidence is 25

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available and proves the prosecution case to the required standard. She asserted that in the instant case, there was no need to call the Investigating Officer as a witness. That the trial Judge therefore correctly found that there was sufficient evidence to prove the offence for him to convict the appellant.

Resolution of Ground 1

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The Supreme Court in **Ntambala Fred v. Uganda** (supra) emphasised the point that there is no law in Uganda that requires that the testimony of a victim of a sexual offence must be corroborated by the evidence of another person. The court, at pages 8-9 of the judgment considered the complaint that there was no corroboration to support the testimony of the victim. They observed and held that:

"The learned Justices of Appeal addressed their mind to the law on what amounts to corroboration as stated in **Uganda vs. George Wilson Simbwa** (SC) Criminal Appeal No. 37 of 1995 wherein it was held that:

Corroboration affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence *which implicates him, which confirms in some material particular not only the evidence that the crime has been committed but also* that the defendant committed it. The test applicable to determine *the nature and extent of corroboration is the same whether it falls* within the rule of practice at common law or within the class of *offences for which corroboration is required.*"

As seen from the above holding, corroboration is evidence from other 25 sources which supports the testimony of the complainant and connects or tends to connect the accused person to the commission of the crime.

The value of corroboration is rooted in the legal standard (proof beyond reasonable doubt) that must be met by the prosecution in order to secure a conviction. Consequently, the prosecution may find it necessary to adduce evidence from more than one witness in order to prove their case beyond reasonable doubt.

Nevertheless, section 133 of the Evidence Act provides that: "Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact." (Our *emphasis*). $\mathbb{R}$

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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. As stated by this court in **Sewanyana Livingstone vs. Uganda SCCA No. 19 of 2006**) 'what matters is the quality and not quantity of evidence.'

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The Supreme Court then upheld the decision of this court that on the basis of a single witness, the prosecution proved that the Appellant defiled his 14-year-old daughter. Corroboration was found within the evidence that was adduced by the prosecution which supported the testimony of the victim. 10

> In the instant case, the decision of the trial Judge that the Appellant complained about was at page 52-53 of the Record and as follows:

"Like in most sexual offences, this was a single witness incident. This was a married woman, the mother of six. She braved the indignity and humiliation of going public about the defilement of her womanhood. That act of reporting the sexual assault immediately to the authorities was *corroboration of her evidence of the sexual act.*

The accused person in his testimony from the dock told court that the village Chairperson came to the place where he was seated in conversation with others including DW2 at about 5.00 pm, and reported to them that he, Benon had been accused of raping Dinah. DW2 *corroborated that part of the evidence.*

There was a medical report. But it was inconclusive. It was admitted as prosecution exhibit PE1, and it showed that there were no injuries on Dinah's private parts, or on her body parts like her elbows, back or 25 thighs. The Clinical Officer who tendered in the police form 3 and its appendix told court that Dinah being a married woman, and being pregnant at the time of the incident, it was distinctly possible to be involved in forceful sexual intercourse without exhibiting injuries in her *private parts.* 30

> *While medical evidence is important in sexual offences, it by no means is* the only or conclusive evidence in determination of the existence of a sexual act. In the case of *Bassita Hussein v. Uganda Crim. App. No. 35 of 1995*, the Supreme Court held that,

"Though desirable, it is not a hard and fast rule that the victim's 35 *evidence and medical evidence must always be adduced in every* case of defilement to prove sexual intercourse or penetration.

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Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt.'

I believe the same principle applies even in cases of rape. I was satisfied that the prosecution proved the ingredient of the sexual act beyond reasonable doubt".

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The trial Judge relied on a decision of the Supreme Court to come to the finding that reliance on medical evidence in cases of sexual offences is not mandatory. The victim was a married women aged 30 years at the time of the alleged offence. She was the mother of six children, the 10 pregnancy with which she was raped, possibly being the seventh. The Clinical Officer who testified in support of the medical report gave his opinion as to why the examining doctor came to the finding that there were no injuries in the victim's private parts. In the absence of expert evidence adduced by the defence to challenge this opinion, the court 15 made no error when it disregarded the medical report for it was inconclusive, as the Judge found and held.

It is clear from her testimony that the victim admitted that she did not fight her assailant because she was pregnant and he subdued her by putting her in a strangle hold. She expressed her decision not to put up 20 any further resistance in the following words, at pages 17-18 of the Record:

> "Before I reached Katuku's place I met the accused person. I had reached (the) sugar plantation where there were no people. When I met him he grabbed me by the arm and took me to the nearby bush. When he grabbed me I raised an alarm. When I raised an alarm he immediately kicked me and I fell down. He started kicked and strangled me. (sic) I was pregnant and I was weak. When he over strangled me, I became too weak I accepted and he raped me. He inserted his penis and he raped me from 5:00pm to 7:00pm. On that day there was a function and many people had gathered there so there was no one to help me.

After he finished raping me I went and reported the matter to the chairman. The chairman went to his place and arrested him but later he *escaped from them. The chairman took me to police."* the that Iron.

One may wonder at the duration of two hours in which the assault took place, but then the witness was never taken to task about this in cross examination, so it stands. We therefore find that in the absence of physical resistance by the victim there could have been no injuries on her thighs, elbows and back as counsel for the Appellant wanted this court to believe.

We also find that it is immaterial that there was no report produced by the Investigating Officer or adduced in court about the state of the scene of the crime. The witness herself testified that it was in a sugarcane plantation where the assailant pulled her into a nearby bush. The environment is not inconsistent with the fact that there were no injuries found on the rest of her body when she landed on the ground after her assailant tackled her down.

With regard to the complaint that the prosecution did not call the Investigating Officer as a witness, the ground rule set in section 133 of the Evidence Act applied to this case, that no particular number of witnesses shall in any case be required for the proof of any fact. Ordinarily, the Investigating Officer is required to testify, where the need arises, about the circumstance under which the suspect was arrested. 15

In the event that they admitted the offence, it is the Investigating Officer to testify first, leading to the production of the confession statement. 20

In this case, the Appellant was not arrested by a Police Officer but by the LCI Chairman, Muhure John (PW2). It is he that testified about the circumstances under which the Appellant was arrested and that he handed him to the police at Kasonga Police Post. There being no dispute about this, the need to call the Investigating Officer was obviated.

As to whether the assertions by the victim that it was the Appellant who raped her were corroborated at all, we find that there was ample corroboration within her testimony. The victim immediately reported

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the incident to a person in authority. She did not have any fear about the implications of the report to her marriage and her status in the community. She had children and she had not a care that they would also get to know that she was raped. The trial Judge thus correctly found that the very fact of the report to a person in authority amounted to corroboration. Ground 1 of the appeal therefore fails.

Ground 2

The appellant's grievance in this ground was that the trial Judge erred in the process of taking the plea.

¹⁰ Submissions of counsel

Counsel for the Appellant submitted that the ingredients of the offence of rape were not explained to the Appellant during his taking of the plea. She relied on *Namara Daphine v. Uganda*, Criminal Appeal No. O30 of 2013, where it was held that the accused must plead to each ingredient of the offence and that generalized statements were insufficient in plea taking. Counsel contended that the plea taking procedure as laid down in *Adan v. Republic* [1973] EA 445, was not followed in this case. She prayed that this court finds that there was an error in the procedure and that this ground succeeds.

- ²⁰ In reply, counsel for the respondent asserted that the appellant's plea was properly taken. She distinguished this case from one where the appellant pleaded guilty, *Namara Daphne v. Uganda* (supra) wherein the appellant was convicted on her own plea of guilty. Counsel referred to section 22 of the Trial on Indictments Act (TIA) on what amounts to
- a proper indictment and section 60 of the same Act on the procedure of pleading to an indictment. She further referred to *Nsubuga Ali aka Cobra v. Uganda*, CACA No. 276 of 2017, where this court laid down the procedure that should be followed on recording a plea of guilty. 25

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Counsel went on to point out that it was clear, at page 8 of the Record, that the charge was read out to the appellant in Runyoro. She emphasised that the particulars of the offence were also read out and explained to the Appellant. He in turn responded that he understood the indictment but he did not know the offence; in other words, he pleaded not guilty. That assessors were then appointed and the trial commenced. She thus prayed that this court finds no merit in this ground and dismisses it.

Resolution of Ground 2

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In order to support the contention that the trial Judge erred in taking 10 the Appellant's plea. Counsel for the Appellant relied on the procedure that was explained in *Adan v. Republic* (supra), where it was held that:

"When a person is charged with an offence, the charge and the particulars thereof should be read out to him, so far as possible in his own language, but if that is not possible in the language which he can 15 speak and understand. Thereafter the Court should explain to him the essential ingredients of the charge and he should be asked if he admits them. If he does admit his answer should be recorded as nearly as possible in his own words and then the plea of guilty formally entered. 20 The prosecutor should then be asked to state the facts of the case and the accused be given an opportunity to dispute or explain the facts or to add any relevant facts he may wish the court to know. If the accused does not agree with the facts as stated by the prosecutor or introduces new facts which, if true might raise a question as to his guilt, a change of plea to one of not guilty should be recorded and the trial should 25 proceed. If the accused does not dispute the alleged facts in any material respect, a conviction should be recorded and further facts relating to the question of sentence should be given before sentence is passed."

In this case, the Appellant did not plead guilty to the offence of rape. At the time he took his plea, section 60 of the TIA provided as follows: 30

60. Pleading to indictment.

The accused person to be tried before the High Court shall be placed at the bar unfettered, unless the court shall cause otherwise to order, and the indictment shall be read over to him or her by

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the chief registrar or other officer of the court, and explained if need be by that officer or interpreted by the interpreter of the accused person be required to read instantly to the indictment, unless, where the accused person is entitled to service of a copy of the indictment, he or she shall object to the want of such service, and the court shall find that he or she has not been duly served with a copy. iEmphctsis added,t

The Record, at page 11, shows what transpired as follows:

CourA: I take it you understand Rungoro.

Accused: Yes. 10

> Court: Tusinguire Benon Aou are charged with the offence of rape and that is an offence contrary to S. 123 & 124 of the Penal Code Act. It is alleged that you Tusinguire Benon on 28/01/2012 at Ngakonge village Kgangutali Sub-county in Hoima District you (had) sexual intercourse with ... Dnah without her consent meaning you forced this person into a sexual act when she did not agree. Have you understood? *Le ctarge against you?

1\tslngwre: I have understood the charges. Court: What is your answer?

Ttslngwre: I do not know the offence Court: I am recording a plea of not Guilty. 20

There is no doubt that the court read over the charge as it was required by section 60 TIA. The court also read over the particulars of the offence and explained them to the Appellant before he responded in his own

- words by stating, "I do not know the offence." His plea of not guilty was then entered by the trial Judge. There was no need to read out the facts to the Appellant, as it is done when one pleads guilty, because they would come out through the evidence that would be adduced in the impending trial. 25
- In the circumstances, we find that the procedure in *Adan v R* (supra) did not apply to this case. The trial Judge made no error at all in taking the Appellant's plea. Ground 2 of the appeal therefore had no merit and 30 it fails. w-

Ground 3

In this ground, the Appellant complained that the trial Judge erred in law and fact when he disregarded his defence of alibi.

Submissions of Counsel

- 5 10 15 In her submissions, M s. Zemei for the appellant referred to Bogere Moses v. Uganda, SCCA No. I of 1997, where it was held that when the prosecution adduces evidence that the accused was at the scene of the crime and the accused adduces evidence that he was elsewhere at the material time, it is incumbent upon the court to evaluate both versions judicially and give reasons why one and not the other is accepted. Counsel pointed out that in his judgment, at pages 6,7 atd 8, the trial Judge referred to the defence of alibi raised by the Appellant, but instead of analysing the evidence that he adduced, the Judge analysed the evidence about the Appellant's arrest. Further, that he concentrated on the evidence of the victim alone and not both parties, yet the facts on the Record with regard to the events that ensued on that day actually supported the Appellant's defence of alibi. It was also her submission that the issue of time was irrelevant to the facts before court since there were a number of unanswered questions, especially
- 20 with regard to the scene of the crime.

In reply, counsel for the respondent referred to Uganda v. George Ulilliam Simbwa, SCCA No. 37 of 1995, where it was held that it is the duty of the prosecution to destroy the alibi raised by the accused person and place him at the scene of crime. She further referred to Bogere

25 Moses & Another v. Uganda (supra) on what amounts to putting the accused person at the scene of crime. She drew our attention to Opolot Justine & Another v. Uganda, CACA No. 155 of 2009, where the court found that a person cannot be in two places at the same time. That since the trial Judge in that case found that the appellants were placed

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at the scene of the crime, he had to reject the appellants, alibi and it was not necessary for the prosecution to adduce any further evidence to disprove it, having placed the appellants at the scene of the crime.

5 Counsel went on to submit that in the instant case, at pages 53 and 54 of the Record, the trial Judge evaluated the version of the prosecution where evidence of identification by the victim proved the participation of the Appellant. But the version of the appellant was that he had gone to the lakeside only to be informed upon his return that he was needed by the police. That he then went to DW3 to escort him to the police. It

- was also his evidence that DW3 rang the LC1 Chairperson and together, they took the appellant to the police station. However, counsel contended that this evidence contradicted that of the LC1 Chairman who testified for the prosecution that he responded to the alarm from DW3's home. He therefore did not go to DW3's home in response to a 10
- telephone call. That the LC1 Chairman further explained that he saved the appellant from an angry mob that nearly killed him. 15

It was counsel's further submission that the trial . Judge found the evidence of PW2 (the LC I Chairman) to be more reliable than that of DW2 and DW3, whose testimonies were intended to save the Appellant "from the jaws of the law." That the Judge also found that PW2's testimony corroborated the testimony of the victim and that is why he believed that the victim was a truthful witness.

Counsel further contended that the evidence that the Appellant ran away and was hiding from the authorities when accused of the crime corroborated the evidence adduced by the prosecution because it was inconsistent with innocence. He referred to *Uganda v. George William Simbwa* (supra) where it was held that the evidence of disappearance of the accused person amounts to circumstantial evidence which corroborates and implicates them in the commission of the offence. 25

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Counsel concluded that the appellant was positively identified as the person who sexually assaulted Dinah, thereby placing him at the scene of crime.

Resolution of Ground 3

- In *R v. Chemulon Wero Olango* (1937) 4 EACA 46, it was stated that $\$ \mathsf{S} \$$ the burden on the person who sets up an alibi is to account for so much of the time of the transaction in question as to render it impossible as to have committed the imputed act. It is also the position that by setting up an alibi, an accused person does not thereby assume the burden of proving its truth so as to raise doubt in the prosecution case (See *Ntale* 10
- *v. Uganda* [1968] EA 365). Instead it is the duty of the prosecution to disprove it using evidence on the Record to put the accused person at the scene of the crime at the time the offence was committed, or other evidence to that effect.
- 15 In the instant case, the Appellant set up an alibi in his testimony, at page 21 of the Record, as follows:

"On 23/01/2012 I was with one Garasi then the complainant ... Dinah came and by passed us going to Katuku's place. She left us seated and *returned and found us still seated. She left us seated at Katugu's place. I was with Garasi. The chairman came and found me seated and inquired* from me if I had seen ... Dinah.

I informed the chairman that she had by passed us and went and later came back and found us seated. The chairman told (us) that Dinah had reported me for raping her. I asked the Chairman the time I raped her because she left me seated with Garazo. I told the chairman to go and *resolve the matter. At Chairman's people were many including Dinah."

The appellant had no obligation to prove the truth of this alibi but he called two witnesses in his defence, none of whom was Garasi. Their testimonies were detailed and recorded by the court from page 23-28 of

the Record. 30

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The Appellant complained that the trial Judge analysed the evidence adduced by the prosecution and disregarded his testimony as well as DW2 and DW3 which proved that he was elsewhere at the time he was alleged to have committed the offence. However, we observed that in his judgment, there was a section entitled "Defence," from page 55-57 of the Record. In that portion, the trial Judge analysed the evidence adduced by the prosecution vis-d-vis the testimonies of the Appellant, DW2 and DW3 in great detail. It was therefore not correct for counsel for the Appellant to state that the trial Judge disregarded the Appellant's defence of alibi and evaluated the evidence adduced by the prosecution alone.

Counsel for the Appellant also contended that the issue of time was irrelevant to the facts before the court because there were many unexplained facts about the scene of the crime. It is our view that this submission contradicts the very basis of the defence of a-libi. One cannot come to a conclusion as to where the suspect was at the time the offence was committed, in order to exculpate him from having committed it, without analysing the various time periods referred to in the evidence of both the prosecution and the defence. This is because one who sets up an alibi seeks "to account for so much of the time of the transaction in

question as to render it impossible as to have committed the imputed act,' as it was held in *Chemulon Slero Olango* (supra).

Counsel for the Appellant further contended that the trial Judge evaluated the evidence about the Appellant's arrest instead of that relating to the commission of the offence. We found that this too was not correct. At pages 54 to 55, the trial Judge evaluated the evidence relating to the participation of the Appellant in the offence for which he was indicted. After setting out the factors that make for a reliable identification of the assailant by the victim he found and held that: 25

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"The evidence of PW3 Dinah was that she knew Tusingwire Benon very *well even prior to the occurrence of the sexual act. He was a neighbour* in the village where she lived. The evidence was that he was the secretary for defence in their village. He was therefore a well-known person. Dinah told court that the assault took place from about 5 pm. That was broad daylight. It lasted for about two hours as the assailant was at this time not getting any resistance. That was a long enough time to make a positive identification. This was a body contact incident, and that meant the two were in body contact. The conditions were favourable for a correct identification. There was no possibility of mistaken identity."

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We observed that the trial Judge evaluated the evidence about the Appellant's arrest for a particular purpose. It was the prosecution case that after he committed the offence, the appellant fled from his village. Indeed, he too testified that he went to the lakeside. Therefore, he was not arrested in his own village and home, Nyankonge LCI; he was instead arrested in Rwesambya Village (LCI) where he sought refuge in DW3 Bizamabo David's home, his brother-in-law. In view of that, the trial Judge found, at pages 56-57 of the Record, that:

"The evidence of running away and hiding from the authorities when accused of a crime corroborates prosecution evidence, as this is 20 inconsistent with innocence. I found that the evidence of Nyabuhara was a pack of lies. She did not come out as a truthful witness in cross examination. Her evidence was only intended to save her friend Tusingwire from the jaws of the law. The same was true of the evidence of Tusingwire. I disbelieved it. I believed the evidence of ... Dinah. She 25 appeared to be a truthful witness. Even in absence of evidence of corroboration, I would base a decision on her single witness evidence. But there was evidence of corroboration as I have shown. The prosecution proved the ingredient of the participation of the accused in the sexual act beyond reasonable doubt." 30

We therefore find that the trial Judge made no error of fact or law when he disbelieved the Appellant's alibi. Ground 3 of the appeal therefore also fails.

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Ground 4

In Ground 4, the Appellant complained that the trial Judge erred both in fact and law when he imposed a sentence upon him that was manifestly harsh and excessive.

Submissions of Counsel

Ms Zimei for the Appellant relied on *Wamutabanlwe Jamiru v. Uganda*, Criminal Appeal No. 74 of 2007 for the principles upon which the appellate court may interfere with the sentence imposed by the trial court. She referred to *Rwabugande Moses v. Uganda*, SCCA No. 25 of 10 2014, where it was held that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with Article 23 (8) of the Constitution. She further referred to *Bukenya Joseph v. Uganda*, SCCA No. 17 of 20LO, where it was held that the time spent on remand need not be considered in a mathematical fashion 1s but it must be considered and such consideration included in the sentencing record. Counsel pointed out that the appellant was sentenced to 30 years' imprisonment and after deduction of the remand period of 6 years, the sentence should have come down to 24 years' imprisonment. She contended that the sentence imposed was excessive 2o and prayed that it be substituted with the period so far served by the Appellant. She explained that after mentioning the 6-year remand period, the same should have been considered but the trial Judge went on to impose a sentence of 30 years'imprisonment including the 6 years spent on remand. She prayed that this court finds the sentence harsh 25 and excessive in the circumstances.

In reply, counsel for the respondent submitted that the sentence was not harsh as the offence for which it was imposed carries a maximum sentence of death. Further, that the Constitution (Sentencing Guidelines for the Courts of Judicature) (Practice Directions), 20¹³

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prescribe a range from 30 years' imprisonment to death for the offence of rape. Counsel went on to submit that the sentence could not have been harsh because the victim was pregnant at the time she was raped and she had a miscarriage thereafter. She pointed out that the victim further testified that six years after the incident, she was still traumatized and did not have peace.

Counsel went on to submit that the trial Judge considered both mitigating and aggravating factors and complied with Article 23 (8) of the Constitution by deducting the period of 6 years that the appellant spent on remand, bringing his sentence to 24 years' imprisonment from the date of conviction. She invited this court to find that the trial Judge passed an appropriate sentence. She went on to refer to *Kyalimpa Edward v. Uganda*, SCCA No.10 of 1995 for the principle that an appropriate sentence is a matter for the discretion of the sentencing Judge and can only be interfered with by an appellate court if it is found to have been illegal, harsh or manifestly excessive so as to amount to an injustice.

Counsel for the respondent finally submitted that the sentence imposed by the trial Judge was consistent with the current sentencing regime for the offence of rape. She relied on *Anguyo George v. Uganda*, CACA No. 44 of 2014 where a sentence of 40 years' imprisonment for the offence of rape was upheld by this court. She also drew our attention to *Mubaugizi Alex v. Uganda*, SCCA No. 7 of 2015, where a sentence of 30 years' imprisonment was upheld by the Supreme Court for the offence of rape. Counsel finally invited court to uphold both the conviction and sentence of the appellant and dismiss the appeal. 20

Resolution of Ground 4

The principle is well settled that this court will not interfere with a sentence imposed by the trial court exercising its discretion unless the

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sentence is illegal, or this court finds that the trial Judge did not consider an important matter or circumstance which ought to have been considered while passing sentence. Further that the court may interfere with the sentence if it is shown that it was manifestly excessive

or so low as to amount to an injustice. [See *Livingstone Kakooza v. Uganda*; SCCA No. 17 of 1993].

We observed that though the Appellant's complaint was that the sentence imposed was harsh and excessive in the circumstances of the case, the submissions of counsel addressed an alleged illegality in the sentence. Counsel asserted that the trial Judge did not deduct the

10 period that the Appellant spent on remand and so the resultant sentence was 30 years' imprisonment, yet it was not.

In his sentencing ruling at page 59 of the Record, which was really a summary with bullet points and not a ruling as such, the trial Judge stated thus:

"Court: Sentence and reasons

- Accused is \$1^{st}\$ offender.
- *He is young and can reform.*
- *Was a leader Defence Secretary*
- \$_{BUT}\$ 20
- *a) Committed crime of rape.*
- *b) Lady was pregnant.*
- *c)* Lady had miscarriage.
- *Accused being on remand 5 yrs. 4 months.*
- *Family responsibilities.* 25
- Appears remorseful.

Court: Sentence of 30 years and remove remand of 6 years and so sentenced to 24 years."

This was certainly a novel way of recording a sentence. However, despite

the format, it is clear that the trial Judge who sentenced the Appellant 30

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on 26th June 2017, after the decision of the Supreme Court in the case of **Rwabugande Moses** (supra) deducted the period the Appellant spent on remand, committed no error in law. He complied with the provisions of Article 23 (8) of the Constitution.

The Supreme Court in *Aharikundira Yustina v. Uganda, Criminal 5 Appeal 27 of 2015* had this to say about sentences that are challenged for being manifestly excessive:

> "There is a high threshold to be met for an appellate court to intervene" with the sentence handed down by a trial judge on grounds of it being manifestly excessive. Sentencing is not a mechanical process but a matter of judicial discretion therefore perfect uniformity is hardly possible. The key word is "manifestly excessive". An appellate court will only intervene where the sentence imposed exceeds the permissible *range or sentence variation.*" {**Emphasis supplied**}

In order to persuade us that the sentence was harsh and excessive in 15 the circumstances of this case, counsel for the Appellant ought to have cited decisions that showed that the sentence exceeded the permissible range or sentence variation, but she did not. On the other hand, counsel for the respondent did so to persuade us to uphold the sentence imposed by the trial Judge. 20

We have considered the fact that the maximum sentence for the offence of rape is death. Further, that the sentencing range specified in Part I of the 3rd Schedule of the Sentencing Guidelines for the offence is from 30 years up to death. Counsel for the Appellant drew our attention to

sentences for the offence of murder by this court and the Supreme 25 Court of 30 years and 40 years' imprisonment, which was way above what was imposed by the trial Judge in this case.

The Appellant's counsel therefore did not persuade us that the sentence of 24 years' imprisonment that was imposed by the trial Judge was

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manifestly excessive in the circumstances of this case. We therefore have no other alternative but to uphold the sentence.

In conclusion, this appeal substantially failed on all grounds and it is hereby dismissed. The Appellant shall continue to serve the sentence that was imposed by the trial Judge.

Dated this 30 1st day of 2024

¹⁰ Richard Buteera DEPUTY CHIEF JUSTICE

¹⁵ Hellen Obura JUSTICE OF APPEAL

(- Irene Mulyago

20 JUSTICE OF APPEAL

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