THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 17 OF 2015

NAMUNGALA ISA::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of Hon. Lady Justice Catherine Bamugemereire in the High Court of Uganda at Jinja in Criminal Session Case No. 242 of 2012)

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE STEPHEN MUSOTA, JA

HON. LADY JUSTICE PERCY NIGHT TUHAISE, JA

JUDGMENT

This is an appeal against sentence by Lady Justice Catherine Bamugemereire in Criminal Case No. 242 of 2012 in which the appellant was convicted of the offence of rape contrary to Sections 123 and 124 of the Penal Code Act and sentenced to 43 years imprisonment less the time spent in Prison.

The victim, Namusoke Sarah was a close neighbour to the appellant, Namungala Isa and that for a long time he had persistently demanded for sexual intercourse with her and also with other neighbours. On the 28th day of March, 2012 while

the victim, Namusoke Sarah aged 79 years was in her house at Namwendwa sleeping at night, she heard somebody moving within the house. She lit the candle and realized that somebody was pushing her bedroom door. The door was hit hard from the outside, it fell inside and a bare chested man whom the victim identified as Namungala Isa, the appellant entered.

The appellant then hit the victim's head using a metal which he was holding, pushed her down and proceeded to have forceful penetrative sexual intercourse with her. The victim made an alarm hence the appellant running away and residents gathered including her own daughter and the LC1 Chairman. A week later, the appellant was arrested and accordingly charged with rape. The trial Judge convicted and sentenced the appellant to 43 years imprisonment less the time he had spent in prison.

Being dissatisfied with the decision of the trial Judge, the appellant with leave of this Court appealed against sentence only and the grounds of appeal were that;

1. ***The learned trial Judge erred in law and in fact when she imposed an illegal sentence against the appellant.***
2. ***The learned trial Judge erred in law and in fact when she passed manifestly harsh and excessive sentence against the appellant thereby failing to exercise his discretion judiciously.***

At the hearing of the appeal, Mr. Ivan Geoffrey Mangeni appeared for the appellant while the respondent was represented by Ms. Asiku Nelly, Senior State Attorney.

Counsel for the appellant submitted that the sentence imposed on the appellant by the trial Judge was contrary to Article 23(8) of the Constitution which entails Court to take into account the period of time a convict spends in lawful custody. He invited Court to look at page 96 of the record of appeal where the trial Judge stated that the prison time already spent had been considered and must be deducted from the 43 year term. According to counsel, the trial Judge should have deducted the period of 2 years and 7 months that the appellant had spent on remand.

Counsel further stated that the sentence was illegal and vague because "prison time" as stated by the trial Judge is not provided for in the law. He added that it would have been prudent for the trial Judge to clearly state that the period spent on remand had been deducted.

On ground 2 of the appeal, counsel submitted that the trial Judge sentenced the appellant to 43 years stating that although he was a young man, he had not shown any remorse. According to counsel, the trial Judge never considered that the appellant was a first offender and had no previous criminal record. He relied on ***Bikanga Daniel V Uganda Court of Appeal Criminal Appeal No.38 of 2000*** for the proposition that the attitude and language of the learned trial Judge

in her approach and comments before she imposed the sentence was in question because the language was not civil and commonly used in Court.

Counsel for the respondent opposed the appeal and conceded on ground 1 that the sentence imposed by the learned trial Judge was vague. She prayed that this Court sets aside the sentence and exercises its discretion under Section 11 of the Judicature Act to resentence the appellant to 30 years imprisonment. She relied on ***Mubangizi Alex V Uganda, Supreme Court Criminal Appeal No. 7 of 2015,*** where Court found that the sentence of 30 years imprisonment for rape was appropriate considering both the aggravating and mitigating factors.

As a first appellate court, it is our duty to re- evaluate the evidence as adduced and make our own inferences and conclusions on the facts and the law bearing in mind that it was the trial court which had the opportunity to observe the demeanour of the witness which this court was unable to do. **See Rule 30(1) of the Rules of this Court and Selle and Another versus Associated Motors Boat Company Limited and Others [1968] EA 123.**

The appellate Court is not to interfere with the sentence imposed by a trial Court which has exercised its discretion 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 circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle. ***See Kiwalabye Bernard V Uganda, Criminal Appeal No.143 of 2001.***

In the instant appeal, it was conceded by the respondent's counsel that the sentence imposed by the learned trial Judge upon the appellant was vague. In sentencing the appellant, the learned trial Judge stated as follows;

> *"Offender is sentenced to 43 years imprisonment. Prison time already spent has been considered and must be deducted from the 43 year term. Although he is a young man, he has not shown much remorse. The ghastly and beastly act of cowardice by the offender deserves condemnation in the strongest terms possible. The sentence passed cannot and will not remove the pain, the shame and the emotional and physical wounds inflicted on the victim, an elderly woman. Only time will heal.*
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> *The manner in which the offence was committed had strong undertones of gender power relations written all over. The offender should learn to value the opposite sex. It is hoped that in some way, the sentence will serve as a deterrent to other likeminded miscreants."*

With due respect, our reading of the above excerpt shows that the choice of words used by the leaned trial Judge in sentencing the appellant was vague and emotional. The learned trial Judge sentenced the appellant to 43 years imprisonment less the time spent in prison. Although she mentions that the prison time already spent has been considered, she did not state the time spent in 'prison'. There is no provision of such a sentence in our laws. What is provided for is the remand period under Article 23(8) of the Constitution.

Article 23(8) of the Constitution provides as follows;

> *"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."*

We therefore find that the sentence was ambiguous and the learned trial Judge did not take into account the provisions of Article 23(8) of the Constitution. For the said reasons, we set the sentence aside. Ground 1 of the appeal succeeds.

Since conviction of the appellant was not in issue, we shall proceed under Section 11 of the Judicature Act to resentence him.

On ground 2, the learned trial Judge is faulted for passing a manifestly harsh and excessive sentence against the appellant thereby failing to exercise his discretion judiciously.

The mitigating factors presented for the appellant were that he was a first offender, a young man capable of reforming and had been on remand for two years.

The aggravating factors presented were that sexual offences were rampant and the appellant committed a serious offence which carries a maximum sentence of death. It was committed against an old woman of 79 years who was not given

any respect as a grandmother and had inflicted psychological and physical injuries on her.

The Supreme Court has in ***Mbunya Godfrey V Uganda, Supreme Court Criminal Appeal No.4 of 2011,*** emphasized the need to maintain consistency while sentencing persons convicted of similar offences. Court 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."*

In ***Onaba Razaki V Uganda, Court of Appeal Criminal Appeal No.327 of 2009,*** the appellant was convicted of rape and sentenced to 15 years imprisonment. This Court set aside the sentence of 15 years and substituted it with 14 years' imprisonment.

In ***Yebuga Majid V Uganda, Court of Appeal Criminal Appeal No.303 of 2009***, the appellant raped the victim while in her sleep and he was sentenced to 15 years imprisonment. On appeal, this Court upheld the sentence of 15 years.

Having considered both the aggravating and mitigating factors set out above, we take into account the period that the appellant spent on remand and now sentence him to 17 years and 8 months. From that sentence, we deduct the period of 2 years and 8 months that the appellant spent on remand. The appellant shall serve a sentence of 15 years from 13th November, 2014, the day he was convicted.

We so order

Dated at Jinja this ....17th........... day of .....July..................2019

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HON. MR. JUSTICE BARISHAKI CHEBORION

JUSTICE OF APPEAL

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HON. MR. JUSTICE STEPHEN MUSOTA

JUSTICE OF APPEAL

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HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUSTICE OF APPEAL

17/7/19

Appellant present.
Mr. [illegible] for the State.
Mr. [illegible] for the appellant.
Hellen Birungi: clerk.
CJA: Judgment delivered in the presence of the above.

17/7/19