

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

Coram: Arach Amoko, Mwangusya, Opio- Aweri, Mwondha and Tibatemwa
Ekirikubinza JJSC

CRIMINAL APPEAL NO. 025 OF 2015

BETWEEN

NATURINDA TAMSON.....APPELLANT

AND

UGANDA.....RESPONDENT

(Appeal arising from the decision of the Court of Appeal at Kampala Criminal Appeal No. 13 of 2011 delivered on the 3rd February 2015 before Kasule, Kakuru and Egonda Ntende JJA)

JUDGMENT OF THE COURT

The appellant was aggrieved and dissatisfied with the decision of the Court of Appeal and appealed to this Court on one ground as follows:-

That the Learned Justices of the Court of Appeal erred in law when they confirmed the sentence of imprisonment of 16 years which they had declared illegal.

He prayed that this Court allows the appeal and sets aside the sentence.

Background:-

The appellant was convicted by the trial Judge on 16th December 2010 of offences of Rape, Defilement and Aggravated robbery c/ss 123, 129(1) and 285 and 286(2) of the Penal Code Act respectively together with a co-accused.

It was alleged that on the night of 22nd October 2008, thugs broke into the home of Kyomuhendo Harriet (KH) with an iron bar demanding money from her. The appellant had a torch which he was flashing around. KH failed to produce the money and the appellant raped her. His co-accused A1 also raped her. Both assailants were known to KH as they were village mates. The appellant also had sexual intercourse with Nagaba Joan a girl less than 18 years of age as she was 16 years at the time of commission of the offence. The appellant and his co-accused robbed KH of shs. 100,000 (One Hundred Thousand shillings), a panga, 4 hoes, a flask, 18 plates, a mattress, a shirt,

a trouser and 2 hurricane lamps. The appellant and his co-accused were sentenced to 18 years for each of the counts. The trial Judge ordered the three sentences to run concurrently. Dissatisfied with the sentence, the appellant appealed to the Court of Appeal against sentence only.

The Court of Appeal varied the sentences imposed by the trial judge to 10 years imprisonment for Rape, 13 years imprisonment for Defilement and 16 years imprisonment for Aggravated Robbery respectively as charged and convicted.

Representation

The appellant was represented by Ms. Wakabala Susan on private brief. The respondent was represented by Mr. Wanamama, a Senior state Attorney.

Submissions

Counsel for the appellant submitted that the learned Justices of the Court of Appeal correctly evaluated the record on sentence that had been passed by the trial Judge and declared it null. She further submitted among others that the Court of Appeal found that the trial Judge did not comply with Article 23(8) of the Constitution of Uganda as he did not take into account the period spent on remand by the appellant. He left the obligation to prison authorities which was erroneous and a nullity.

She quoted paragraph 16 of the judgment of Court as follows:-

"Where a Court determines a sentence of imprisonment is the appropriate sentence, the trial Court is required to take into account the period spent on remand in determining the sentence. Much as the learned trial Judge stated that he is taking into account the long period spent on remand he left it to those who administer the sentence to deduct the period spent on remand from the sentence he had imposed. This was misdirection. This duty belonged to the trial judge and not to the prison authorities. This misdirection rendered the sentence a nullity."

Counsel further submitted that the Justices of the Court of Appeal passed new sentences for the counts of Rape and Defilement. But when they got to passing a sentence on the Aggravated robbery they confirmed the sentence that they had declared null.

She argued that the Court after deducting 2 years, from the sentence of 18 years imprisonment came to 16 years imprisonment which they upheld. Counsel concluded that by doing so, the learned Justices upheld an illegal sentence as it had not taken in account the period spent on remand as

provided by Article 23(8) of the Constitution. She prayed that this Court be pleased to set aside the sentence and substitute it with a legal sentence taking into consideration the mitigating factors like the appellant being a first offender, has been on remand for 2 years, he was 27 years at the time of conviction of the offence and is now 29 years and has been in prison serving the illegal sentence and has not accessed Justice. The period the appellant has served to be considered sufficient and order his release.

On the other hand, Counsel for the respondent in his written submissions conceded that the Court of Appeal Justices confirmed the sentence of 16 years imprisonment for Aggravated robbery after deducting the 2 years the appellant had spent on remand. He, however, argued that the learned Justices were entitled to do so and did not occasion a miscarriage of Justice.

He also conceded that the learned trial judge sentence was found wanting in law in as far as the trial Judge did not deduct the 2 years spent on remand before the conviction of the appellant.

He conceded in his submissions that the learned Justices of the Court of Appeal subsequently deducted the 2 years and went ahead and passed new sentences on counts of Rape and Defilement and for Aggravated robbery came to 16 years imprisonment, all to run concurrently.

He contended that he associated himself with the decision of the Court of Appeal Justices as they confirmed 16 years on Aggravated robbery by the trial Judge and there was no illegal sentence upheld by the learned Justices of the Court of Appeal since the illegality was only in failure to deduct the 2 years spent on remand before conviction. By the learned Justices deducting the 2 years from 18 years, they cured the error so the confirmation of 16 years imprisonment was legal.

He prayed that the decision of the Court of Appeal be upheld.

Consideration of the Appeal:-

This was a second appeal in which the appellant appealed only against sentence on the 3rd count of Aggravated robbery c/s 285 and 286(2) of the Penal Code Act.

It is trite law as settled in a host of cases of this Court and the predecessor Court of Appeal for East Africa that **"An appellate Court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case....."** (See Livingstone Kakooza Vs Uganda SC Criminal Appeal No. 17 of 1993).

The complaint of the appellant is that after the Court of Appeal finding that it was erroneous for the trial Judge not to deduct or take into account the period the appellant spent on remand and left it to the Prison Authorities, the learned Justices went ahead and merely deducted the 2 years from 18 years, when the 18 years had been declared a nullity.

It is not in dispute that the Court of Appeal has powers of the Court of original jurisdiction (see section 11 of the Judicature Act)

Article 23(8) of the Constitution was reproduced and the words "shall be taken into account in imposing the term of imprisonment" were in bold (highlighted). The language used in this Article is mandatory which in our view failure to comply with leads to fatal consequences and the cure lies in passing sentence afresh. The learned Justices relied on the case of (**Kwamisi Jacob versus Uganda COA Criminal Appeal No. 203 of 2009**) and had this to say:

In our view, the foregoing provision imposes an obligation on the trial court to take into account the period an accused has spent on remand in the determination of an appropriate sentence. Failure to comply with the foregoing constitutional provision renders the subsequent sentence a nullity.

Considering the above, it's clear to us that the learned Justices had invalidated the 18 years imprisonment on each of the counts which had been imposed by the trial Judge. In the judgment at page 16 of the record of proceedings in paragraph 17, they stated as follows, "**we take it that the learned trial Judge had in mind a sentence of 18 years on each count less 2 years on remand which would set the actual sentence in this case to 16 years imprisonment on each count rather than the stated 18 years.**"

The (**Court of Appeal Rules**) **Directions SI 13-10 Rule 30**, provide for the power of Court to reappraise the evidence and draw its own inferences of fact with a view of coming up with its own independent decision.


The learned Justices considered the mitigating and aggravating factors. They considered that the appellant was a first offender, spent 2 years on remand, he was 29 years old. But nevertheless he committed a multiplicity of offences of which the maximum sentence is death.

They were sentenced to 10 years imprisonment from the date of conviction (16th Dec 2010) on the Count of Rape, 13 years imprisonment on the count of defilement and 16 years imprisonment for aggravated robbery. They ordered all sentences to run concurrently.


After the Court of Appeal reappraised the evidence and re-evaluated it, they found that the appropriate sentence was 16 years imprisonment. It is trite law that sentencing is a matter of discretion of Court but has to be exercised judicially. It was held in **Banco Arabe Espanol Vs Bank of Uganda Civil Appeal No.8 of 1998** as follows: - It is trite that an appeal against a decision made in exercise of discretion, the appellate court will not interfere with the trial court's discretion unless it was arrived at unjudicially. In such a case therefore, the primary duty of the appellate court is to consider whether or not the trial court exercised its discretion judicially....” In the instant case it is clear to us that the Court of Appeal properly exercised its duty. We accept counsel for the respondent's submission that after re-appraising the record, the Court was entitled to come to its own decision or pass an appropriate sentence. There was nothing illegal with that and that did not culminate in confirmation of an illegal sentence.


Considering the facts of this appeal, it was on a point of law only as it was in respect of Article 23(8) of the Constitution. We are inclined to believe that the Court of Appeal after taking into account the period the appellant spent on remand came to the term of imprisonment of 16 years for Aggravated robbery.


There is no hard and fast rule therefore that an appellate court cannot pass a similar sentence to the one which was passed by the trial court.

We find no merit in the appeal. The same is accordingly dismissed. The appellant should continue to serve the sentences as varied by the Court of Appeal, *and as confirmed by this court* 

Dated at Kampala this *26th* day of *April* 2017


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ARACH AMOKO
JUSTICE OF THE SUPREME COURT


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MWANGUSYA
JUSTICE OF THE SUPREME COURT


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OPIO AWERI

JUSTICE OF THE SUPREME COURT

Mwondha

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MWONDHA

JUSTICE OF THE SUPREME COURT

Tibatemwa

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TIBATEMWA EKIRIKUBINZA

JUSTICE OF THE SUPRME COURT

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