

5 **THE REPUBLIC OF UGANDA**
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

10 **CORAM: (MWONDHA, MUGAMBA, BUTEERA; JJSC;**
NSHIMYE; TUMWESIGYE, Ag. JJSC.)

CRIMINAL APPEAL NO 71 OF 2018

BETWEEN

15 **WANYANGA EREMIYA:..... APPELLANT**

AND

20 **UGANDA :..... RESPONDENT**

[Appeal from the judgment of the Court of Appeal in Criminal Appeal No. 223 of 2014
(Kasule, Barishaki Cheborion & Obura, JJA) at Jinja dated 28th June, 2018]

25 **JUDGMENT**

30 Wanyanga Eremiya, the appellant, was indicted and convicted of rape contrary to sections 13 and 124 of the Penal Code Act, and sentenced to 21 years imprisonment by the High Court at Iganga (Alividza, J). He appealed to the Court of Appeal against both conviction and sentence. That court upheld the conviction but reduced the sentence to 16 years' imprisonment. He now appeals to this court only against sentence.

5 **Background**

On 6th March, 2011 at Buwumi Trading Centre, Bulesa sub-county in Bugiri District, at around 9:00p.m., Auma Eunice aged 69 years, was going home from the market when she saw three men, Wafula, Zubairi and the appellant. They were sitting near the verandah of a milling house. As she passed by them one of them grabbed her, 10 tore her dress and used it to tie her hands. They then gang raped her. Auma Eunice reported the matter to Buwumi Police Station the next day. Two of the suspects escaped but the appellant was arrested and charged with the offence of rape. He was convicted 15 and sentenced by the High Court. His appeal against conviction was dismissed but his sentence was reduced to 20 years' imprisonment.

Being dissatisfied with the decision of the Court of Appeal to sentence him to 16 years' imprisonment, the appellant lodged his 20 appeal on the following ground:

The learned Justices of Appeal erred in law when they sentenced the appellant to 16 years imprisonment which sentence was harsh, illegal and manifestly excessive.

At the hearing, the appellant was represented by Emmanuel 25 Muwonge while Joanita Tumwikirize, State Attorney, represented the respondent. Both counsel filed written submissions.

Learned counsel for the appellant contended that the sentence of 16 years' imprisonment was manifestly harsh and excessive. He argued that the appellant was a first time offender with no previous 30 record of conviction, a family man with children and that he had

5 since commenced the reconciliation process with the family of the
victim. He relied on the case of **Tumwesigye Anthony vs. Uganda**
Criminal Appeal No. 46 of 2012 where the court reduced a 32 year
term of imprisonment for the offence of murder to 20 years. He also
relied on the case of **Tukamuhebwa David Junior & Anor vs.**
10 **Uganda**, SCCA No. 59 of 2016 where this court maintained a
sentence of 10 years' imprisonment for the offence of rape.

Counsel went on to argue that Article 23(8) of the Constitution
requires the court to take into account the period spent on remand
before sentencing. He argued that the Court of Appeal failed to
15 make an arithmetical deduction of the period spent on remand as
was held in the case of **Rwabugande Moses vs. Uganda**, SCCA No.
25 of 2014. He added that this was a proper case that warranted
interference with the exercise of discretion by the Court of Appeal.

He prayed the court to allow the appeal, set aside the sentence of
20 16 years' imprisonment and substitute it with a sentence of 10
years' imprisonment or less.

Learned counsel for the respondent opposed the appeal. She
argued that the sentence imposed by the learned Justices of
Appeal was not illegal because the learned Justices followed the
25 law relating to sentence. Counsel submitted that the court
considered both the mitigating and aggravating factors before
imposing the sentence. She further argued that the court also took
into account the aggravating factors such as the manner in which
the victim, an elderly woman of 69 years, was gang raped.

30 Counsel contended that the appellant's argument that the
sentence imposed fell short of arithmetical deduction as required

5 by law was misconstrued. She referred court to the Court of Appeal judgment to illustrate the fact that the court first meted out a sentence of 20 years' imprisonment and deducted 4 years before finally sentencing the appellant to 16 years' imprisonment.

10 She also submitted that the appellant's appeal against harshness and excessiveness of sentence was contrary to section 5(3) of the Judicature Act which prohibits appeals to this court against severity of sentence.

15 Counsel finally argued that this court cannot interfere with the sentence imposed by the Court of Appeal since the appellant failed to show that the exercise of discretion by the Court of Appeal resulted in the sentence imposed being manifestly excessive as to occasion a miscarriage of justice or that there was a failure to consider an important matter or that the sentence imposed was wrong in principle.

20 He relied on the case of **Kiwalabye vs. Uganda**, Court of Appeal Criminal Appeal No. 143 of 2001, and **Wamutabanewe Jamiru vs. Uganda** SCCA No. 74 of 2007, to support her argument. She prayed the court to dismiss the appeal for lack of merit.

Consideration by Court

25 It is trite that an appellate court can only interfere with sentence imposed by a trial court in very limited circumstances. This court has in numerous cases discussed the circumstances under which an appellate court can interfere with the discretion of a lower court.

5 For example, in Kyalimpa Edward vs. Uganda, SCCA No. 10 of 1995, this court while referring to R vs. Haviland (1983) 5 Cr. App. R(s) 109 held as follows:

10 **An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was**
15 **manifestly so excessive as to amount to an injustice: Ogalo s/o Owoura vs. R (1954) I E.A.C.A 270 and R vs. Mohamedali Jamal [1948] I E.A.C.A 126.**

In Kamya Johnson Wavamuno vs. Uganda SCCA No. 16 of 2000, the court held as follows:

20 **It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to exercise a discretion, or a failure to take into account a material consideration, or taking into account an immaterial consideration or an error in principle was**
25 **made. It is not sufficient that the members of the court would have exercised their discretion differently.**

We find no justification to interfere with the discretion of the Court of Appeal in sentencing the appellant as the sentence is not illegal and the court took into account all material considerations.

5 It was the appellant's contention that the Court of Appeal failed to make an arithmetical deduction of the period spent on remand as held in the case of **Rwabugande Moses vs. Uganda**, SCCA No. 25 of 2014 and that this amounted to an illegality warranting interference with the exercise of discretion by the Court of Appeal.

10 Article 23(8) provides as follows:

"Where a person is convicted and sentenced to a term of imprisonment of 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
15 **term of sentence."**

This court in the case of **Rwabugande Moses vs. Uganda** (supra) discussed the meaning of the phrase "taking into account of the period spent on remand" and had this to say:

It is our view that the taking into account the period
20 **spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision: consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in**
25 **lawful custody prior to the trial must be specifically credited to an accused.**

While exercising their powers under section 11 of the Judicature Act cap 13 to impose a new sentence the Justices of Appeal stated:

Considering the circumstances of this case, we find the
30 **sentence of 21 years' imprisonment harsh in the**

5 **circumstances and substitute it with 20 years' imprisonment. We note that the appellant had been on remand for 4 years. He will therefore serve a sentence of 16 years. The sentence is to run from 30th April, 2014, the day the appellant was convicted. (our emphasis)**

10 **...in conclusion, we maintain the conviction but set aside the sentence of 21 years' imprisonment imposed upon the appellant and substitute it with a sentence of 16 years running from 30th April, 2014, the date of conviction...**

15 The discretion of the Court of Appeal as the sentencing court was influenced by the consideration of both the mitigating and aggravating factors. The Court of Appeal went further and examined the antecedents of the appellant and the time the appellant had spent on remand. The court first set aside the
20 sentence of 21 years for being harsh and excessive and substituted it with a sentence of 20 years. The court then subtracted the 4 years period the appellant had spent on remand thus arriving at the 16 year imprisonment term.

25 We therefore, find no fault in the process leading to the imposition of the 16 year sentence of imprisonment on the appellant by the Court of Appeal as it was in accordance with the law.

30 The offence of rape of which the appellant was convicted attracts a maximum sentence of death. The appellant with his accomplices gang raped a 69 year old woman. We find it preposterous, therefore, for the appellant to complain that the sentence by the Court of Appeal was excessive.

5 Counsel for the appellant also argued that this court is bound by
the principle of consistency which requires that appellants in cases
involving similar facts be given similar sentences. He relied on the
cases of **Tumwesigye Anthony vs. Uganda** Criminal Appeal No.
46 of 2012 where the court reduced a 32 year term of
10 imprisonment for the offence of murder to 20 years' imprisonment
and **Tukamuhebwa David Junior vs. Anor vs. Uganda** SCCA No.
59 of 2016 where this court maintained a sentence of 10 years'
imprisonment for the offence of rape.

The case of **Tumwesigye vs. Uganda** is distinguishable from the
15 instant case because the circumstances of the two cases are clearly
different. The case of **Tukamuhabwa David Junior**, on the other
hand, shows circumstances which are graver than those in the
instant case. There was rape by the two appellants and in addition
aggravated robbery.

20 With respect to the conviction of rape, the Court of Appeal gave the
appellants a sentence of 10 years' imprisonment each, and for
aggravated robbery they were given a sentence of 18 years each.
We think that the sentence for rape was not an appropriate
sentence. It was very much on the lower side considering the
25 circumstances of the case. But the DPP did not cross-appeal
against the sentence and, therefore, this court could not interfere
with it as it was not raised as a ground of appeal. The sentence
should, therefore, not be viewed as the standard sentence in cases
of gang rapes.

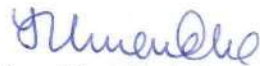
30 We therefore find that the sentence of 16 years is neither illegal
nor manifestly excessive.

5 In the result, we dismiss the appeal.



Dated at Kampala this ^{5th} ~~November~~ ^{December} day of ~~November~~, 2019.

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Hon. Justice Faith Mwendha
JUSTICE OF THE SUPREME COURT

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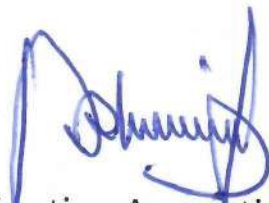
Hon. Justice Paul Mugamba
JUSTICE OF THE SUPREME COURT

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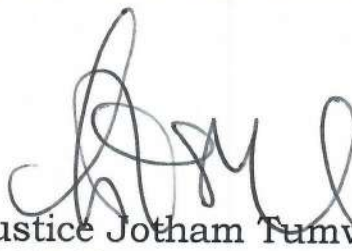
Hon. Justice Richard Buteera
JUSTICE OF THE SUPREME COURT

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Hon. Justice Augustine Nshimye
JUSTICE OF THE SUPREME COURT

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Hon. Justice Jotham Tumwesigye
JUSTICE OF THE SUPREME COURT