THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 271 OF 2015

MUDDE JOHN::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Entebbe before Alividza, J. dated 23rd July, 2015 in High Court Criminal Session Case No. 097 of 2012).

CORAM: HON. JUSTICE RICHARD BUTEERA, DCJ
HON. JUSTICE ELIZABETH MUSOKE, JA
HON. JUSTICE CHEBORION BARISHAKI, JA

JUDGMENT OF THE COURT

This is an appeal against both conviction and sentence arising from the decision of Alividza, J. whereby she convicted the appellant on one count of rape contrary to **Sections 123 and 124 of the Penal Code Act, Cap. 120** (count one) and on another count of simple robbery contrary to **Section 285(1)** of the same Act (count two). The appellant was then sentenced to concurrent sentences of 20 years imprisonment on count one, and 5 years imprisonment on count two.

The facts giving rise to this appeal, as accepted by the learned trial Judge were that on 29th October 2011, at Kalantini Village in Wakiso District, the appellant had unlawful sexual intercourse with Mpeera Milly, aged 45 years, without her consent. The prosecution evidence was that on the fateful day, the victim left her home late in the evening to take food for her sister who was admitted at a nearby clinic. On her way, she was waylaid by the appellant who forcefully dragged her to the bush and had sex with her. During the assault, the victim's phone rang from her pocket. The appellant then took the phone as well as UGX 15,000/= from her pocket. When PW1 was passing by after the incident, he saw the appellant running towards him.

PW1 then asked the appellant why he was running but the former ran towards the bush.

The appellant denied the offence. His case was that he was at home sleeping when Local Council Officials in the company of the victim went to his house and searched it. They informed him that they were looking for someone else and then left. The appellant left the village and returned two months later when his wife had given birth.

Upon his return to the village, he was arrested and charged with the offence of rape and simple robbery.

The trial Judge believed the prosecution evidence, convicted the appellant and sentenced him as indicated above. Being dissatisfied with the decision, the appellant appealed to this Court against both conviction and sentence on the following grounds:

> "1. **The Learned trial Judge erred in law and fact when she failed to evaluate the evidence on record regarding the identification of the appellant.**
>
> 2. **The Learned trial Judge erred in law and fact when she relied instead of rejecting the prosecution evidence that had wide discrepancies and inconsistencies (sic).**
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> 3. **The Learned trial Judge erred in law and fact when she found out (sic) that the evidence of the prosecution witnesses was corroborating.**
>
> 4. **Without prejudice to the above, the Learned trial Judge gave a very harsh and heavy punishment to the appellant."**

Representation:

At the hearing of the appeal, the appellant was represented by Ms Sarah Awelo, while Ms Caroline Acio appeared for the respondent.

Either party filed written submissions in support of and in reply to the appeal, respectively.

Appellant's case

On ground 1 of the appeal, counsel for the appellant submitted that the trial Judge wrongly made a finding that the prosecution evidence was sufficient in regard to positive identification of the appellant. Counsel pointed out that while both PW1 and PW2 testified that they knew the appellant as the son of Kibirango, the appellant denied being a son to the said Kibirango. However, that the trial Judge ignored the appellant's evidence in that regard.

Counsel further made reference to the appellant's evidence that the Local Council authorities left him at his home indicating that it seemed the appellant was not the assailant but a one Kato Paul. It was counsel's argument that the trial Judge ignored this evidence which was never discredited at trial.

It was counsel's further submission that by the trial Judge only considering the prosecution evidence in isolation of the defence evidence, she caused injustice to the appellant. Counsel relied on **Bogere Moses & anor Versus Uganda, Supreme Court Criminal Appeal No. 1/1997**, for the above submission.

Counsel further submitted that the trial Judge wrongly made a finding that the appellant was well known to PW1 prior to the rape, which was not true. He argued that from the record, PW1 did not know the appellant, nor did he know his family. PW1 testified that the appellant did not have a wife, yet it was evident that the appellant had a wife.

Counsel further submitted that it was hard to fathom how PW1 was able to recognize the face of a person who was running at 8:30 pm. It was the same witness who was unable to recognize the contents of a black polythene bag that he found on the way until he flashed a torch.

It was counsel's further submission that the learned trial Judge erred in relying on the victim's evidence at the scene of crime. The learned trial Judge did not take into consideration the unique nature of the victim's mental status constituted by panic and fear. In counsel's view, the victim lost her

senses during the sexual assault and it was impossible for her to make a positive identification of her assailant. Counsel made reference to the victim's evidence that it was until the assailant took the phone and money that she realized that she had been raped. Counsel submitted that it was hard to understand how a person in that state could have identified the assailant.

On grounds 2 and 3 of appeal, counsel for the appellant submitted that the medical findings were inconsistent with the victim's allegations of rape. Counsel pointed out that the victim claimed that she felt pain in the lower abdomen and had been strangled during the attack, yet the Medical Report indicated that there were no external injuries on her private parts, nor on her elbows or neck. In counsel's view, this was not a minor discrepancy but the same was just treated lightly by the trial Judge.

Counsel for the appellant further submitted that the victim was also inconsistent as to whether she was raped or not. In counsel's view, this pointed to the untruthful nature of the victim and her evidence ought to have been treated with caution.

In regard to the count of simple robbery, counsel submitted that the prosecution failed in proving any of the ingredients of the said offence. Counsel pointed out that no stolen item was recovered from the appellant's house and no investigations were ever carried out.

Further, that there was no ample corroboration in the prosecution evidence that the learned trial Judge relied upon in convicting the appellant of simple robbery.

Counsel prayed that this Court acquits the appellant on both counts.

On ground 4 of appeal, counsel for the appellant submitted that the sentence of 21 years imprisonment was unfair in the circumstances of the case. This was considering that the victim did not suffer any abnormality or acquire any disease. Further, that the value of the stolen phone was never established and only cash of UGX 13,000/= was lost in the process.

Counsel prayed for this Court to reduce the sentence imposed on the appellant to the time he has so far served in prison.

Reply

In reply to ground 1 of the appeal, counsel for the respondent submitted that the learned trial Judge evaluated the evidence as a whole and arrived at the right conclusion that the conditions at the time favored positive identification and that the appellant was well identified by the prosecution witnesses. Counsel pointed out that the learned trial Judge relied on the evidence of PW1 who told Court that the appellant was well known to him because the latter was born and raised in the former's village. Counsel argued that the description given by PW1 of the appellant established that he knew him before the incident in issue.

Counsel further submitted that PW1 identified the appellant and even called him by name to ask what he was running from. Further, that it was 8:30 pm and there was moonlight.

It was counsel's further submission that as per the evidence of the victim, the appellant was well known to her as he grew up in a nearby village. Further, that the appellant raped the victim for about 20 minutes and he asked her if she recognized him.

Counsel for the respondent argued that the two prosecution witnesses demonstrated with consistence and detail that the appellant was well known to them. Further, that the evidence on record indicated that the incident happened when there was a lot of moonlight and not so dark at 8:30pm, and the witnesses were able to identify the appellant.

Counsel pointed out that the reason why the Local Council authorities did not act immediately was because they thought the matter needed police attention but not because they thought the assailant was Kato Paul.

On grounds 2 and 3 of appeal, counsel for the respondent submitted that there was no inconsistency between the evidence of the victim and the

medical evidence. He indicated that it was never the victim's evidence that she had external injuries. Counsel pointed out that the Medical Conclusion that there was possible rape with no external injuries was consistent with the victim's evidence.

Counsel for the respondent made reference to the appellant's argument that the victim kept changing positions as to whether she was raped or not. Counsel pointed out that at first, the victim was ashamed to say that she had been raped. While giving evidence, the victim was consistent and there was no contradiction in her evidence. In counsel's view, this could not amount to a contradiction.

Counsel further submitted that if this Court finds that the above amounted to contradictions/inconsistencies in the prosecution evidence, then the same should be treated as minor and not pointing to deliberate untruthfulness.

Counsel further submitted that there was no legal requirement for corroboration in sexual offences and that a conviction could be based on the evidence of a single witness. Nevertheless, that in the present case as rightly found by the trial Judge, the evidence on record was well corroborated.

Counsel prayed for the appeal to be dismissed and for the conviction and sentences to be confirmed.

Resolution of the Appeal

We have carefully listened to the submissions of counsel for either side and perused the lower Court record.

As a first appellate Court, we have a duty to review and re-evaluate the evidence that was adduced before the trial Court, by subjecting the same to a fresh scrutiny, draw inferences and reach our own decision. We are also alive to the fact that this Court did not have the opportunity to hear and observe the witnesses as the trial Judge did. See (***See Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions, Kifamunte***

Henry Versus Uganda, SC Criminal Appeal No.10 of 1997, Bogere Moses Versus Uganda, SC Criminal Appeal No.1 of 1997).

With the above principles in mind, we shall proceed to re-evaluate the evidence on the offence of rape contrary to sections 123 and 124 of the Penal Code Act and simple robbery contrary to section 285(1) of the Penal Code Act.

Rape

In addressing the matter before her, the trial Judge rightly stated the ingredients for the offence of rape as follows:

1. That carnal knowledge (sexual act) was committed against the victim;
2. There was lack of consent or it was obtained by force or means of threat; and
3. It was the appellant who committed the unlawful sexual act.

Prosecution relied on two witnesses to prove the above ingredients against the appellant.

Jamil Sebbalama (PW1) testified that he knew the appellant as someone born in his village. On 29/10/2011 while returning from the village shops going home, he found a polythene bag that had fallen on the way. He flashed a torch light and discovered that the polythene bag had a box containing food. When he had moved about 15 meters from the polythene bag, he heard someone making an alarm from the direction where he was coming from. He identified that it was the voice of the victim asking for help and saying that the son of Kabirigo had taken her phone.

PW1 then heard footsteps and he saw the appellant running towards him. PW1 inquired from the appellant what he was running from but the latter turned and ran to the bush. PW1 testified that he was able to recognize the appellant because there was moonlight at 8:30pm.

When the victim came out of the bush, she informed PW1 that it was Mudde. The victim then went to a neighbor's house to get help.

During cross examination, PW1 indicated that Kibirango had four sons and that the appellant was the fourth. Further, that the appellant did not have a wife.

Nampeera Milly (PW2) testified that the appellant grew up from a village neighboring hers. Further, that she knew him and also knew his father. She testified that on the fateful day she left home to take food for her sick sister at a nearby clinic. Suddenly, someone jumped from the roadside, held her by the neck and told her that he was going to kill her. The victim tried to get hold of the assailant's private parts so as to defend herself but he then kicked her. The assailant then pushed her to the bush and put his knee in between her legs. Upon her underpants getting torn, he started having sexual intercourse with her. After about 20 minutes, her phone rang from her jacket. The assailant took one hand off the victim's neck, got the said phone and switched it off and also took UGX 13,000/= that was also in the victim's jacket pocket. The assailant then called the victim 3 times by her name and asked her if she had recognized him. The victim gestured by nodding her head, that she had not recognized him but she had already identified him. She further testified that she was able to identify the assailant as the appellant because it was not too dark and there was moonlight.

Upon the appellant taking victim's phone and money, he ran away. The victim cried for help saying that it was the son of Kibirango who had raped her and that he had stolen her money and phone. She indicated that at first she didn't mention that the appellant had raped her because she was ashamed.

The victim then went to a neighbor's house. She was advised to go and report to the Local Council authorities since it was thought that police would not help her. She then called the Local Council Authorities from the appellant's village. She informed them that the appellant had waylaid her and stolen from her. The Local Council Authorities went to the appellant's home and found him wearing the same black shorts from the time of the incident. The victim was then advised to report the matter to police.

She further testified that when police went to arrest the appellant, he ran away. She did not tell the Local Council Authorities that the appellant had raped her but she informed the police. She was also medically examined and the Medical Report admitted in evidence.

It was her evidence that the pain in the neck took long to heal and she also got injuries on her thigh.

On his part, the appellant denied the allegations that he had raped the Victim. He testified that on the fateful day, he was at his home sleeping. Then at about 6:00pm the next morning, Local Council Authorities in company with the victim went to his house. They searched his house. He was then informed that what they were searching for was not at his house. As the Authorities left his house, they mentioned amongst themselves that it seemed the appellant was not the one but a one Kato Paul.

It was his further testimony that he thereafter left home since he had a contract of pouring murram along the Gomba Road. He left his wife, who was pregnant by then, with a telephone contact to reach him in case of anything. After two months, he returned home upon his wife giving birth. When he was at home preparing to go to hospital to buy medicine prescribed after his wife's discharge, the victim's husband informed him that he was needed by Police. While buying medicine from the hospital on his way to the Police Station, he was arrested by Police.

The appellant further testified that he did not know a one Kibirango and that his father was called Joseph Nvule.

In our opinion, all the ingredients of the offence of rape were contested in this matter. From the submissions of counsel, grounds 2 and 3 of the appeal mainly related to failure by the prosecution to prove the first two ingredients of the offence of rape, being that the act of sexual intercourse took place and non-consent of the victim. Then ground 1 related to failure by the prosecution to prove the appellant's participation in the commission of the crime.

Sexual intercourse means that there has to be penetration of the vagina, however slight, by a sexual organ. In ***Bassita Hussein Versus Uganda, Supreme Court Criminal Appeal No. 35 of 1995***, the Court indicated that the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence.

In the present case, the prosecution sought to prove the aspect of sexual intercourse with the evidence of the Victim and the medical examination report (PEXH 1).

According to the medical examination Report, there were no external injuries on the victim's private parts, elbows or neck. But the conclusion was that there was possible rape with no possible injuries. The rape was reportedly on 29/10/2011 and the Medical Report is dated 31/10/2011. While the victim testified that the assailant was all the while during the rape holding her by the neck, the medical Report did not support this allegation. In our view, there might have been marks or stiffness in the neck owing to the manner in which the victim was held down for 20 minutes. Evidently, the Medical Report did not in any way assist the prosecution much in proving that the act of sexual intercourse took place and without the consent of the victim.

What remained was the victim's evidence that she was raped by the appellant. From the evidence on record, it appears to us that the victim did not disclose to PW1 and the neighbors that she was raped but that the assailant had stolen from her. She also didn't disclose the fact that the assailant had raped her to the Local Council Authorities. It appears to us that when the Local Council Authorities went to the appellant's house on the morning after the rape, they were looking for a thief and not a sexual offender. The victim's explanation for the failure to disclose the rape was that she was ashamed at first.

It is true that sometimes victims of rape are ashamed to disclose what happened to them. However, in the circumstances of this case, we would have accepted the victim's explanation if there was other evidence to

corroborate her evidence. We are alive to the law that even if there was no corroborating evidence, the Court would still go ahead and rely upon the uncorroborated evidence of a witness if it was satisfied that he/she was truthful ***(See Okello Geofrey Versus Uganda, Court of Appeal Criminal Appeal No. 0329 of 2010)***. In the present case, besides the victim not disclosing at first that she had been raped, the Medical Report did not support her claim on the manner in which she was allegedly raped. In the circumstances of the case, the victim's evidence was not strong and compelling enough to stand on its own.

Although the victim testified that she took her torn underpants to Police, unfortunate to the case this evidence was never tendered in Court.

In believing the testimony of the victim in the present case, the trial Judge stated as follows:

> *"From the demeanor of the witness, and the way she narrated what happened to her, she appeared credible on the fact that sexual act were performed on her. I find no reason to disbelieve her on this fact..."*

As mentioned above, we are alive to the fact that the trial Judge had an opportunity to observe the demeanor of the witnesses at trial, which we did not. However, in the circumstances of the case and the evidence on record, we find that the victim's evidence alone could not stand to prove the ingredients of sexual intercourse without the victim's consent, beyond reasonable doubt.

The appellant also raised a complaint that the conditions prevailing at the time when the crime was committed did not favour positive identification.

The law regarding identification was settled in ***Abdudala Nabulere & Anor Versus Uganda, Court of Appeal Criminal Appeal No. 9 of 1987***, as follows:

"...The judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger. In our judgment, when the quality of identification is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused well before, a court can safely convict even though there is no 'other evidence to support the identification evidence; provided the court adequately warns itself of the special need for caution..."

In the present case, the incident is reported to have taken place at 8:30pm, which was at night. The prosecution witnesses' evidence was that they were able to identify the appellant as the assailant because of the bright moonlight on the fateful night and that the incident took 20 minutes. Further, that the appellant was well known to both the victim and PW1 who properly identified him as the assailant.

From the evidence on record, we are not convinced beyond reasonable doubt that the appellant was well known to the two prosecution witnesses. First of all, the appellant denied being a son to a one Kibirango whom both witnesses indicated was the appellant's father. The appellant's denial was neither challenged nor discredited in cross examination. Further, PW1 testified that the appellant had no wife yet this was not true. From the evidence on record, the appellant had a wife.

The circumstances in which PW1 allegedly identified the appellant were also not favourable. It was at night and the assailant was running towards PW1 then again turned off to the bush. The assailant did not speak to the said witness.

It is also our observation that the circumstances were not favorable for the victim to properly identify the assailant during the incident. She was

reportedly held by the neck for the entire 20 minutes and as per her evidence, she did not even realise that she had been raped until her phone rang. In addition, it was at night and as indicated above, the appellant was not well known to the victim.

We find that the evidence sought to be relied upon by the prosecution, and which was believed by the learned trial Judge, did not prove the participation of the appellant in the rape of the victim beyond reasonable doubt.

Simple Robbery

There are three ingredients to be proved beyond reasonable doubt in a charge of simple robbery:

1. That there was theft
2. That the person used or threatened to use actual violence at, immediately before or immediately after
3. That the accused participated in the theft.

The prosecution needed to prove the above ingredients beyond reasonable doubt that the appellant stole the victim's phone and money. Prosecution relied principally on the evidence of the victim and PW1 which has already been stated above.

The victim's evidence was that the assailant stole her phone and money. She then went to a neighbors' home and informed them about the incident. Further, that the matter was reported to the Local Council authorities who went to the appellant's home to do a search. It appears to us that this was in the endeavor to recover the stolen property. PW1 corroborated this evidence that on the fateful night, the victim was making an alarm about her stolen property.

However, we reiterate that the conditions were not conducive for proper identification as to remove any reasonable doubt that it was the appellant who participated in the stealing of the property. The prosecution did not

manage to prove the third ingredient of the offence of simple robbery being that it was the appellant who participated in the theft.

In the result, the appeal succeeds on all grounds of appeal. The conviction of the appellant is quashed on all the two counts of rape and simple robbery respectively. The sentences are set side accordingly. We order the immediate release of the appellant unless he is otherwise being held on other lawful charges.

Dated at Kampala this ..... day of 2023

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Richard Buteera
Deputy Chief Justice

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Elizabeth Musoke
Justice of Appeal

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Cheborion Barishaki
Justice of Appeal