THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CRIMINAL SESSION CASE No. 0054 OF 2002

UGANDA :: PROSECUTOR

-VERSUS-

TUGUMENAWE JACK ALIAS BYARA :::::::::::::::::: ACCUSED

BEFORE: HON MR JUSTICE PAUL K. MUGAMBA

JUDGMENT:

The accused was indicted for rape, contrary to section 117 and 118 of the Penal Code Act. In all the prosecution called four witnesses namely Medius Nyabuhara (PW1), No.20054 D/CPL Etoju Sam (PW2), Niwagaba Francis (PW3) and Dr Robert Tumuhimbise (PW4). The accused was the sole witness for the defence.

Briefly the prosecution case is that on 3rd March 2000 at Kyonyo village, Mayengo Parish, Kamuganguzi Sub-county in Kabale District the prosecutrix (PW1) was returning home from a Trading Centre where she had gone to buy some salt. The time was about 6.00p.m. About ten metres away from her house PW1 met accused whom she knew well as a relative and a resident of the same village. Accused threw PW1 onto a footpath and forcefully had sexual intercourse with her. PW1's efforts to resist and cry out bore no results for some time until she was heard by her children who had rushed to the scene. Accused ran away when the children appeared on their way to the scene. As accused went away he stated that the first time PW1 had alleged that he had stabbed her but that this time it had been his intention to kill her. The complainant reported the matter to the chairman and on

8th March 2000 she reported the matter to Police. Accused was arrested and charged with rape.

Accused's defence was of alibi. He stated that at the alleged time of the offence he was in far off Katuna where he worked. He denied involvement.

The prosecution has a duty to prove the case against the accused beyond reasonable doubt. See **Leonard Aniseth Vs R [1963] EA 206.** A conviction will be secured on the strength of the prosecution case and not on the weakness of the defence case. In order to successfully prosecute the offence of rape the state has to prove three ingredients which are:-

1. That there was unlawful carnal knowledge.
2. That there was lack of consent.

3. That it was the accused who committed the offence alleged.

PW1 testified that she had carnal knowledge on the occasion when she was thrown on a village footpath by her attacker. PW3 testified that when he answered the alarm he was able to see PW1's assailant within 10 metres on top of PW1. It is only PW1 who states positively that she had sexual intercourse on the occasion. There is no medical evidence positively showing that PW1 had sexual intercourse. The report sought to be preferred by the prosecution to this effect thought PW4 bore no names and was abandoned for want of significance. The evidence of a complainant in sexual offences need not be corroborated though as a matter of practice court will always find it safe to look for some corroboration before it convicts on the evidence of that

single witness. See **Chila & Another Vs Republic [1967] EA 722.** Court must warn itself and the assessors of the dangers of convicting on the corroborated evidence of a single witness, but may go ahead and convict if it is satisfied that the witness was truthful. Clearly there is no corroboration of the evidence of PW1 showing there was sexual intercourse. PW1 could have been mistaken like it was that in her testimony she said she had not gone to report to the Gombolola Chief after the alleged offence when in her statement to police, Exhibit D1 she stated that she had actually reported to the Gombolola chief. All in all I do not find the prosecution has proved beyond reasonable doubt that PW1 did have sexual intercourse on the occasion.

The second ingredient was whether or not she gave her consent. It is her testimony that she did not give

consent. The defence does not claim that there was consent in any event. In the circumstances I find the prosecution has proved this ingredient beyond reasonable doubt.

Regarding accused's participation, both PW1 and PW3 knew the accused very well. He was not only a relative but someone from the same village. In **Abdalla Nabulere & Others Vs Uganda [1979] HCB 77** the Court of Appeal for Uganda stated:

> "***Where the case against accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the Judge should warn himself and the assessors of the special need for caution before convicting the accused***

in reliance on the correctness of identification. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witness can be all mistaken. The Judge should 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 power to quality the greater the danger."

I have indicated earlier that accused's defence is of alibi. Where an accused person is not his responsibility to prove it. The prosecution has a duty to disprove and duty to alibi by adducing evidence which places accused at the scene of crime. See **Sekitoleko Vs Uganda [1967] EA 531.** Accused testified that he was in Katuna at the time the offence is alleged to have been committed while the prosecution evidence is to the effect that he was seen and identified at Kyonyo village by PW1 and PW3. PW1 testified that she knew the accused as a relative and a resident of the same village whom she knew earlier. Such was the evidence of PW3 also. PW1 testified that accused threw her on the ground and held her close. PW3 came within 10 metres of the accused. The time was about 6.00p.m. and there was ample light to enable both PW1 and PW3 identify the accused. There was sufficient time for both PW1 and PW3 to identify accused

whom they had earlier. I am satisfied the prosecution has disproved the alibi sep up by the accused as he was properly identified by both PW1 and PW3.

Both assessors in their joint opinion advise me to convict accused of rape. I have shown elsewhere n the course of this judgment that I am not satisfied the prosecution has proved there was sexual intercourse. I am therefore inclined to differ with the assessors. I find the accused not guilty of rape but rather I convict him of Indecent Assault, contrary to section 122 (1) of the Penal Code Act.

P.K. MUGAMBA

JUDGE

6th November 2003.