THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT ARUA

CASE NO: HCT-02-CR-SC-0059 OF 2003

UGANDA :: PROSECUTOR

VERSUS

No. RA 64508 CPL OKANYA MUSA :::::::::::::: ACCUSED

BEFORE: HON. MR JUSTICE AUGUSTUS KANIA

JUDGMENT:-

The accused Okanya Musa is indicted for rape contrary to sections and 124 of the Penal Code Act Laws of Uganda 2000. It is alleged that the accused the accused on the 29th day of March 2001 at Paicho Camp 2 in Paicho Division in the Gulu District unlawfully had carnal knowledge of Acen Karolina without her consent. The accused denied the offence and pleaded not guilty.

The case for the prosecution in brief is that on the fateful night at 1000 hours at Paicho Camp 2, Ali – Kal Parish, Paicho Division in

Aswa County Gulu District when the complainant was asleep in her house the accused forcibly entered the house. He warned the complainant not to make noise and raped her. The accused then left but the complainant reported the incident immediately to her neighbour and the camp leader who advised her to go back into her house to sleep until the following morning. In the morning she made a report at the Army detatch at the sub-county Headquarter, which led to the arrest of the accused and his eventual being charged with the offence of rape.

The accused in his sworn statement denied the offence. He testified that on the 29th March 2001 he was in charge of deploying soldiers and that after he had deployed them his wife called him to tell him his child was seriously sick. This was at 6.30p.m. He went home and found his son seriously sick so he had to take him for medical treatment to the doctor who was in charge of his detatch. After treatment he went home and remained home until 10.00p.m. when his child died. After his son

had died he reported to the RSM and later went to inform the doctor who had treated the boy and he came home with him where he spent the rest of the night until 6.30a.m. He stated that he was then arrested by the officer in charge of the detatch for failing to answer the radio signal when he was raised on radio and he was caned as a punishment. He was then transferred to the Division Headquarters and detained for 1½ months and then taken to court because a woman alleged that the person who raped her the previous night was of his size.

The above is more or less the summary of the case for the prosecution and the defence.

Once an accused person denies the offence with which he is charged he thereby puts in issue each and every essential ingredient of the said offence. The onus of proving the guilt of the accused in then on the prosecution. This burden remains on the prosecution throughout the course of trial and at no stage does it

shift onto the accused because in our criminal justice system the accused has no burden to prove he is innocent. To secure the conviction of the accused, the prosecution must prove his guilt beyond reasonable doubt. If at the end of the case there is a doubt as to whether the accused committed the offence or not, such doubt must be resolved in favour of the accused leading to his acquittal. See **Woolmington Vs DPP [1935] AC 462** and **Lubogo & Others Vs Uganda [1967] EA 440.**

It is also trite that the accused is to be convicted on the strength of the prosecution case but not on the weakness of the case for the defence. See **Israel Epuku s/o Achiete Vs R [1934] 1 EACA 166.**

To secure the conviction of the accused person the prosecution has to prove beyond reasonable doubt each and every essential ingredient of the offence with which the accused is charged. In

the offence of rape the essential ingredients the prosecution is under a duty to prove beyond reasonable doubt are following:-

1. That sexual intercourse with the complainant took place.
2. That such sexual intercourse with the complainant was without her consent.
3. That the accused participated in such sexual intercourse.

To prove the fact of sexual intercourse with the complainant the prosecution relied on the evidence of PW1 Dr Kilama and PW2 Karlina Aceng. The evidence of PW1 Dr Kilama was admitted under the provisions of section of the Trial on Indictment Act Laws of Uganda 2000. The evidence is comprised of a medical report compiled in Police Form 3. It is to the effect that Dr Kilama examined the complainant at the request of Central Police Station Gulu with a complaint that she had been raped. The examination was done on the 30th March 2001 and the findings of PW1 Dr Kilama were:-

1. That the complainant was aged 55 years.
2. That there was penetration but the hymen had been ruptured a long time ago.
3. That there was a tear in the posterior faucet and this injury was fresh.
4. That there were no signs of venereal diseases.

The medical report was signed for the Medical Superintendent Gulu Regional Hospital and stamped. It was tendered as an exhibit and marked exhibit P1.

PW2 Karlina Aceng testified that on the 29th March 2001 when she was sleeping in her house her assailant entered by making the door open. He then ordered her to lie down and he had sexual intercourse with her. The defence did not contest this ingredient. In fact Mr Oyarmoi, learned counsel for the accused conceded that the prosecution has proved the fact of sexual

intercourse beyond reasonable doubt. Considering the uncontested evidence of the complainant and the medical evidence of PW1 Dr Kilama, I find that the prosecution has proved beyond reasonable doubt that sexual intercourse took place with the complainant.

To prove the second ingredient that the sexual intercourse was without consent of the complainant the prosecution relied on the evidence of the complainant alone. The complainant PW2 Karlina Aceng's evidence on this point is that her assailant who was armed and in military uniform entered her house where she was sleeping by kicking the door open. Once inside her assailant ordered her to lie down and had sexual intercourse with her without her consent. She gave evidence that she did not raise an alarm because she was frightened, as she feared for her assailant could kill her. She offered no resistance for the same reason and because she was too weak to resist. As soon as the assailant had left her house, she reported the incident to he immediate

neighbour and to the camp leader. The defence did not dispute that the sexual intercourse with the complainant was without her consent. The fact that the assailant of the complainant gained entry into the complainant's house by violently kicking the door open, he was dressed in military uniform and had a gun and ordered the complainant to lie down before immediately having sexual intercourse underscores complainant's evidence that she did give consent to the sexual intercourse. I find that the prosecution has proved beyond reasonable doubt that the assailant of the complainant had sexual intercourse with her without her consent.

With regard to the identity of the accused as that person who had unlawful sexual intercourse with the complainant there is only the eyewitness evidence was that on the fateful day at about 10.00p.m. While she was sleeping in her house, the accused kicked open her door and entered. The accused who was dressed in military uniform and armed with a gun ordered her to

lie down, put his gun ordered her to lie down, put his gun beside her and had sexual intercourse with her without her consent. She testified that she was able to identify the accused as her assailant because he was carrying a torch. The accused on his part denied participating in this offence.

It is trite that when the guilt of an accused person is dependent on the visual identification of a sole identifying witness the court should look for some other independent evidence to corroborate such identification evidence of a single witness. This is because an honest witness who claims to have identified an accused person might as well be mistaken particularly so if the identification of the accused was made under difficult condition.

This however does not mean that it is not lawful to act and convict an accused person on the uncorroborated evidence of a sole identifying witness. It is perfectly lawful to convict on such evidence. However before acting on such evidence, the presiding

judge has a duty of warning the assessors and himself/herself of the dangers of acting on such evidence in the absence of corroboration as I indeed did during my summing up to the assessors. Having administered such warning, the judge may then proceed to act and convict on such evidence if he finds that such identification was made under conditions favourable to a correct and positive identification without the possibility of an error or mistake.

Conditions that favour correct identification have been developed over the years and laid down in the following cases. See **Abdalla Bin Wendo Vs R [1953] EACA 166, Roria Vs R [1967] EA 583** and **Abdalla Nabulere & Others Vs Uganda [1977] HCB 72.** These conditions are:-

(i) The familiarity of the accused to the witness.

(ii) The conditions of lighting.

(iii) The proximity of the accused to the witness when the identification was made.

(iv) The length of time during which the witness identified the accused.

Though the complainant gave evidence that she had not known the accused before the incident, she testified that she used to see the accused among soldiers as they passed by her house. According to this piece of evidence thought the complainant might not have known who the accused was, he was pretty familiar to her because she often saw him among other soldiers passing by her house.

With regard to the condition of lighting PW2 Acen Karlina, the complainant testified that the accused kicked open her door and entered her house with a bright torch. By this torchlight she was able to observe that the accused was dressed in an army uniform with an army hat and that he was armed with a gun. She was

also able to see the accused place his gun beside her before he raped her though the complainant's evidence was that when the accused was having sexual intercourse with her he switched off the torch her evidence shows that before the accused started having sexual intercourse with her there was sufficient torch light to observe and identify the accused.

He evidence as regards her proximity to the accused when he entered her house is that on kicking open her door the accused entered her house (one roomed hut) as all the houses in the campsare). He ordered her to lie down, put his gun beside her before he had sexual intercourse with her. From the time the accused kicked his way into the house of the complainant, ordered her to lie down and placed his gun beside the complainant, he must have got very close to the complainant.

With regard to the length of time the complainant took to identify the accused she herself stated that the accused was not in her

house for very long. However considering the evidence of the complainant that on gaining entry into her house the accused ordered her to lie down, place his gun beside her before switching off the torch and draping her, I find that period enough to enable the complainant make an identification.

In the result considering that the accused was not a total stranger to the complainant, there was torch light I the house for some considerable period of time and that the accused and the complainant were during the above period in one room and close to each other, I find the conditions were favourable to correct identification of the accused by the complainant free of mistake or error. I accordingly find that the accused was correctly identified as the assailant who had sexual intercourse with the complainant without her consent.

The prosecution also endeavoured to connect the accused with this offence through the evidence of PW3 Salina Adyero. She

testified that on the 29th March 2001 between 11.00p.m. and 12.00p.m. when she was conversing with two other people in her house she heard a gunshot behind her house. She concluded it was the accused who had fired his gun because he had bought a drink from her and he sat drinking outside of the house. She had known the accused because she had seen him on three previous occasions though this was the first time for him to come to her stake for a drink. PW3 Salina Adyero testified that on hearing the gunshot she extinguished the candle, which was in the house. The accused then came and squatted at the door and other soldiers arrived and disarmed him. The accused ran away only to return at midnight with another gun when the soldiers who had disarmed him had gone away. By this time the witness testified she was hiding behind her house. Form her hiding place the witness saw the accused going to the house of Alonyo Susan but before but before she could reach there Alonyo Susan ran to join the witness. PW3 Salina Adyero then testified that the accused instead now headed for the house of Acero Margaret who fled to

the camp leader's house before the accused could reach her house. It was her evidence that she saw the accused very clearly because he was having a torch. She then saw the accused entering the house of the complainant only to learn later that the complainant had been raped.

Still applying the conditions under difficult condition the accused was known to PW3 Salina Adyero because she had prior to this day seen the accused three times and the accused had the fateful night been to her house to buy and take a drink. The accused from the time PW3 Salina Adyero was observing him from her hiding place had a torch which he was flashing around by which she managed to identify him. The house of Alanyo Susan to which the witness saw the accused go was only 15 metres from where she was hiding. The house of the complainant which the accused eventually entered was only 5 metres from PW3 Salina Adyero's house behind which she was hiding. With these distances the accused was very close to the witness when he was

under her observation. The accused had been in the presence of the witness since about 11.00p.m. that night but from the time he came back at 12.00 midnight he kept moving while being observed by the witness from her hiding place, the accused kept moving from the house of Alanyo Susan, towards that of Aciro Margaret until he finally into the house of the complainant. These movements added amounted to some considerable length of time when he was under the observation of PW3 Salina Adyero. I find from the above evidence that the accused was familiar to the witness, the torch he was carrying afforded sufficient lighting, the accused was close to the witness and he came under the observation of the witness for a considerable period of time.

All in all I find that the above conditions were favourable to PW3 Salina Adyero properly identifying the accused as that person on the fateful day who went to the house of Alanyo Susan and Aciro Margarret and eventually entered the complainant's house. This evidence which attempts to link the accused with this offence is

circumstantial in nature. The circumstances the prosecution is relying on are that that fateful night the accused was seen by PW3 Salina Adyero in the neighbourhood going from house to hose. He eventually entered the house of the complainant and soon thereafter the complainant complained that she had been raped. It is trite that before drawing an inference of the quilt of an accused person from circumstantial evidence, there must be no other co-existing circumstances, which would weaken or destroy that inference. See **Teper Vs R [1952] AC 498.** In the instant case the circumstances being relied on to draw an inference of the guilt of the accused have no co-existing circumstances to weaken this inference. The accused was seen entering the house of an old woman of 55 years at night and soon thereafter the woman complains of having been raped and on examination PW1 Dr Kilama makes a finding that indeed somebody had sexual intercourse with her. The only irresistible inference from these set of facts is that it is that person in this case the one who was seen entering the complainant's house who had sexual

intercourse with the complainant. I find that by this circumstantial evidence the prosecution has proved that the accused indeed did have sexual intercourse with the complainant without her consent.

The accused made a statement on affirmation in which he stated that the fateful night he was assigned to deploy soldiers. After having deployed the soldiers, at 6.30p.m. he received information from his wife that his child was very sick. He collected the child and too him for medical treatment but unluckily he died, the whole night he was busy preparing for the funeral and he was at home. By this statement the accused was pleading the defence of alibi.

It is trite that once an accused raises the defence of alibi, he does not assume the burden to prove it is true. It is up to the prosecution to disprove that alibi by evidence and place the accused squarely at the scene of crime. See **Asineth**

In the instant case PW2 Karlina Acen indentified the accused in her house as her assailant. PW3 Salina Adyero that evening first saw the accused went to her house to buy a drink. In the of the same evening after a gunshot soldiers disarmed the accused and he went away. PW3 Salina Adyero again gave evidence that the accused again returned armed and after roaming in the neighbourhood entered the complainant's house. Having found that the identification of the accused by both PW2 Karlina Acen and PW3 Salina Adyero was positive, the accused has thereby been put squarely at the scene of crime. The accused having been properly identified under conditions that favour correct identification, I find that the prosecution has proved beyond reasonable dount that the accused participated in having sexual intercourse with the complainant without her consent.

It is trite in sexual offences that a conviction should ordinarily not be based on the uncorroborated evidence of the complainant. It is however, not unlawful to base a conviction on such uncorroborated evidence of a complainant provided that the judge

warns the assessors and himself/herself of the dangers of acting on such evidence alone and finds the evidence of the complainant truthful. See **Chill & Another Vs R [1967] EA 722.** I did administer this warning during my summing up to the assessors. In the instant case the complainant's evidence on the fact of sexual intercourse is corroborated by the evidence of PW1 Dr Kilama while by the participation of the accused is corroborated by circumstantial of PW3 Salina Adyero. Though the evidence of the complainant on the lack of consent is not corroborated by some other evidence I have considered it very carefully and found it to be truthful in all respects and I find that it can be acted on in the absence of corroboration.

In the result, the prosecution having proved all the essential ingredients of the offence of rape beyond reasonable doubt, in agreement with the unanimous opinion of the assessors I find the accused guilty of the rape of Karlina Acen contrary to sections 123 and 124 of the Penal Code Act and convict him accordingly.

AUGUSTUS KANIA

JUDGE

18/03/2004.

Right of appeal explained.

AUGUSTUS KANIA

JUDGE

18/03/2004.

Ogwal:-

The convict has no record – he can be taken as a first offender. He was remanded 10/12/2001. The offence of rape is grave. It is very bad in this case because the victim was 55 years old. The act was a taboo. I pray for a strong deterrent sentence.

Oloya:-

The convict is a first offender who has been on remand for two years 9 months 25 days. He can still be rehabilitated and be useful. I pray for an appropriate sentence.

Court:-

Sentence and reasons for the same.

The offence of rape is a capital offence with the death sentence as its maximum sentence. This court has stated over and over that our women deserve to be treated in dignity but not being humiliated and traumatized by sexual violence. This particular offence is more aggravated for two reasons. It was committed by the very soldier who was deployed to ensure the security and happiness of the victim. If we are not safe in the hands of our soldiers where can we feel safe. Secondly the victim was more than 30 years older the accused put to be his own grandmother. As stated rightly by Mr Ogwal the learned Resident State Attorney

this act is a taboo in most if not all Ugandan cultures. It deserves a deterrent sentence.

Though this offence is very serious with grave consequences. This case must be taken on its own merits. The accused is a young man of about 25 years with a future if he can reform. He is a first offender and has been on remand for 2 years 9 months 25 days. I am constitutionally bound to take this period the accused has been on remand when passing sentence.

Having considered the above mitigating factors and having taken into account the period the accused has been on remand, I sentence him to 10 years imprisonment.

AUGUSTUS KANIA

JUDGE

18/03/2004.