THE REPUBLIC OF UGANDA

IN THE CENTRAL CIRCUIT NAKAWA HIGH COURT HOLDEN AT NAKAWA

HCT.CR.SC.NO. 76 OF 2003

UGANDA ……. PROSECUTOR

Versus

NDYAYOBOSSE EDWARD ……..ACCUSED

BEFORE.HON MR. JUSTICE V. A. R. RWAMISAZI-KAGABA

JUDGMENT

Ndyayobosse Edward, who I shall refer to as "the accused my judgment, is indicted for rape contrary to section 123 and 124 of the Penal Code Act. The particulars in support of the charge are that on the 25th day of April 2001 at Kigologolo village, in Mubende District had unlawful sexual intercourse with Speranzia Mukantabana without her consent.

The accused denied the charge and was represented by Kamya Senyonga while the prosecution was led by Niyonzima Vincent.

The prosecution called five witnesses to prove its case. The central character of the case is Speranzia Mukantabana (PW3) who on the 25/4/2O01 went to the accused's house at about 11.00. There were other people who the accused was entertaining to enguli (crude waragi) Mukantabana joined the drinkers; and drunk enguli with them.

As Mukantabana was trying to leave with Nyambuga PW4 the accused grabbed her, retained her in his house and had sexual intercourse with her for about 1½ hours. She tried to raise an alarm and struggled with the accused. But he overpowered her. She felt pain in the process.

Nyambuga reported to the complainant's husband-Paskale Adisuti where and how she had left his wife. Adisuti (PW5) went to the accused's house found his wife screaming and saw the accused get off his wife. The accused had no shorts on and Speranzia was lying on her back.

Nyambuga (Pw4) returned to the accused's house in answer to the alarm. Speranzia told her that accused had raped her and tore her clothes. The witness observed the torn skirt of Speranzia. She observed the scratches on her hands (forearm) (Sperenzia's).

The case was reported the Chairman of the area and Kitongo Police Post where the name of the accused was given to P.C. Ngageno (PW2) as the rapist. This witness arrested the accused after a long search because the accused was in hiding.

PC.Ngageno also observed scratches on the victim. He forwarded the accused to Mityana Police Station.

Mukantabana was examined on P.F.3 by Dr. Ochan and his findings were exhibit P.1

The accused denied the offence and alleged the case was framed against him because of (a) the existing grudge between his family following the separation of his brother Tanasi with Nakate, the daughter and Adisuti. (b) the compensation which the Adisuti had been ordered to pay for the damage caused to the accused's crops by their cattle.

This being a criminal case, the prosecution must prove the ingredients of rape beyond reasonable doubt. The accused has no burden to prove or disprove the prosecution evidence. The prosecution must succeed on the strength of the defence or lies told by the accused. If there is any doubt created by the evidence, that doubt must be resolved in favour of the accused and he must be acquitted.

I explained to the assessors as I now warn myself on the meaning and standard of proof in criminal cases and what a reasonable doubt means.
See: (I) Woolmitgton vs. D.P.P. (1935) AC 462
(2) Ojepan Ignatius vs. Uganda - Criminal Appeal 25/1995 (S.C)

As this is a sexual offence, the courts have developed a practice of insisting on corroboration of the evidence of the prosecutrix before a conviction is based on it. The corroboration must relate to sexual intercourse having taken place, the absence of consent on the part of the prosecutrix, arid the identity of the accused as the rapist. Notwithstanding what I have stated above, the court can convict on the uncorroborated evidence of the prosecutrix after it has warned itself (and the assessors) of the dangers of convicting on uncorroborated testimony of

the of the prosecutrix as reliable and truthful: Such corroborative evidence maybe circumstantial or both.

I directed the assessors, and warn myself what is corroboration and how it can be extracted from the evidence before the court. The dangers of convicting on uncorroborated evidence.
See (1) Safari Innocent vs. Uganda - Criminal Appeal 10/1995 (S.C)
(2) Remegious Kiwanuka vs. Uganda - Crim. Appeal 41/1995 (S.C.)

The accused in this case is indicted for rape which consists of three that the prosecution must prove beyond reasonable doubt; namely
a) that there was sexual intercourse,
b) that the sexual intercourse was without the consent of the prosecutrix (Mukantabana), and,
c) that ***it*** was the accused who had sexual intercourse with the victim
See: (1) Nakholi vs. Republic (1967) E.A. 337.
(2) Adam Mulira vs. R. (1953) 20 EAA 223

Sexual intercourse is complete when there is the slight penetration of a male penis into the vagina of a female.

The penetration need not be accompanied by injuries to the private parts of the female or by ejaculation of male semen, though such occurrences would be strong pointers to sexual intercourse having taken place.
See the meaning of sexual intercourse — section 44 Sexual offences Act 1956- England.
(2) ***Archbold - 1997 Edition - paragraphs 20-24 and 20-256 at pages 1696 and 1762 respectively.***

The prosecutrix Mukantabana (PW3) was an old woman who knew what sexual intercourse is all about. She described how the accused pushed his penis deep into her vagina, continued to have sex with her for a longtime (about 1½hours) and finally ejaculated into her. Her story stands corroborated by Dr. Ochan who observed in his report exh. P1 that there were injuries on her private parts, thighs, legs and elbows which were recent and were consistent with force having been used sexually. This finding was in addition to the finding that Mukantabana vagina had been penetrated, though a long time ago. This last finding is not surprising in light of the victim's age and marital status.

Her testimony (PW3) of sexual intercourse having taken place is further corroborated by her struggle to resist being raped; her cries and alarm. in the course of being raped she felt a lot of pain. The eye witness account of Nyambuga (PW4) and Paskale Adisuti further corroborates her story. Nyambuga left the victim being and returned to the house of the accused in response to the alarm. The victim had scratched victim had scratched on both her arms. She (PW3) looked weak could not stand and told her (PW4) that accused raped her. Adisuti on the other hand, arrived at the accused's house to find the accused, without trousers while his wife was lying on her back, without a skirt. Finally the victim repotted the accused for raping her at Kitogo Police Post to P.C. Ngageno (PW2).

All this evidence assembled together, leaves no doubt that Mukantabana was subjected to penetrative sexual intercourse on the day named in the indictment.

In order to prove the offence of rape the prosecution must prove that the sexual intercourse was forceful and secured without consent of the victim. The absence of consent may be adduced from the evidence of the victim and or the circumstances surrounding the event.
See: (1) Nakholi v. R. (1967) EA 337 (supra.
(2) R. vs. Howard so Criminal Appeal Reports 56 (C.A)
(3) R. vs. Lang 62 Crim. Appeal Reports 50.

Mukantabana (victim) told court that she never consented to the sexual intercourse and she was not giving her body for the enguli the accused had given her.
The victim and Nyambuga described how the accused chased other drinkers and shut her in his house. She said — "Accused grabbed my hand, shut the door — threw me down on a mat in the sitting room". Later she says 'I felt pain because there was a struggle". I was raising an alarm" The evidence above quoted clearly shows that the victim did not consent to the sex act with the accused. But her story is supplemented by Nyambuga and Adisuti who came to the accused's house after Adisuti received a report of his wife being detained by the accused.

Nambuga heard an alarm and saw the victim's torn skirt and scratches on both arms of the victim after Adisuti rescued her. The victim was raped on the bare floor in the sitting room. If there consent the accused would have taken her to the bed which was in his bedroom. The shameful location on the floor negatives consent on the part of the victim.

The injuries the victim sustained during the struggle were observed by (PW4) and P.C. Ngageno (PW2). PW1 Dr. Ochan confirms the injuries that Nambuga and Ngageno observed.

I therefore find that the conduct of the victim before, during sexual intercourse is strong corroboration of her being forced into the sexual act to negative existence of consent.

The physical harm that the doctor, Ngageno and Nambuga saw the victim is further proof that the victim never consent to sexual intercourse. .

It was the testimony of both the victim and Nyambuga among that it is a taboo among Banyanrwanda (which is the tribe of the victim her husband accused and Nyambuga) for a mother-in-law to have sexual intercourse with a son-in-law. It is a fact, in this case, that the accused's brother Tanasi had married the victim's daughter, hence accused was a son-in-law of the victim.

On this ground and other grounds, there could not have been voluntary sexual intercourse between the victim and accused within the prohibited degree. Thus, the accused defied their culture and subjected the victim to this forceful intercourse.

I find on the basis of what I have said above that the s to which the victim was subjected by the accused consent.

See: Archbold — **(1997)** ***Edition. Paragraphs 20-26 to 32 paged 1696*** - **99**

As to the identity of the accused, all the witnesses said place the incident took between 11.00 a.m. and 12.00 noon.

The accused and the victim's family were village mates. The two families related through the marriage of Accused's brother, Tanasi to the victims daughter, Nakate.

Both the victim and Nakabugo described how the accused remained with the victim alone in his house after chasing away other drinkers. Adisuti (PW5) found the accused "in the act" and Nakabugo saw the victim emerge from the accused's house, weak and unable to walk on her own with a torn skit. The conduct of the accused is hiding implicates the accused further in the commission of the crime.

See (i) Remigius Kiwanuka vs. Uganda - Crim. Appeal 41/95 'SC.)

In defence, the accused denied having sexual intercourse with the victim because he said both the victim and her husband could not have gone to his house because of the misunderstanding that arose after their daughter separated with his brother Tanasi and the pending claim of Shs. 15,000/- which the Adisuti family was supposed to pay after their cattle destroyed the accused's crops.

In other words, the accused is stating that the evidence given against him by the victim and her husband is lies because of grudge. Where evidence for the prosecution is shown to be given for a certain motive, that grudge must be investigated and the evidence of the affected witness must be approached with caution. It may be necessary, in some cases, to look for some corroboration of that evidence before it is acted upon to convict.

That is what is called "tainted evidence"
See: (1) Archbold - (1997) Edition par. 16-1 7 page 1498
(2) ***R. vs. Beck 74 Criminal Appeal Reports 221***
(3) ***Stephen Oporach vs. Uganda (1991) HCB 8***
(4) Odwong Denis vs. Uganda (1992-3) HCB 70

I have investigated both motives. The affected persons were in court, but none of those grudged were put to them or other witness during cross-examination. I have considered the evidence of the accused in light of the prosecution evidence and found that the accused's story is a concoction, baseless and mere lies. I reject it for its incredibility and improbability.

It is the evidence of the victim and Nambuga that both the victim had been drinking enguli and both were on the verge of getting drunk. I have addressed my mind to section 12 of the Penal Code Act. I am unable to find that the accused was too drunk as no to know what he was doing. He entertained his visitors — he chased them when he decided to have forceful sex on the victim, he shut the door and had sex in the privacy of his house.

He had the wisdom to run to his bedroom when Adisuti bumped into him while in the act and later, had the wisdom to run into hiding. I therefore find the accused knew what he was doing. His mind was not in any way impaired by the alcohol he had consumed.
See (1) R. vs. Asa Nswazalugudo & Yozefu Kidemu (1945) 12 E
(2) Uganda v. Andrea Mulera (1974) HCB 251.

After considering all the prosecution and defence evidence together, I find the prosecution has discharged the burden placed up it to prove the three ingredients of the offence of rape.

I accept the testimony of the prosecution witnesses as truthful while I reject the defence as lies. I find the accused guilty.

Both assessors have advised me to find the accused guilty and convict him as indicted. I agree with their opinion and consequently convict the accused for the offence of rape contrary to sections 123 and 124 of the Penal Code Act.

V. A. R. Rwamisazi-Kagaba
J u d g e
23/7/2004