THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT RUKUNGIRI

CASE NO: HCT-05-CR-SC-0123 OF 2003

UGANDA :: PROSECUTOR

VERSUS

MPERUKA DAVID :: ACCUSED

BEFORE: THE HON. MR. JUSTICE RUBBY AWERI-OPIO

J U D G M E N T:-

The accused, Mperuka David was indicted for Rape contrary to sections 123 and 124 of the Penal Code Act. The particulars of the offence alleged that the accused on the 30th day of June 2002 at Kakinga Cell in Kanungu District, did have unlawful carnal knowledge of Kiconco Fabith without her consent.

On arraignment, the accused pleaded not guilty. By that plea the accused set in issue all the essential elements of the offence charged. In a nutshell, that meant that each and every ingredient of the offence charged had to be proved beyond reasonable doubt in order to secure a meaningful conviction of the accused. It is

trite law that an accused person bears no burden to prove his innocence since he is presumed innocent until proved guilty. This principle of law was laid down since the decision in **Woolmington Vs DPP [1935] AC 462.** The above principle was enshrined in Article 28 (3) (a) of our 1995 constitution.

The essential elements requiring proof beyond reasonable doubt in the offence of rape are:-

(1) that there was unlawful sexual intercourse with the complainant. In this connection there is need to prove penetration of the man's penis into the complainant's vagina or sexual organ however slight;

(2) that the complainant did not consent to that sexual intercourse;

(3) that it was the accused who had unlawful sexual intercourse with the complainant.

In a bid to discharge the burden of proof placed on it by the law, the prosecution called the evidence of three witnesses. The evidence of Dr Birungi of Kambuga Hospital who examined the

victim was admitted during the preliminary hearing under section 66 of the Trial on Indictments Act.

Jovia Tugumisirize (PW1) was the victim's mother who testified that she got the accused red handed having sexual intercourse with the victim. PW1 reported the matter to Kanyarutokye Francis (PW2) who was the area local council chairman who traced and arrested the accused and also visited the scene. PW3 Mugisha Godfrey testified that he was the victim's brother and that the victim had told him that she had been sexually assaulted and he confirmed that from his mother (PW1). Upon that report he traced the accused and arrested him and took him to police.

On whether there was an unlawful sexual intercourse with the complainant, the prosecution concluded that there was. For that contention the prosecution relied on the medical report of Dr Birungi which was admitted during the preliminary hearing under section 66 of the Trial on Indictments Act. That was the report where the victim was examined from Kambuga Hospital on 2/7/2002. The victim was found to be 35 years old lunatic. Her

hymen had ruptured long ago. She had scratch marks on her labius minora. She had injuries which were consistent with force having been used sexually. She also had injuries on her thighs, legs and the back. The prosecution also relied on the evidence of Jovia Tugumisirize (PW1) who testified that on the fateful day the victim had gone to fetch water from a nearby well. From there she heard her making an alarm. On answering the same she found someone on top having sexual intercourse with the victim. That person later ran away, whereupon she reported the matter to the local authorities.

It is to be borne in mind that sexual intercourse is considered proved only when there is evidence of penetration of the man's penis into the victim's vagina or sexual organ. It is interesting to note that in this case the victim was a lunatic and could not make a meaningful testimony. She was tested and it was found that she did not even know that she was in the court of law. However this kind of quagmire was put beyond doubt by the Supreme Court decision in **Bassita Hussain Vs Uganda; Criminal Appeal No. 35 of 1995** (unreported). In that case the victim

could not testify because of her tender age and it was contended in the lower court that in the absence of her evidence and medical evidence the court should find that there was no sexual intercourse. That contention was overruled. In confirming the view of the lower court, the Supreme Court had this to say:

> ***"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence. Though desirable, it it not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt."***

In the instant case although the complainant did not testify there was medical evidence of Dr Birungi which established that the

victim had signs of penetration. She had injuries on her thighs and all the injuries were consistent with force sexually used and were recent. The above evidence was admitted during the preliminary hearing under section 66 of the Trial of Indictments Act. It is trite law that such evidence admitted or agreed upon in a memorandum filed under the above section is deemed to be proved: See **Abasi Kanyike Vs Uganda; Supreme Court Criminal Appeal No. 34/1989.**

Furthermore there was the evidence of Jovia Tugumisirize (PW1) who testified that on the fateful day she found a man having sexual intercourse with the victim. In view of the above evidence I agree with the defence and the assessors that this ingredient has been proved by the prosecution beyond reasonable doubt.

As to the second ingredient whether there was lack of consent, the defence did concede that indeed there was lack of consent. Notwithstanding the above concession, it is trite law that court must make specific findings on each and every essential ingredient of the offence charged. See **Uganda Vs Hudson**

Apunyo; Lira Criminal Session Case No. 7 of 2004 (unreported).

In the instant case there was the medical evidence that the victim had bruises on her thighs, legs and the back, which were consistent with her putting some resistance. The victim was strong enough to put in resistance. In addition there was the evidence of Jovia Tugumisirize (PW1) who testified that she heard an alarm, which the victim was making that she was being raped. If there was consent, the victim should not have raised an alarm which attracted PW1. It was because she did not consent that she put in some resistance which resulted in the injuries on her thighs, legs and back. According to PW1 and PW2 the victim even had scratch marks on her neck. All that would go to prove that there was lack of consent which resulted in the above injuries on her body. In conclusion therefore I agree with the prosecution, and the defence and both assessors that the second ingredient has been proved beyond reasonable doubt.

On the third ingredient whether the accused participated in this offence, the prosecution contended that he did. The defence denied participation of the accused and relied on the defence of denial and alibi.

The prosecution relied on the evidence of Jovia Tugumisirize (PW1) who testified that on the fateful date at 8.00p.m. she heard the victim making an alarm that the accused was having sexual intercourse with her. She rushed to the scene and indeed got the accused having sexual intercourse with the victim. The accused was on top of the victim. She saw the accused at a very close range. After that the accused ran away. The next day she made a report to the local council chairman. The accused later disappeared from the village and was arrested from another village far away.

The evidence implicating the accused was from a single identification witness. In dealing with this category of evidence court should always look at the principles which were stated in **Nabulere Vs Uganda [1979] HCB 77.** Briefly the principles

are that in a case resting entirely on evidence of identification, the court has a duty to satisfy itself that in all the circumstances of the case, it is safe to act on such evidence, which must be free from mistake or error on the part of the identifying witness or witnesses. The evidence of such witnesses must be tested as to its truthfulness and any possibility of mistake or error excluded. Where conditions for correct identification are favourable such task will be easier. But where conditions are difficult it would be unsafe to convict in the absence of some other evidence connecting the accused with the offence.

In the instant case the incident took place at night at 8.00p.m. Jovia (PW1) however stated that there was a bright moonlight which she used for identifying the accused. She testified that she went too close to the scene and identified the accused. During cross-examination she stated that if she had gone with a stick she would have injured the accused. This witness knew the accused very well. She appeared to be truthful. I do not see any possibility of mistaken identity. The victim mentioned in her alarm that the accused was raping her. The defence of total

denial and alibi could have been a mere afterthought in light of the above identification. Moreover PW1 was very consistent. She told everybody who cared that it was the accused who was responsible for raping the victim. She told her son Mugisha Godfrey (PW3) and she later told Kanyarutokye Francis (PW2) who was the local council chairman.

For the above reasons I do find that the prosecution has proved this ingredient beyond reasonable doubt. At the end of the trial one assessor could not avail herself to give her opinion. Court made a number of concessions to enable her attend but she failed to turn up on allegation that she was down with malaria. Court dispensed with her attendance. In agreement with the remaining assessor, I do conclude that the prosecution has proved all the ingredients of this offence, and find the accused guilty and is convicted accordingly.

RUBBY AWERI OPIO

JUDGE

31/8/2005.

14/9/2005:-

Accused present.

Twinomuhwezi present for the state.

Ndimbirwe present for the accused on state brief.

Judgment read in open court.

Twinomuhwezi:-

No previous record. Treat him as first offender. This is a serious offence. The conduct of convict is not that of a human being. He raped a lunatic. He has been on remand since July 2002. We pray for a deterrent sentence.

Ndimbirwe:-

He is first offender. Has been on remand since 2002. We pray that court be lenient. At the time of the offence the convict was 40 years old. He is approaching the average of his life. He regrets his action.

SENTENCE:-

This is a very serious offence. It entails maximum of death sentence. The convict acted in a very inhuman way by having sexual intercourse with a lunatic. This court should take a very serious view of this offence. However court should consider that he is first offender. He has been in custody for long. He was 40 years old at the time of the offence. Court should give him chance to reform.

For the above reasons the convict is sentenced to seven years imprisonment. Sentence takes consideration that he has been on remand since 2002. Otherwise he should have been sentenced to 10 years.

Right of appeal explained.

RUBBY AWERI OPIO

JUDGE

14/9/2005.