

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

HCT-04-CR-SC-0087-2008

UGANDA.....

PROSECUTOR

VERSUS

MBUSI PATRICK alias KHABUSI MASABA.....ACCUSED

BEFORE: HON. MR. JUSTICE E.K. MUHANGUZI

RULING

This is a ruling under section 73 of the TIA as to whether, at the close of the prosecution evidence, there is sufficient evidence that the accused committed the offence.

The brief facts of the case are that on 29.01.2009 the accused was indicted for rape contrary to section 123 of the Penal Code Act, Cap. 20. It was alleged that he, on 10.5.2008 at Neloba village in the Manafwa district, did have unlawful carnal knowledge of **Mutonyi Harriet Monica** without her consent. He denied the offence and to prove the case against him, the prosecution called four witnesses. At the close of the prosecution evidence **Ms. Mugala**, learned counsel for the accused on State brief, did not make a submission of no case to answer and left court to make the necessary finding.

Article 28 (3) (a) of the Constitution of Uganda provides that every accused person shall be presumed innocent until that person has been proved or has pleaded guilty. As the accused in this case did not plead guilty he has to be proved guilty. The burden of proving him guilty lies upon the prosecution who allege that the accused has committed the offence. See:- 1. Sections 101-103 of the Evidence Act, Cap.6; 2. ***Woolmington v. D.P.P. [1935] A.C. 462.***

The prosecution, at this stage of the trial must prove every essential ingredient of the offence, not beyond reasonable doubt but, to that standard which is in other words described as making out or establishing a *prima facie* case against the accused. That is the standard at which a reasonable tribunal, properly directing its mind on the law and evidence, will convict if the accused does not offer any explanation or defence. See the case of ***Rananlal T. Bhatt v. R [1957] E.A. 332*** in which the Court of Appeal of Eastern Africa stated that a *prima facie* case is not made out by a mere scintilla of evidence or by any amount of worthless discredited evidence.

In rape cases such as the one before court now there are three essential ingredients every one of which the prosecution must prove in order to prove the case against the accused, namely:-

1. Unlawful sexual intercourse with the complainant;
2. complainant's lack of consent to the sexual intercourse; and
3. The accused being the one who had the unlawful sexual intercourse with the complainant.

See:- 1. Section 123 of the Penal Code Act, Cap. 6;
2. ***Adam Mulira v. R. (1953) EACA 223;***
3. ***Nakoli v. Republic [1967] E.A. 337.***

Upon carefully considering the evidence of the victim, **Mutonyi Harriet Monica** (PW.I) court finds that on 10.5.2008 she was attacked and forced into sexual intercourse by a man who was not her husband. The man held and twisted her neck and subdued her into forceful sexual intercourse. The evidence of **Dr. Kiggundu Josen** (PW.4) on exhibit P.1, who examined the victim on 20.5.2008, confirmed the injuries on the neck of the victim, which corroborates the lack of consent of the victim and the use of force on the victim. On the basis of the above evidence court finds that prosecution proved the essential ingredients No.1 and No.2.

Regarding the third and last essential ingredient court, after careful consideration of the evidence of all four prosecution witnesses, finds that only the complainant claimed to have identified the accused as her assailant at the time and scene of crime. The law on this aspect of the case is that court should normally look for corroboration of the complainant's evidence first and only rely on her sole evidence if it is satisfied that her evidence is truthful. See:-

1. *Chilla & Anor. V. R [1967] E.A. 772;*
2. *Charles Katende v. Uganda [1971] 2 ULR 10;*

However, in the case before court now the victim is, in addition, a single identifying witness whose evidence must be tested with the greatest care. See:- **Abdallah Bin Wendo & Anor. V. R (1953) 20 EACA 186; Abdallah Nabulere & 6 Others v. Uganda [1979] HCB 77.** The conditions under which the victim claimed to have identified her assailant were as follows:- The victim was sleeping around 11:00p.m but woke up when she had some movement in the house which she thought were rats. As soon as she lit a candle someone blew the candle out and grabbed her and held and twisted her neck which subdued her into submitting to sexual intercourse with the assailant. She was so frightened that she did not resist at first until later when she

managed to push the accused away and ran outside the house and made an alarm. None of the persons she named as those who responded to her alarm testified.

Her neighbour who testified was **Mabonga David** (PW.3) but did not testify about hearing her alarm that night, though he stated that his house is not more than 200 metres away from that of the victim. The victim appears to have taken a whole week to report the case to police naming the accused as the assailant (exhibit D.1 is her statement to police dated 17.5.2008). She was examined by the doctor (PW.4) ten days later on 20.5.2008.

On the basis of the above evidence court finds that, first, the conditions under which the victim claimed to have identified the accused as her assailant were difficult and that evidence of identification requires corroboration. Unfortunately, court cannot find any other evidence to corroborate that evidence of identification.

Secondly, court finds that the report of the victim naming the accused as her assailant was not only a whole week after the alleged rape but also coincided with the day the accused was arrested, that is 17.5.2008. Perhaps the victim could not identify her assailant unless and until the accused was arrested which casts doubt on her ability to identify the assailant correctly at the time and scene of crime.

Finally, under cross-examination, the victim stated that the time from when the assailant grabbed her up to the time the assailant left her house was about three minutes. However, in her clarifications to court she stated that her assailant spent about one hour having sexual intercourse with her. Court finds these two pieces of evidence so contradictory that the victim's evidence is too discredited and unreliable to support a conviction.

All in all court finds that due to lack of corroboration and poor conditions of identification, coupled with the victim's unreliable evidence prosecution did not prove the third and last essential ingredient of the offence and failed to prove the offence.

Consequently, court finds the accused not guilty, acquits him and sets him free forthwith unless he is held on other charges.

E.K. Muhanguzi

JUDGE

24.3.2009

24.3.2009

Accused present.

Ms. Mugala for accused.

Ms. Ogwang State Attorney for State.

Wanale Court Clerk.

Court: Ruling delivered, signed and dated.

E.K. Muhanguzi

JUDGE

24.3.2009