REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CASE NO HCT- 03-CR-SC-0336/2010

UGANDA……PROSECUTION

VERSUS

IKOMU PETER ALIAS OFWONO……ACCUSED

BEFORE HON LADY JUSTICE FAITH MWODHA

JUDGMENT

The accused was indicted on two counts of rape C/S 123 and 124 and aggravated robbery C/S 285 and 286 (2) (b) of the Penal Code. It was alleged on the first count that the accused Ikomu Peter alias Ofowno on the 26th of July 2009 along Dhikusooka Rd and Railway line in Jinja District had unlawful carnal knowledge of Mutesi Aisha without her consent.

It was alleged on the second count that the accused Ikomu Peter alias Ofowono on the 26th of July 2009 along Dhikusooka road and Railway line in Jinja District robbed Mutebi Aisha of the

nokia phone, cash 15,000/=; a pair of ladies shoes and at or during after the said robbery threatened to use and or used a deadly weapon.

The prosecution in criminal cases has the burden to prove the case against the accused beyond reasonable doubt in order to bring the guilt of the accused person home; see *Sekitoleko v. Uganda [1967] EA 531*. The accused has no duty to prove her/his innocence and he can only be convicted on the strength of the prosecution case against him; see J*ustin Nankya v. Uganda SC Cr App 24/95 unreported.*

In the offence of rape the prosecution has to prove the following to that standard;

1. The victim experience penetrative sex in her vagina
2. The penetrative sex was experienced without her consent
3. The accused is the one who participated in it

On the first ingredient the victim testified that on the fateful day the accused who came following her at around 9:00pm on the 26/07/09, he came and caught her neck and strangled her. That she could not make an alarm as he caught her mouth. That he asked her if she was mama Najib. That he threw her down and he removed her knickers and pet cot. That he had sexual intercourse with her. That he pulled out his knife and threaten to kill her if he made an alarm (this witness requested the court to be in camera). PW2 was Dr. Katende. The doctor who examined the victim said that he examined the victim on 27/07/09 at 1:15pm. That she had wounds and scratches in the neck, knees and ankles and vagina. He identified the PF3 which he endorsed his findings on. That he diagnosed the injuries as rape. That there was penetration. That the wounds and injuries were consistent with force having been used sexually and the victim was strong enough to put up the resistance. I was satisfied that this ingredient was proved.

On the second ingredient, PW1 already testified that the accused came and caught her neck and threw her down. That her cloths were torn i.e. the pet coat and her knickers (these pieces were produced in court and the court saw how they had been torn). That the accused caught her mouth and later pulled out a knife of which he threatened to kill her if she made any alarm. Its trite law that in sexual offences before a conviction is made there has to be corroboration in the material particular though court can convict after warning itself and the assessors if the court is satisfied that the victim is truthful *see George Bargirana v. Uganda [1975] HCB page 361.*

PW2 testified that when he examined the victim in his report PF3 and its appendix he found injuries and wounds and inflammations on the body and in her private parts. These injuries/inflammations were consistent with force having been used sexually. The victim immediately after she escaped from her attacker went and reported to police. That evidence establishes that there was no consent. PW3 who visited the scene said he found there signs of scratches.

On the last ingredient, the victim knew her attacker. Much as he came from behind and caught her neck the accused threw her down and had sex with her. He even asked her if she was the mother of Najib. The victim said there was moonlight. She said she always saw the accused at Panadol place where they used to visit with her husband to watch football. That the accused followed her for three times though she did not report anywhere. This is a case which depended on proper identification by a single witness identifying the accused. The law was settled in superior courts like in the cases of *Abdulla bin Wendo and another v. R [1953] 20 EACA 166, Abdalla Nabulere and others v. Uganda [1978] 79* where it was held that while identification of an accused person can be proved by the testimony of a single identifying witness this does not lessen the need for testing with the greatest caution the evidence of such witness regarding identification are difficult. Circumstances to be taken into account include the presence and nature of light, whether the accused person is known to the witness before the incident or not, the length of time and opportunity the witness had to see the accused and the distance between them. It was also stated that the true test is whether the evidence can be accepted as free from the possibility of error.

In the instant case there was moonlight which evidence was not challenged at all in cross examination, the accused when he caught the victim talked to her asking her if she was the mother of one Najib. He then threw her down, tore her inside clothes which the court had the opportunity to see. The victim immediately reported at the earliest opportunity. The victim had prior knowledge of the accused as above stated before the incident and the incident took between 20-30 minutes from the calculation from the time the accused attacked her. I had no doubt that favorable conditions for proper identification existed. I was satisfied that this ingredient was also proved.

On the second count the prosecution had to prove beyond reasonable doubt the following;

1. That there was theft
2. That there was use or threat to use a deadly weapon at or before or after or during the robbery
3. That the accused person participated

On the second count it was only PW1 who testified that her mobile phone; shs 15000; and a pair of lady shoes were stolen. There was no recovery of particulars of the mobile phone. So I was not satisfied that it was proved.

On the second ingredient again it was PW1 who alleged that the accused pulled out a knife and he threatened to kill her is she made alarms. The knife was not recovered and there was no any other evidence produced to support it. So this could not be proved.

On the last one still it could not be proved as far as the offence of robbery was concerned since there was no other supporting evidence.

The Principal State Attorney Mr. Mulindwa submitted that the prosecution had proved the case on both counts and he cited the case of *Katumba James v. Uganda Sc Cr App 45/99* where the issue of a single identifying was discussed. He submitted that the prosecution had proved its case beyond reasonable doubt. He submitted further that the accused was a liar who gave contradicting evidence for his activities. He referred to EXD 1. That there was evidence that the accused had been in prison several times for different reasons. He submitted that the knife fell within the definition of deadly weapon as defined in S.286 (3) of the Penal Code Act.

Counsel for the defense Chris Munyanasoko conceded on the proof beyond reasonable doubt of the first and second ingredient but conested the proof of the third ingredient. He submitted that the circumstances were not favorable for proper identification because of the way the attacker was described. That it was at 9:00pm and the victim could not tell court how long the sex act took. That the accused put up the defense of alibi which the prosecution had not proved. That she successfully showed that he was not anywhere near the scene of crime. He submitted that for the offence on the second count there was no evidence at all adduced by the prosecution to prove it. That even PW3 the investigating officer testified as to how he had it was to trace the mobile phone. He prayed that court acquits the accused person on the second count.

On this I agreed with defense counsel that the prosecution evidence against the accused in respect of the second count of aggravated robbery was lacking and the accused is acquitted on the second count. However on the first count of rape C/S 123 and 124 the accused person was put at the scene of crime, his defense was a mere concoction of lies. It could not be believed. He said he left home and went to wok and then went home again at midday. That at 1:30pm he went back to town. That he went to show ground and arrived there between 2:30pm- 3pm and that he left the show ground at midnight. He said that after leaving the show ground he went to Babes at 1:30am and reached home at 3:30am at Mpumudde Sakabusolo. When he was asked why there was such a delay to reach Mpumudde he said that it because it was sticky it had rained. This was just diversion but the fact remains that the show ground is within Jinja Municipality, it just shows that he was merely giving misinformation. But his movements show that he was in town and the victim had identified him properly and he was put at the scene of crime. The accused is merely a hard core criminal who took advantage of an unsuspecting victim who did not report his advances on her.

The assessors in their joint opinion advised me to find the accused guilty as the prosecution had proved its case beyond reasonable doubt.

I agreed with their opinion for reasons already given in this judgment. The accused is found guilty and he is convicted accordingly as charged on the first count of rape and he is acquitted on the second count of aggravated robbery.

Faith Mwondha
Judge
17/09/10