

REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA HOLDEN AT MUBENDE
CR CASE NO 100/05
CRD 115/01
UGANDAPROSECUTION
VERSUS
BYAKATONDA RONALD.....ACCUSED

BEFORE HON.LADY JUSTICE FAITH MWONDHA

JUDGMENT

The accused was indicted on a charge of rape C/S 123 of the Penal Code Act. The particulars as alleged by the prosecution were that the accused Byakatonda Ronald and another still at large during the night of 6th-7th February 2001 in Gayaza sub county head quarters cells in Kiboga District had carnal knowledge of Kyakuwa Joyce without her consent.

The prosecution always has the burden to prove its case beyond reasonable doubt in order to bring the guilt of the accused home. The burden doesn't shift at anyone time to the accused. In the case of *Bernado Mugaya v. Uganda Cr. Appeal No 20 of 1971 EACA (Unreported)*, Duff P put it as follows, "in consideration, the judge must always of course bear in mind the rule that the onus of proof is on the prosecution and the appellant does not have to establish his innocence," see also *Justine Nankya v. Uganda SC CR Appeal No 24 of 1995* which cited with approval *Okoth Okale v. R [1955] EA 555*.

In a charge of rape the prosecution had to prove the following essential ingredients to bring the guilt of the accused home;

1. that there was a woman
2. that this woman experienced unlawful sexual intercourse without her consent
3. that the accused participated in it

The prosecution on the first ingredient produced PW1 who was obviously a woman by the name of Joyce Kyakuwa Nabanoba. There was the medical evidence contained

in EXP1 i.e. PF3 and its appendix. The report was dated 08/02/2001 of Kiboga hospital. It was referring to Kyakuwa Joyce as complaint in a rape case. She had a ruptured hymen though not recent. There were infalinations around her private parts. That the injuries and inflammation were consistent with force having been used sexually. That there were injuries on the thighs and elbow and that these injuries were consistent with force having been used sexually. That there were signs of resistance and there were no signs of V.D. the report was signed and stamped. I was satisfied that the first ingredient was proved.

On the second ingredient, there was the evidence of PW1 who narrated how the accused with two other men met her when she was with her husband at around 6pm. That the accused arrested her and she was detained in cells. That earlier she had been charged with theft and she went to court. That she had secured bail to be out while attending her trial. That when the accused arrested her he said that she had escaped from prison whereas not. That the army men told her that if she did not want to be in prison she should get a man. That the accused agreed with him by affirming so. That at around mid night the accused and three people entered the jail where she was. That she heard the door being opened and the light was flashed from the torch. That they went to her. That they raped her by removing the short she had put on. That she recognised Byakatonda. That she did not raise alarms because they had a gun. That the person who had a gun was in army uniform. That she knew Byakatonda's voice. That she heard him say "oba ali ludawa" meaning "where is she". That even when the short was being removed he said that the bullets (used condoms) should be removed. That they used condoms and they put them in the shorts after using them. That her clothes got torn. That they left and they closed the door. That she did not know who opened the door the following day and she did not see the accused again. That she then went out covering herself with an old blanket. That there was nobody guarding her. That a soldier came and told her to go but she said she wanted a release letter. That she never saw the accused again. That when one Ayoni Can (PW2) she requested him to go and tell her sister (PW3) to bring her clothes and also that she was raped. That the RDC came and told her to go to hospital.

There was the medical evidence also which was in the report PF3 with the appendix. It has already been summarised which in addition to the PW1's testimony

corroborated her oral evidence in the material particulars. There were injuries and inflammations around her private parts which were recent and consistent with the force used sexually. They showed that force was used sexually. There were injuries on the elbow and thighs and showed that the complaint PW1 was strong enough to put up some resistance. The evidence above showed that PW1 experience unlawful sexual intercourse without her consent. All the above was in conformity with S.123 of the Penal Code. I was satisfied that this ingredient was proved.

On the third ingredient, PW1 testified that the accused was in company of two other army men when they met her. She was with her husband at around 6pm. That she had known the accused before as SPC at the Gombolola and he had over stayed there. That she used to see him before the incident. Even the accused in his defence stated that he knew the complaint. And that he used to see her in the meetings and market. She said that the accused on the material day arrested her and she was detained on the allegation that she escaped from prison. That she told him about her release on bail but one of the army men, the accused was with told her that if she did not want to be in cells she should get a man, which the accused affirmed. That she heard the accused ask where she was when the cell was opened where she was. That he even said that the bullets (used condoms) should be removed and they collected the used condoms and put them in the short which they had removed from her. That they had a torch they were flashing around and she knew the accused's voice. I was satisfied that this ingredient was proved.

The accused gave a sworn statement in which he first testified on events not connected to the case. After saying that he knew the complainant first as a campaign agent for the movement and that she was a tailor in the market at Kyanga. He testified about the case of theft which had been charged on her. That when she was being looked for she escaped to Kibale. She denied having had sexual intercourse with her forcefully or otherwise and that he was being framed. He said that it was PW2 who arrested her the night she alleged to have been raped. But later he stated that he found when she had been arrested by PW2 and told her to go to the cells. That she told him that he was against her. That she went and the accused also went to the Gombolola compound but did not reach the cells. That the cells were about 1km from the Gombolola. that she told her sister PW3 to bring the form for release on bail and her

husband was with her. That the husband said he was going to bring the bail release form. That he told those who were guarding her to let her sit if she had the bail release forms. That she refused to sit saying she was a suspect. That she was taken to cells and he went to tell the chairman.

In cross examination, he denied arresting the complaint but admitted moving with her in the company of army men where he told her to sit down on the ground and she refused. That he was the police officer on duty that day at the Gombolola. That the complaint was taken at the detach where all of them were working.

From the defence it comes out clearly that the accused was at the scene of crime but he was merely denying. His evidence alone puts him squarely at the scene of crime as it corroborates strongly PW1's evidence. Her evidence was not shaken at all and so I was satisfied that the accused participated in having carnal knowledge of the complaint without her consent.

The prosecution in their submission submitted that it had proved its case beyond reasonable doubt on all the three ingredients. The evidence of PW1 and the medical evidence which was unchallenged proved that he accused committed the offence. There was sufficient light to enable her identify the accused and she had known him before and he is the one who arrested her on the pretext that she had jumped jail whereas not.

The defence conceded that ingredients one and two had been proved beyond reasonable doubt. He submitted that PW3 and PW4 were merely told so was by PW2. that the torch light could not be sufficient to enable the complaint to positively identify the accused. That there was a likelihood of mistaken identity which raises doubt on the truthfulness of the testimony of PW1. That there were no exhibits and the accused was pleading alibi which was not perforated. He submitted that the accused should be acquitted.

This is a case which depended on proper and correct identification by a single witness. The law relating to such a case was long settled in various superior courts following the case of *Abdalla bin Wendo and Another v. R* [1953] 20 EACA 166. it

was held that while the identification of an accused person can be proved by the single testimony of a single witness this does not lessen the need for testing with the greatest caution the evidence of such a witness regarding identification especially when conditions favouring correct identification are difficult. Circumstances to be taken in account include the presence and nature of light, whether the accused person is known to the witness by the incident or not, the length of the time and the opportunity the witness had to observe the accused and the distance between them.

All these conditions which assist in testing the evidence of a single identifying witness existed. The accused raised the alibi because he knew that he had been positively identified. He told court how he carried out the arrest which strengthened the prosecution case and by so doing the alibi could not stand.

The assessors in their joint opinion advised this court to find the accused guilty and convict him as the prosecution had proved its case beyond reasonable doubt.

I agreed with them because of the reasons already given in this judgment. I find that the accused person committed the offence and the prosecution had proved its case beyond reasonable doubt. The accused is accordingly guilty and convicted as charged.

Faith Mwendha

Judge

07/07/2010