

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

**HCT-04-CR-SC-0066-2008**

**UGANDA.....PROSECUTOR**

**VERSUS**

**OLUPOT FRANCIS.....ACCUSED**

**BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN**

**JUDGMENT**

Olupot Francis hereinafter referred to as the accused is indicted for rape contrary to sections 123 and 124 of the [Penal Code Act](#). Prosecution alleges that the accused on 24<sup>th</sup> April 2004 at Opeta village in Pallisa District had unlawful sexual intercourse with Ajangole Kevina without her consent. The accused pleaded not guilty.

In an attempt to prove the indictment against the accused person as required by the law, i.e. beyond any reasonable doubt, prosecution adduced the evidence of four witnesses.

PW.I Ajangole Kevina the complainant testified that on 24.4.2004 at 8:00p.m the accused person came to her house, pushed the door, held her hand and asked where her husband was. When she told him that he was not around the accused kicked her legs and she fell down. He then forced her into sex. At the time of rape her children Alice Mudondo and Norah Akurut were in the house at the door way. That she was coming out of the house to go and lock the door of the kitchen. After rape she went with her children to the neighbours home to report. The neighbour is called Perez Kungu.

PW.I went on to testify that she did not make any alarm because the accused was armed with a panga and threatened that if PW.I made any alarm she would be cut into pieces. PW.I reported the offence to Pallisa

police station. She was examined by a doctor on 25.4.2004. That the accused was between the house and the kitchen. That he held her hand while she was coming from the main house. There was bright moonlight. She was wearing a half petty and skirt without a blouse. The episode took 5 minutes.

PW.2 was Akurut Norah daughter to PW.I. On 24.4.2004 she was asked by PW.I to escort her to close the kitchen. She remained in the door way. She saw a man called Olupot Francis (accused) catch her mother's hand and ask where her husband was. The man kicked PW.I who fell down. The man was wielding a panga. PW.2 saw the man having sex with the mother. After, they went with the mother to a neighbour's home called Perez Kungu.

PW.2 said she managed to see the accused by the aid of bright moonlight. The night looked like daytime.

PW.3 Mudondo Alice also a daughter to PW.I testified that on 24.4.2004 she was at home with her mother she was also asked to escort PW.I to lock the kitchen. They remained in the house main doorway while the mother went to lock the kitchen. PW.3 saw the accused hold her mother's hand. She identified the accused in the dock. PW.3 heard the accused ask the mother where her husband was. When she told him the husband was not around, the accused kicked her and she fell down. PW.3 moved closer to her mother but was warned by the accused that she would be cut with a panga. PW.3 retreated to where PW.2 was. Thereafter the mother told them to go to Kungu Perez's home because she feared the accused would come back the next day.

PW.4 was Dr. Kirya Clement. He examined the victim on 26.4.2004 and found her aged 31 years. He found evidence of penetration and the victim's hymen was long ruptured. She was bleeding from the vagina although there was no visible injury. She had no bruises on the thighs. PF.3 Appendix was tendered in evidence and exhibited as P.I.

The doctor clarified that the bleeding could have been due to menstruation or a sore from the cervix upwards.

In his defence, the accused denied the offence. He testified that on 24.4.2004 he was at his home and selling in his shop. After he went to sleep. That he did not force the complainant into sex on 24.4.2004. The accused revealed there was a grudge between him and the complainant because she suspected the accused to have organized a theft of her goods from her shop. The alleged theft was reported to police and the accused was arrested. That the allegation of rape is a continuation of the grudge. The accused denied the contents of the statement he allegedly made at police.

This was the close of the defence case.

Prosecution did not make a submission.

In his submission, Mr. Magirigi learned defence counsel contended that the prosecution failed to prove any of the ingredients of the offence of rape. That the evidence of PW.2 and PW.3 is at variance with that of PW.1 as to where the offence took place. That PW.1 says it was in the main house but PW.2 and PW.3 say it was near the kitchen. That the allegation against the accused is because of a grudge with the complainant.

In an indictment for rape prosecution must prove beyond any reasonable doubt that:-

1. There was carnal knowledge of the complainant.
2. The carnal knowledge was without her consent.
3. The carnal knowledge was by the accused.

The offence of rape is committed by any person who has unlawful sexual intercourse of a woman or girl above 18 years old without her consent or if the consent is obtained by force or by means of threats or intimidation of any kind. It can as well be rape if consent is procured by fear of bodily harm or by means of false representation as to the nature of any act or in case of a married person by personating her husband.

See **S. 123 of the [Penal Code Act](#)**.

It has been held that the two essential ingredients of rape are therefore carnal knowledge of a woman or girl and lack of consent. Both these ingredients must come out in evidence of the prosecution to be proved.

See: ***Kerry's Outline of Criminal Law New Edition by IWC Turn Cap.8 P.151 Paragraph 143 and Nakholi v. R [1967] E.A. P.338.***

The burden of proof in criminal cases does not shift from prosecution except in a few instances as prescribed by the law this case not being one of the exceptions. ***Joseph Kiiza & Another vs. Uganda 1978 HCB 269.***

***SULAIMAN KATUSABE V. UGANDA SC. CR. APPEAL 7 OF 1991*** (Unreported).

In this trial prosecution relied on the evidence of PW.1, PW.2, PW.3 and PW.4. PW.1, PW.2 and PW.3 were eye witnesses. The offence took place at night. However, the witnesses corroborated each other

that there was bright moonlight which enabled them identify the accused person. They each knew the accused person before. PW.I talked to the accused when he asked where her husband was. Both PW.2 and PW.3 heard the talk between the accused and PW.I. The accused was wielding a panga and he threatened PW.1, PW.2 and PW.3. The incident took about 5 minutes. I am satisfied that although conditions were difficult to aid correct identification, the prosecution witnesses were able to identify the accused as the assailant. The witnesses knew the accused before, therefore there was no mistaken identity.

PW.I testified that the accused wrestled her and had forcible sexual intercourse with her. Her daughters PW.2 and PW.3 saw the accused having sex with their mother. None of the prosecution witnesses could mistake the sexual act with something else.

The Doctor PW.4 confirmed that there was penetration.

I am satisfied that prosecution evidence proved that there was carnal knowledge on PW.I. **UPAR V. UGANDA 1971 E.A. 98.**

PW.1, PW.2, PW.3 described the moments before the carnal knowledge was procured. The accused is said to have ambushed PW.1, held her hand, asked whether her husband was at home. When PW.1 revealed the absence of the husband, the accused kicked her legs and she fell down. He proceeded to have sex with her. When she tried to make noise the accused threatened to cut her with panga. These circumstances help show that the complainant (PW.1) did not consent to the sex.

The accused put up a defence of *alibi*. That he was not at the scene of crime. That on that day he spent all day attending to his shop. He denied raping the complainant and imputed a grudge. This was the core of Mr. Magirigi's submission that his client was innocent.

The law is that an accused has no duty to prove an *alibi*. The duty lies on the prosecution to disprove a defence of *alibi* and put the accused at the scene of crime. I am satisfied that the evidence of PW.1, PW.2 and PW.3 was consistent enough to place the accused person at the scene of crime. The accused was properly identified by the witnesses and he was placed at the scene of crime. I am satisfied that the offence of rape has been proved by prosecution.

In their separate opinions one of the assessors Nathan Wananda was of the opinion that prosecution did not satisfy him that PW.1 was raped because she contradicted herself that she was raped in the house but

said she was raped from outside. That PW.2 said the mother was in a skirt while PW.1 said she was in a petty coat and a blouse. That the Doctor said there was no sign of injury. I did not agree with this opinion because the contradictions outlined were minor and did not go to the root of this case nor did they point to deliberate untruthfulness by the prosecution witnesses.

I agreed with the lady assessor Perpetua Buyera that the offence has been proved beyond reasonable doubt. That the accused was identified using bright moonlight, he wrestled the PW.1 and threatened her with a panga. The accused talked to the victim and the witnesses knew him before as a village mate. 5 minutes was long enough and the distance between the accused and the victim was very close.

Finally that the contradictions were minor. I agree. Consequently Olupot Francis is found guilty and convicted of rape contrary to sections 123 and 124 of the [Penal Code Act](#).

**Musota Stephen**

**JUDGE**

**21.4.2011**

21.4.2011

Accused in court.

Alpha Ogwang for State.

Magirigi on State brief.

Loyce Interpreter.

Assessors in court.

**Resident State Attorney:** Case for judgment.

**Court:** Judgment delivered.

**Musota Stephen**

**JUDGE**

**21.4.2011**

**Resident State Attorney:**

To my knowledge the convict is a first offender nevertheless the offence is serious punishable by death. The convict acted very high handedly by raping the victim in front of her children thus insulting her modesty and dignity. I pray for a deterrent sentence to deter others.

**Magirigi:**

The convict prays for leniency. He is remorseful. He is married with children who need his attention. He has been on remand for 6 years. He has learned a lot in the period. We pray court considers the time long enough. I pray for a lenient sentence.

**Musota Stephen**

**JUDGE**

**21.4.2011**

**Sentence and Reasons**

The convict is a first offender. I agree with the learned Resident State Attorney that the convict was heartless in abusing the modesty of the victim and raping her in front of her children. I will however consider the defence plea that the convict has been on remand for 6 years without trial and he is remorseful and has apparently learnt a lot. This period of remand will be considered. The convict is accordingly sentenced to 2 years which will translate into 8 years of custody.

Right of appeal explained.

**Musota Stephen**

**JUDGE**

**21.4.2011**