

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT RUKUNGIRI
HCT-CR-11-CSC-073/2011
CRIMINAL CASE RUK. 00-CR-CSC-292/2010
CRB 1083 /2010

UGANDA ::: PROSECUTOR

VERSUS

MUHWEZI LAMUEL:::ACCUSED

BEFORE HON. MR. JUSTICE J.W KWESIGA

JUDGMENT

Muhwezi Lamuel, the Accused person, is indicted for Rape contrary to Section 123 and 124 of the Penal Code Act. It is alleged that on 3rd May, 2010 at Kyehunde village, in Rukungiri District, the Accused person had unlawful sexual intercourse with Ngasirweki Veneland without her consent.

The brief facts of the Prosecution case is that on 3rd May, 2010, at night, while the complainant was coming from Bwambara Trading Centre the Accused person wrestled her down and forcefully had sexual intercourse with. She disengaged herself from the culprit and ran away while making alarm. The Accused was arrested after two weeks, he denied participation.

The Accused person pleaded not guilty at the commencement of the trial and left the burden of proof as a whole upon the prosecution. The State has the duty to prove the charges against the Accused person beyond reasonable. The State, to get a conviction, must prove beyond reasonable doubt the following essential elements of the offence of rape:-

- (1) Must prove that the complainant was subjected to sexual intercourse.
- (2) That she did not consent to the Sexual intercourse.
- (3) That the Accused person participated in or did the complained of sexual intercourse.

It is trite that in proof of sexual intercourse slightest penetration of the female sexual organ with the male sexual organ shall be sufficient proof of sexual intercourse. Before analyzing the evidence and determining whether it proved the elements of the offence I will summarise the evidence as follows:-

PW 3 Ngasirweki 52 years old, the complainant, told court that on 3rd May, 2010 at about 7:30 p.m while going home, passed by the Accused's home the Accused later followed her and by passed her, greeted her and went ahead of her. He shortly stopped and faced her, he held her by the neck, wrestled her and forcefully had sexual intercourse with her. She

deceived him that they should shift to a more convenient place off the road and he got off her to change place and she escaped and ran away while making alarm that LAMU had raped her. She was bleeding from the neck. She ran towards the home of ABEL. The incident took place about ¼ kilometer from the Accused person's home. She said there was a moon light and she properly identified the Accused.

PW 4 TWINOMUHANGI JOHN turned into a hostile witness his evidence was discredited by the prosecution. His testimony is disregarded and none of the parties can rely on it.

PW 5 TUKESIGA FRANCIS testified that at 8:00 p.m on 3rd May, 2010 there was an alarm not far away from his home, he heard a woman making alarm that LAMU had raped her. He visited the scene next morning and saw evidence of struggle. Very early in the next morning, the complainant came to him and told him, it was LAMU, the Accused person who raped her. She had scratches or injuries around her neck. PW 6 Turyahikayo Jackson, LC 1 Chairman confirmed, the complainant reported a case against LAMU. She stated LAMU had assaulted and raped her. LAMU, disappeared in the village. KYARIMPA ABEL, PW 7, told court that on 3rd October, 2010 at about 8:00 p.m he had met the complainant and shortly after she heard her making alarm that she had been attacked. She told him it was the Accused person. She had lost her headscarf and Kitenge cloth. She stated LAMU had sexual intercourse with her. PW 1 Godfrey Tucungwirwe's evidence was admitted. This witness, a Senior Clinical Officer, examined the victim and found inflammation in her private parts, she had vaginal discharge indicating she had contracted (STD) and had bruises around the neck. In Defence, the Accused person denied participation. He said the whole day he had been at his butcher up to 7:30 p.m. He walked home at about 8:00 p.m. he was arrested two weeks later on the charge of rape. He called DW 1 Mutabazi Sulaiman who told court that the Accused person worked for him in a butchery and that on a date he does not remember, which was a Saturday, he told him that he was being Accused of raping an old woman. He later on learnt that the Accused person had been arrested and charged with rape. It was settled in **KIBASO VS UGANDA [1965] E.A 507** by Court of Appeal for Eastern Africa. That in a charge of rape the burden is on the prosecution to prove that sexual intercourse took place without the consent of the complainant. The fact of non-consent must be proved beyond reasonable doubt. **Halsbury's Laws of England, Volume 10 3rd ed. Page 746** set out that slightest penetration is enough so it is not a defence to say that one just stopped at the mouth of the vagina.

The complainant in the instant case was aged 52 years and a mother who testified that the Accused person had sexual intercourse with her. There is no doubt that at her age she fully knew what amounts to sexual intercourse. All the court needs to do is to assess her truthfulness. This is an offence that takes place, most of the times in the presence of the Accused person and the victim in a place of isolation, therefore the victim would be a single

identifying witness. Adequate warning was given to the two Assessors pursuant to the guidelines in the leading decisions that have overtime, been followed in Uganda courts; **ABDALA BIN WENDO VS R (1967) 20 EACA and RORIA VS REPUBLIC [1967] EA** which states:-

“Subject to certain well-known exceptions, it is trite that a fact may be proved by the testimony of a single witness respecting identification especially when it is known that conditions favouring correct identification were difficult. In such circumstances what is needed is the other evidence whether it be circumstantial or direct, pointing to the guilt from which a Judge can reasonably conclude that the evidence of identification, though based on the testimony of a single witness can safely be accepted as free from the possibility of error.”

In **Uganda Vs Kyamusunga Ivan Cr. Session Case 107 of 1996**. Factors to be considered in identification of the rapist were set out as follow:

- (a) The time taken in commission of the offence.
- (b) The time taken in commission of the offence.
- (c) The time taken while the Accused was under observation.
- (d) Distance between the Accused and the witness.
- (e) The time of the day and whether there was light to and identification.

Also see: **Uganda Vs Wilson Simbwa Cr Appeal 37 of 1995 (C.A.U)**

I have following the above authorities and in the instant case, the victim knew the Accused person very well and shortly before the incident she had seen him entering his home about ¼ kilometer before the scene of crime. He followed and bye-passed her before he grabbed her and wrestled her and put her down on the roadside where he had sexual intercourse with. She had time to observe him as she pleaded with him that they move off the roadside to avoid being found in the act by her children. He accepted and as they shifted from the spot she got the opportunity to run away making alarm saying LAMU had strangled her. It does not matter that she did not specifically state in her alarm that he had raped her. What is important the alarm declared that she did recognise her assailant at the first opportunity. What is it that helped her to recognise the assailant? This was not challenged by the defence. The offence of sexual intercourse is committed when the victim is in body contact with the rapist. She closely observed the attacker. The offence was not started and completed abruptly, she ought to have had opportunity to observe who was raping her.

Therefore, despite the fact that it was at night there were favourable conditions for correct identification of the attacker. The victim immediately after the offence, the following day and even later she was firm that the Accused attacked and raped her therefore this was not an afterthought. Did she consent to sexual intercourse? Her evidence of non-consent was adequately corroborated by her injuries on the neck and her alarm. The injuries on the neck were inflicted in the struggle to overpower her in the forced sexual intercourse. Her alarm

proved that she did not consent to the Act. PW 7 Abel Kyarimpa, visited the scene the following day and found that there had been a struggle at the scene. All these considered together show that there was no consent from the complainant. The Defence of the Accused person was total denial, that he was not the scene. He denied participation from the day he was called to the LC I Chairman PW 6 up to date. However the Prosecution evidence placed him at the scene of crime. I have considered the defence criticism of the manner and delayed reporting to the police by the victim. As it were, each case ought to be decided on its own circumstances and facts. The offence was committed in a rural set-up, against an old illiterate woman. The victim was evidently traumatized but she delayed in the hands of the local authority LC I Chairman who took his time over what he thought would have been settling the matter. This was a capital offence he had no jurisdiction over. He delayed the victim's access to Police and medical attention. In our undeveloped systems where DNA tests are not yet widely available in the country it is of paramount importance that Rape and defilement victims should as much as practically possible be facilitated to access medical examination immediately after the offence and to preserve the necessary evidence for purposes of corroboration. The victim's private parts should not be cleared pending medical examination because this destroys evidence such as body fluids of the suspects capable of being found in the body of the victim which would be corroborative evidence.

I observed Ngasirweki Venerand, the victim as she described her being followed, by passed and wrestled to the ground and raped by LAMU, the Accused. She was straight forward, non-contradictory and my view both honestly and truthful. Her conduct from the scene of crime up to the following day she was consistent, despite her traumatized state, as she pursued Justice through the local authorities. The few days delay at the hands of LCs cannot be used against her. It was adequately explained away by the prosecution evidence. The two Assessors advice and opinion that the State proved all the elements of the offence beyond reasonable doubt has been accepted and I do hereby find the Accused person guilty of Rape contrary to sections 123 and 124 of The Penal Code Act and I accordingly convict the Accused person.

.....
J.W. KWESIGA
JUDGE
13/12/2012

In the presence of:

Mr. Baguma Batson RSA for the State.

Mr. Ndimbirwe Arther for Accused.

Ms. Ampeire Everlyne Court-Clerk.

PRE-SENTENCING FACTS

STATE: No previous criminal record. He is a first offender. Consider the age of the victim 52 years old. The Accused was 31 years old. This is disrespect of mother that should be condemned. We pray for a deterrent sentence.

DEFENCE: The convict has been on remand since May, 2010. He has been found guilty of Rape offence. He can reform. We pray that court is lenient and give him a sentence that allows to go back to society.

ACCUSED: I pray that you consider my family. I pray for lenience.

COURT SENTENCE:

The convict is a young man who raped a woman of advanced age, a resident of his community. There can not be any imaginable justification for this conduct. The Law prescribes a maximum sentence of death due to the gravity of the offence. I have considered that the Accused has been on remand for about 2 years, I find a **sentence of (15) fifteen years** appropriate.

.....
J.W. KWESIGA
JUDGE
13/12/2012