

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

**HCT-04-CR-SC-0001-2011**

**UGANDA.....PROSECUTOR**

**VERSUS**

**MAFUKO TOM.....ACCUSED**

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

**JUDGMENT**

The accused **Mafuko Tom** is indicted for rape contrary to sections 123 and 124 of the Penal Code Act.

Prosecution alleges that on the night of 16<sup>th</sup> August 2010 at Doko village in Pallisa District the accused had unlawful carnal knowledge of **Masani Aida** without her consent.

The accused pleaded not guilty.

The case for the prosecution led by **Mr. Walugembe** the learned resident State Attorney is simply as follows:

The complainant **Masani Aida** reported a case of rape. She was subjected to medical examination which revealed that she had no visible signs of penetration

and her hymen had long been ruptured, no wonder, at the age of almost 60 years. She had injuries and inflammation around the private parts consistent with sexual force having been used. She had a bruise around the neck and lower abdomen. The injuries were 48 hours old.

The accused was examined on PF.24 and found mentally normal and 29 years old. This evidence was admitted during the preliminary hearing and tendered as Exhibit PE.1 for the victim and Exhibit PE.2 for the suspect. It comprised PW.1.

The victim also explained what befell her as PW.2. She testified that deep in the night around midnight while enjoying a peaceful sleep alone in the house, she was attacked by an intruder. She first heard somebody kick the door to her house. Before she could make any alarm somebody got her by the neck and closed her mouth. In the strike of the moment, he started playing sex with her. The intruder had an apparent easy go because PW.2 sleeps naked since she expects peace throughout the night. All this went on without her consent and thereafter the intruder ran away. The incident took about 10 minutes. That by the aid of moonlight outside she identified the accused as the intruder. That she confirmed this by the voice of the accused who is a villagemate who spoke Swahili and warned PW.2 that if she made any alarm she would die. PW.2 further revealed that she saw the accused's face while he ran away and she stood in the doorway.

That the accused wore a blue pair of shorts and a striped shirt. She had ever seen the accused wear these clothes. She confirmed sustaining injuries as seen by the doctor. She reported that very night to the chairman **Damasco Wanyisi** that one

Tom (apparent reference to the accused) raped her. She was given a letter to Kabwangasi police after spending the night at the chairman's home.

**PW.3, Damasco Wanyisi** the LC.I General Secretary confirmed receiving PW.2 at midnight on the day in question. She had a complaint of rape. PW.3 reported the matter to the Chairman LC.I **Nazabwana John** who revealed that **Mafuko Tom** the accused had committed a similar offence before and ran away.

In his defence, **Tom Mafuko** the accused denied raping PW.2. That on the day in question he had a problem and was at his home. Then the defence secretary came and met him eating. He told the accused to report to the chairman after eating and he did so. As he waited for the way forward, police arrived and arrested him. While in police custody he was shown the complainant who alleged he raped her.

In all criminal trials, the burden of proof lies on the prosecution throughout the trial. The guilt of the accused must be proved beyond any reasonable doubt.

In a trial for rape like the instant one it has to be proved that any person had unlawful carnal knowledge of a woman or girl without her consent or with her consent if the consent is obtained by force or by means of intimidation of any kind, or by fear of bodily harm or by means of false representations as to the nature of the act, or, in the case of a married woman by personating her husband.

Therefore the two essential ingredients constituting rape are;

- Carnal knowledge and
- Lack of consent.

I will deal with the ingredients together that is to say, whether without her consent the accused had unlawful carnal knowledge of the complainant.

According to the evidence by the prosecution, it is apparent that the complainant was alone in her house. An intruder forced his way into her house and forcefully had sex with her without her consent.

I had no reason to doubt that these ingredients were proved by the prosecution.

After the act, PW.2 went and reported to PW.3 the LC.I secretary for mobilization of the area. She was in a distressed condition and in bad shape since she had just been operated on. This evidence was corroborated by the medical evidence (PW.1) in Exhibit PE.1. She was found to have inflammation and other injuries in her private parts. The injuries had occurred barely 48 hours before examination. This revelation coupled with the fact that the victim is an old woman who knows what sex is, left me with no doubt that someone performed unlawful sexual intercourse with her without her consent.

The only contentious issue is whether the accused was the culprit. The accused denied the offence and pleaded a defence of alibi. That on that day he had a problem and was at his home throughout. He was arrested upon implication by the complainant and he knew this when he reached the police station.

In the instant case, the complainant (PW.2) was the only identifying witness who was found in sleep in an unlit house. These were definitely difficult conditions to support correct identification.

This court has to warn itself as I warned the assessors that such evidence must be carefully considered to avoid the dangers of any mistaken identity.

Although the complainant zeroed on the accused as the one who violated her, I was not convinced that she was able to identify him. I highly doubt whether she could use moonlight outside her house to see the accused given the surprise attack by the assailant who held her neck as if to suffocate her before having forcible sex with her. She said that as the intruder fled, she stood in the doorway and saw his face as that of the accused as he ran away.

I do not believe that PW.2 saw the accused's face as he ran away. I did not also believe the complainant when she purported to claim that she saw the colour of clothes the accused was pulling on. She testified that the accused was wearing a striped shirt and a blue pair of shorts. There is no way she could have identified these colours in darkness.

The witness further said she identified the accused by his voice when he spoke in Swahili warning her not to make any alarm. This assertion was equally less convincing.

It would appear that the complainant implicated the accused because there was an allegation of rape against him and PW.3 stated so as well. The victim further said she had ever seen the accused wear the same clothes.

I will find that the prosecution evidence remained so weak to disprove the accused's defence of alibi and place him at the scene of crime.

Participation of the accused in this offence has not been proved by the prosecution beyond any reasonable doubt.

The lady and gentleman assessors have given me dissenting opinions.

According to **Ms Lavanance Waiswa**, she was not satisfied that prosecution proved all the ingredients of the offence beyond any reasonable doubt. That the victim did not identify the accused for there was no light in the house and moonlight outside could not assist to identify someone in the house. At the age of the victim, she could not immediately follow the culprit outside. Further that the Investigating officer did not testify.

On the other hand **Mr. Tatyabala Ibrahim** opined that prosecution proved all the ingredients that there was sex with no consent. That time of 10 minutes was enough to identify the accused with the aid of moonlight. That the accused had made advances to the victim before. The victim knew the accused before and what he referred to as circumstantial evidence proved the accused because the accused rape old women before.

With due respect, I did not agree with the opinion of **Mr. Tatyabala** for the reasons I gave. There was no admissible circumstantial evidence to pin the accused. He was never convicted of rape before. There was no proof of previous advances to the victim. I however agree with the opinion of **Ms Waiswa Lavanance**.

Consequently I will find the accused not guilty and acquit him of rape contrary to sections 123 and 124 of the Penal Code Act.

The indictment is dismissed and accused is set free unless lawfully held.

**Stephen Musota**

**JUDGE**

**16.4.2012**