HON.JUSTICE TSEKOKO

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT JINJA

CRIMINAL SESSION CASE NO.151/92

UGANDA :: PROSECUTOR

V E R S U S

ALFRED ODWOR :: ACCUSED

BEFORE: THE HON. MR. JUSTICE C.M. KATO

J U D G M E N T

The accused Alfred Odwor, whom I shall hereinafter refer to as the accused, is indicted for Rape Contrary to the Provisions of sections 117 and 118 of the Penal Code Act as amended by Statute No.4 of 1990.

The indictment alleges that on 25/11/91 at the village of Nabwere in the Gombolola of Buyinja in the District of Iganga the accused unlawfully had carnal knowledge of Mary Sikuku without her consent. The accused pleaded not guilty to the indictment.

The material facts upon which the Prosecution relied to establish their case are as follows:-

That on 25/11/91 the complainant Mary Sikuku went to a beer party which was attended by the accused and Ajambo together with other villagers. That late in the evening at about 7.00 p.m. Sikuku decided to leave the party and go home but before she reached her home the accused came from behind her and caught her then dropped her to the ground and started raping her.

On seeing Ajambo coming the accused jumped from her and he run away. The matter was reported to the local authorities who arrested the accused on that very evening and referred the matter to the police.

That the following day both the accused and the complainant were taken by the police to the dispensary where they were medically examined.

On the other hand the case for defence is a total denial of the whole affair. The accused denies having had anything to do with the complainant. His story and that of his wife is simply that on the day in question the accused went to the beer party from where he went back to his home where he stayed until the following day when he was arrested by the R.C. officials. The accused denies ever having been medically examined.

It is trite law that the burden of proof in criminal cases lies upon prosecution, that burden does not shift to the accused; Woolmington v D.P.P. (1935) AC 461 and Oketh Okale and others v Republic (1965) EA 555 at page 559.

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In a rape case like the one now under consideration it is the duty of prosecution to prove beyond reasonable doubt that the accused had carnal knowledge of the victim of the alleged rape without her consent: (See section 117 of the Penal Code Act). There are therefore 3 major ingredients which must be proved by prosecution beyond reasonable doubt and those are:-

(a) Unlawful carnal knowledge,
(b) Lack of consent on the part of the complainant and
(c) Participation by the accused.

Carnal knowledge is said to be complete once there is penetration by the man's penis into the woman's vagina. It does not matter how slight that penetration is:

Hasbury's Laws of England 3rd Edition Volume 10 Page 746 paragraph 1438 and Archbold Criminal Pleading Evidence and Practice, 38th Edition at page 1124 paragraph 2878. In the instant case prosecution called the evidence of the complainant Mary Sikuku (PWI) who informed the court that the accused had in fact had sexual intercourse with her. There was also evidence of the medical assistant called Badiru Wasike Wamudanya (PWIV) who testified that when he examined the complainant on 26/11/91 he observed that she had had sexual intercourse. The learned defence counsel Mr. Okalang conceded that the issue of penetration was not in dispute. I accept the evidence of Sikuku and that of Badiru as truthful to the effect that there was actual penetration. I do accordingly hold that prosecution has proved the first element of carnal knowledge in this case beyond reasonable doubt.

The next issue to be considered is that of consent. It has been the case for prosecution that the complainant did not consent to the act of sexual intercourse. According to her story she was grabbed from behind then thrown to the ground and struggle ensued during which the accused held her by the neck and removed her nicker then the dress and finally inserted his penis in her vagina between her thighs.

Although the defence did not put up consent as their defence, the learned defence counsel Mr. Okalang argued at great length that the complainant must have consented to the sexual intercourse. It was his case that the complainant having been caught by Ajambo while in the act she put up the story of rape for the fear of being blamed by her husband in case Ajambo reported the matter to him. As for the bruises found on the complainant by PW11 (Ajambo) PW111 (P.C. Bwire) and PWIV (Badiru) he suggested that such bruises were self inflicted by the complainant. With all due respect to the learned defence counsel, I find these two arguments not supported by any evidence. There is nothing on record to support any of the two arguments advanced by the learned counsel.

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I treat those two arguments as a mere theories not facts and as such they (arguments) cannot be given much weight or any weight at all.

Mr. Okalang also seriously argued that since the complainant was grabbed from behind one wonders as to how she came to be raped while lying on her back because she was expected to fall on her face. This argument was explained away by the complainant who testified that when the accused caught her from behind she turned towards him and asked him what the matter was but the accused did not reply instead he threw her to the ground; from that explanation it can reasonably be concluded that by the time the complainant was thrown to the ground she was in fact facing the attacker. Although the complainant might have turned around to find out who her attacker was that does not mean she was voluntarily accepting to have sexual intercourse with him, her reaction was a natural response to what had happened to her, having been grabbed from behind she was naturally forced to turn round in order to find out what was happening.

In her testimony Ajambo (PW11) told the court that she heard the complainant crying ahead of her and when under cross-examination Ajambo said that the complainant was crying while saying that she was being killed by Odwor. This piece of evidence was attacked by the defence counsel who pointed out that it is normal for some women to make noise as if they are crying when playing sex with men.
Here it must be pointed out that according to the evidence of Ajambo she heard the crying a distance away so I doubt whether such crying of women who express their sexual pleasure by crying would be such so as for the whole world to hear.

When under re-examination by Mr. Wamasebu the complainant said that she was crying because she had much pain in her private parts due to the forceful intercourse which she had with the accused person. Mr. Okalang's contention that the complainant's crying was an expression of pleasure derived from sexual intercourse must be rejected as a mere conjecture. The crying by the complainant must have been as a result of forced sexual intercourse.

In her evidence the complainant stated that the accused held her throat while playing sex with her, this evidence is supported by that of Ajambo (PW11) Bwire (PW111) and Badiru (PWIV) who told the court that the complainant had some scratches or bruises on her neck. I have already rejected any suggestion that these injuries were self-inflicted by the complainant as suggested by the learned defence counsel. These injuries must have been sustained by the complainant while struggling with her attacker. While under cross-examination Ajambo said that the intercourse took place by the road side and not in the bush. When being re-examined she (Ajambo) testified that it is not a common practice in their village for people to have sex by the road side.

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Mrs. Tuma one of the assessors who assisted me in this case was of the view that playing sex by the road side is only an indication that there is no consent on the part of the lady. I accept these views as being convincing. No reasonable self-respecting lady would willingly agree to have sex with a man along the road at t at time of the day (7.00 p.m.) unless forced to do so.

Mr. Okalang strongly argued that by the fact that the complainant's clothes were not torn was a clear indication that she consented to the whole affair. It is not a rule of law or practice that in all rape cases the clothes of the victim must get torn. Each case must be taken on its own merits. The mere fact that clothes were not torn or produced in court may be one of the factors to be taken into account when considering [redacted] prosecution case as a whole. In the present case the complainant frankly told the court that she did not surrender her clothes to the police possibly because nobody asked her to do so and possibly they were not torn apart from the nicker which was slightly torn. The complainant explained to the court the manner in which her clothes were removed. The nicker was pushed down while the frock was pushed up, I have not come across any piece of evidence showing that she took part in that exercise. It is my opinion that failure by prosecution to tender the clothes which the complainant was wearing at the time of her being raped has not in any way affected the credibility of the complainant as a witness of truth on this issue of consent.

Considering all the evidence available I am satisfied beyond any reasonable doubt that prosecution has adduced sufficient evidence to establish that the intercourse the complainant had on 25/11/91 was without her consent. This case must be clearly distinguished from that of: Abasi Kibuzo v Uganda (1965) EA 507 which was quoted to the court by the learned defence counsel. The facts of the two cases are quite different. I have however found the cases of: Upar v Uganda 1971 EA 98 and Nakholi v Republic (1967) EA 337 very useful on the issue of necesity for consent in rape cases.

I now move to the question of whether or not the accused ever raped the complainant. Tied up to this issue are two other issues of the defence of alibi and corroboration. It is the contention of prosecution that it was the accused who raped the complainant and nobody else and that the defence of alibi is not available to the accused and that prosecution has adduced enough corroboration in support of complainant's story. On their part the defence are adamant that the accused was not a party to the alleged rape of the complainant as on that evening the accused did not see the complainant at all and that the complainant's evidence has not been corroborated at all.

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In order to prove their allegation that the accused did in fact take part in the alleged rape prosecution produced the evidence of the complainant and that of Ajambo. In her evidence the complainant told the court that on that day she was with the accused at a beer party but when she was on her way home the accused came from behind her and grabbed her when she turned round to find out what was happening the accused dropped her down and started raping her. She says she was able to recognise him because it was early and she had known him for nearly 7 years. When the matter was reported to the R.C. the accused was arrested and denied his act but the complainant preferred the matter to be taken to the police as she was feeling much pain. Ajambo testified that she heard the complainant crying ahead of her while saying that Odwor was killing her. On arrival at the scene the complainant told her that she had been raped by Odwor who by then had run away.

In his unsworn statement the accused denied having raped the complainant, his story was that on the day in question 25/11/93 he went to a beer party at about 1.00 p.m. He left the party at about 6.30 p.m. and went straight to his home where he remained until the following morning when the R.C. men went to arrest him on the allegation that he had raped the complainant. His wife Jane Mbwire (DW11) testified that on the day in question she went with her husband to a beer party at about 1.00 p.m. from there they went home and remained at home the whole night. The following morning her husband was arrested by the R.C. men.

It all boils down to who is to be believed. The evidence of the complainant and that of Ajambo was severely attacked by the learned defence counsel Mr. Okalang on the ground that the two witnesses contradicted themselves on the issue of where the accused was by the time Ajambo arrived at the scene.

In her evidence the complainant stated that when the accused saw Ajambo he jumped off and run away, but Ajambo says that she did not find the accused at the scene. It is most likely that the accused saw Ajambo approaching and he took off before Ajambo had the chance of seeing him.

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I consider this contradiction minor and it does not go to the root of the case, neither the complainant nor Ajambo deliberately told lies. The evidence of Ajambo that she heard Sikuku crying while mentioning the accused's name certainly indicates that the accused was at the scene before the arrival of Ajambo, that piece of evidence corroborates the complainant's allegation that the accused had raped her.

The complainant said that he had known the accused for nearly 7 years, that the incident took place at about 7.00 p.m. that the accused took sometime before he finished his job of raping her and that on that very day she had been to a beer party with the accused. I find the evidence of this witness to be truthful but not that of the accused and his wife. The demeanour of the complainant while in court impressed me as that of a person who could not have fabricated evidence against the accused. On the other hand the accused and his wife did not impress me as witness of truth, for example the accused did not anywhere mention having gone to the beer party with his wife or anybody else but the wife stressed that they had been together the whole day. The issue of where the accused spent the night is to me irrelevant when determining whether or not the accused was at the scene of crime at 7.00 p.m. After the rape at 7.00 p.m. the accused could have gone anywhere for a night, the issue would only have been material to the case if the rape had taken place at night or within the time the accused is alleged to have been at his home.

There is the question of when the accused was arrested. According to the prosecution the accused was arrested on the same evening but according to the defence he was arrested the following morning. Both Ajambo and Sikuku are quite emphatic that on the very evening they reported the matter to the R.C. members and the two ladies went with them to the accused's home the accused was then arrested and taken to the home of R.C.I chairman where an attempt was made to have the matter settled but in vain. None of these witnesses had any grudge with the accused and in fact Ajambo is said to be related to him, I see no reason why they should have conspired to tell lies against him. The accused and his wife must have deliberately chosen to tell this court lies so as to strengthen the accused's alibi. I find as a fact that the accused was arrested on the evening of 25/11/91 and he was taken to the police on 26/11/91.

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I find that the accused did in fact rape the complainant, his defence of alibi cannot be sustained as prosecution has adduced sufficeint evidence to destroy that defence by placing him at the scene of crime at the time the crime was committed. There existed conditions favouring correct identification of the accused by the complainant. Although the complainant's report to Ajambo that she had been raped does not amount to corroboration but it is evidence of consistence. The evidence of Ajambo that she heard the complainant mention accused's name is however enough corroboration, so is the evidence of PW111 that when the complainant went to him she looked distressed and exhousted: Abasi Kibago v Uganda (1965) DA 507 at page 510.

In full agreement with the opinions of the lady assessor and gentleman assessor I find that prosecution has proved its case against the accused beyond reasonable doubt and I find him guilty of the offence of rape contrary to sections 117 and 118 of the Penal Code Act and I do convict him of that offence. So be it done.

C.M. KATO
JUDGE
2/4/93.

WAMASEBU: I do not have accused's record so he should be treated as a first offender. There is no doubt that offences of sexual nature are on the increase this was acknowledged by statute 4/90 whereby the sentence for this type of offence was enhanced. This offence creates a psychological trauma. There is an outcry from women and pressure groups that courts are not helping in stamping out this kind of crime. I request this court to impose life imprisonment which is not the maximum sentence.

OKALANG: The convict is a first offender he has been on remand since December 1991. He has a family with 4 children who need fatherly help. These people had been drinking and they must have been excited. There is no serious evidence that this sort of crime is on increase. It is

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I feel it is a joke to speak of a psychological trauma, the woman's organ still functions. This is a court of law not a court of emotions or sentiments. I pray that a reasonable sentence be imposed warranting the circumstances of the case.

COURT: The accused is a first offender, he has been on remand for about 1 year and 4 months. He has a family to care for. These are some of the facts that I have considered as mitigating on the part of the accused. This court however cannot turn a blind eye to the seriousness of the offence. This offence carries death as its maximum sentence. I agree with Mr. Okalang when he says that this court should not be turned into court of sentiments or emotions, but I feel the court has a duty to protect the weaker members of the society from those who are carried out by their immoral conduct.

Considering all the circumstances of this case I feel a sentence of 8 (eight) years will meet the ends of justice.

Accused is accordingly sentenced to 8 years imprisonment.

C.M. KATO
J U D G E
2/4/93.