

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA.

HOLDEN AT MBALE.

Rape 2 years

CRIMINAL SESSION CASE NO. 13 OF 1993.

UGANDAPROSECUTOR

VERSUS:

A1: ISAYA GUDOI
A2: JOHN MAFABI} ACCUSED

BEFORE: THE HON. MR. JUSTICE S.G. ENGWAU.

J U D G M E N T

The 2 accused persons, Isaya Gudoi (A1) and John Mafabi (A2) are charged in separate counts with rape contrary to sections 117 and 118 of the Penal Code Act. It is alleged that both Isaya Gudoi -A1 and John Mafabi, A2 on 20.11.88 at Bumoi village in the Mbale District, each had unlawful carnal knowledge of Sauya Kasede without her consent. 5

The victim of the alleged rape, Sauya Kasede (PW2) testified that on 20.11.88 at around 10 a.m., she was on her way to Bumoi village to get some native drugs from PW3, her native doctor when she met 2 strangers now the 2 accused persons in this case. This was at a distance of about 300 metres away from the main Mbale-Tororo Road. She did not see any homes in the vicinity except banana plantation. 10

As she approached the 2 accused persons, immediately A1 held her by the neck while A2 grabbed her hands. Both accused led her into the said banana plantation where they removed all her clothes and she remained naked. The 2 accused persons threatened to strangle her to death in case she attempted to raise an alarm. The banana plantation was about 100 metres away from the path she was following at the material time. Frightened as she was, they put her down. Then she heard A2 say, "Gudoi you have sexual intercourse with her first". She identified the said "Gudoi" in court as A1. 15 20

While A1 was having sexual intercourse with her, A2 was holding her down to the ground. She alleges that it took A1 some time before completing the act. Thereafter, A2 in turn started having sexual intercourse with her while A1 was also holding her down on the ground. After A2 had also finished, she was given her half petty only to put on. Both accused then took her by force into a house just after the banana plantation. 25

She was pushed into a small room therein where her hands were tied with a white piece of cloth and some cloth also put into her mouth. A1 then got a panga with which he threatened to cut her in case she made an alarm. Both accused then retired into a sitting-room where they started drinking some alcohol.

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When it was getting dark, the 2 accused persons untied her hands and the cloth in the mouth was removed. Still A1 threatened to cut her with the said panga if she made an alarm. A2 in that small room again had sexual intercourse with her for a second time. As soon^{as} he had finished, she heard him tell A1 that he (A2) was going away. She saw A2 take away her pair of slippers and cash of Shs 150/- and went away.

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A1 who remained with her in the house had sexual intercourse with her transnight. In the morning, A1 got hold of her clothes, namely a skirt and one long sleeved blouse and went away, leaving the door open. She grabbed that chance, managed to get out and started running towards the home of her native doctor, PW3. She was dressed in the half petty only. She found PW3 at home and narrated the whole story to him. PW3 offered her a gomas of his wife to wear and took her to the R.C. of the area. The R.C. gave her a letter and both PW3 and her reported the matter to Mbale Police Station on 21.11.88.

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When she made the report to the Police, she was given an escort of 3 Policemen to go back to the house where she was forcibly made to spend the night. A1 was found at that home and he was immediately arrested. The house was searched and the said blouse and skirt were found therein. She identified the blouse and skirt in court which were tendered in as exhibit P1.

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When A1 was arrested and the said clothes recovered, the party went back to Mbale Police Station. She was then given a letter for medical examination and treatment at Mbale Hospital. The doctor, PW5, examined and treated her. Before the incident, she alleges that she had not yet had sexual intercourse with any man. She claimed to be a virgin by then and that she felt so much pain in the vagina and the body when both accused persons had sexual intercourse with her in turns while holding her tight on the ground.

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However, she denied having consented to the alleged sexual intercourse and also denied that the 2 accused persons were her boyfriends before the incident.

In the testimony of PW3, he admitted that he is a native doctor in his area and that PW2, now the victim of this rape case was his patient. On 21.11.88 at around 9 a.m., he was amazed to see PW2 come to his home while crying and very dirty. She was dressed in half-petty only and he immediately inquired what had happened to her. After cooling her down, she narrated the whole story as stated by PW2 above. After receiving her complaint, PW3 took her to Mr. Moses Guloba, the R.C. of the area who gave them a letter with which they reported the matter to the Police at Mbale Police Station.

In his evidence, PW1, the R.C. Secretary for defence, confirmed that in November, 1988 on a date he could not remember, a team of Policemen in the company of the complainant - PW2 and her father found him selling some banana in a place along Mbale - Tororo railway line for the purpose of arresting the 2 accused persons. One Policeman introduced himself and his team and he saw one Policeman armed with a gun. He was informed of the allegation of rape by the 2 accused persons. He was with one Moses Guloba another R.C. at the material time. The witness and the said Moses Guloba knew the 2 accused persons very well before the alleged incident. He admitted that A1 hails from another village but A2 comes from his village.

The witness and the said Moses Guloba led the Police team to the home of A1. When approaching the home the victim - PW2 and one armed Policeman remained behind. He led the rest to the home at about 10.00 a.m. and they found A1 and his brother one John present. One Policeman introduced himself, informed A1 of the allegation of rape and the team forcibly arrested him as he tried to resist the arrest. The witness then went back leaving A1 being taken to Mbale Police Station.

The Police investigating officer, PW4, testified that on 21.11.88 at around 2 p.m., he was working at the counter at Mbale Police Station when the victim, PW2 reported that she was raped. After satisfactory interrogation, he reported the matter to his boss, the Officer-in-charge Criminal Investigation Department.

He was directed by the said boss to lead a team of Policemen and the victim to go and arrest the suspects. At Bumboi village where the alleged incident happened, they reported to the R.Cs of the area who led them to the home of A1. They found A1 at home, informed him of the purpose of their visit but resisted the arrest. However, being re-enforced by the R.Cs A1 was arrested after all. A search into his house was jointly mounted with the R.Cs. A1 was looking on while standing at the door but hand cuffed after the search. One blouse and a skirt were found underneath a mat on A1's bed. The witness identified the blouse and skirt already tendered as exhibit P1.

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On the material day, A2 was not arrested because he took off when he learnt of the Police presence. A1 was then taken to Mbale Police Station with the items tendered as exhibit P1. However, the R.Cs of the area were left with Police message that A2 also be arrested and be taken to the Police at Mbale Police Station. How A2 was subsequently arrested, the witness did not know.

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The doctor, PW5, who examined and treated the victim stated that on 21.11.88 he received a Police Form 3 in respect of a rape case on PW2. He examined her and found her of the apparent age of 20 years old. She was strong and capable of putting up some form of resistance. She had a freshly ruptured hymen of less than one week prior to the examination. She had also injuries and inflammation around her vagina. She had a tear on the left labium majus and this was consistent with having been sexually used. All the injuries mentioned were of less than one week old. She was on her period at the time of examination. In his opinion, the rapture of the hymen must have been caused by use of a penis. Medical examination report was tendered in court as exhibit P.2.

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Briefly, that was the case for the prosecution. The defence case for A1 is that on 21.11.88 at around 11 a.m., one Policeman in the company of R.C. officials from a neighbouring village of Bumboi found him at home. The Policeman informed him that they had come to arrest him on the allegation that he had raped a girl. He resisted the arrest on the ground that R.C.s of his area were not present. He was overpowered and tied "kandoya" style with a rope on the verandah of his kitchen.

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The Policeman, R.Cs and the victim went inside his main house but was surprised to see them come out with some clothes allegedly found under his bed. He denied having any knowledge of such clothes being in his house. He also denied knowing A2 or the victim. However, he suspected the team which went to arrest him to have been hired by PW3. When PW3 was treating his (A1's) wife, it turned out that PW3 started making love affairs with her which act he said he strongly disapproved but never reported the same to any R.C official of the area or at all. 5

On the other hand, A2 in his defence testified that in the night of December, 1988 he was a party to the patrol of their village. He does not recall the exact date, but at around 3 a.m. his village patrol-mates turned against and arrested him on the ground that young men in the village of his like bring Policemen in the village. He was taken and detained in their Sub-County Headquarters for 3 days before appearing in court. He too denies knowing A1. Both A1 and A2 did not call any witness. 10 15

The learned defence counsel for A1 rightly pointed out the elements of rape as laid in John Kayibanda Vs. Uganda (1976) HCB 253 to include:- carnal knowledge of a woman or girl and lack of consent. It is the duty of the prosecution to prove these two elements beyond reasonable doubt. 20

It is the submission of the defence Counsel that according to the evidence on record, the prosecution has failed to prove beyond reasonable doubt that A1 had committed rape. Evidence of PW2 that she was led to a nearby banana plantation is unbelievable on the ground that it was not corroborated. The prosecution failed to give evidence of the scene of crime whereas the Police arrested A1 just next to the alleged place of crime. 25

The learned Counsel submitted that there are major inconsistencies and contradictions which destroy the basis of this case. PW4 exhaustively informed court of what PW2 told him but did not say that the victim also told him that A1 raped her the whole night. PW4 said that PW2 reported to the Police dressed in a "lessò" but ^{PW2} said she was dressed in a "gomas." 30 35

It is further submitted that the blouse and skirt allegedly found in the house of A1 cannot be true because the way in which they are said to have been found is unbelievable. The victim had the opportunity to raise alarm during the transaction but did not do so. Medical evidence has no probative value as it does not pin point A1 with the offence. The fact that hymen of the victim was found ruptured in itself does not connect A1 with the offence.

In his submission, the learned Counsel for A2 stated that on the allegation of rape, corroboration is required: Lawi Ongweya Vs. R (1964) E.A. 129. It is his contention that in the instant case, there is no corroborative evidence on the allegations made by PW2 independent of her accusation.

The learned Counsel then featured on the contradictions which in his opinion destroy the case. He pointed out that whereas PW2 said that she went in the company of 3 Policemen to arrest the 2 accused persons, PW4 said there was only one Policeman. Again PW2 said that both accused were arrested at the home of A1 but PW1 and PW4 said only A1 was found and arrested. PW2 said she reported the matter to the Police while wearing a "gomas" given to her by PW3 but PW4 said she reported on a "lesso." As A2 was arrested by village-mates, evidence of arrest is contradictory and inconsistent. Also evidence of PW3 is that PW2 and her father and himself reported the matter to the Police but PW4 says that PW2 and her father only reported the matter.

In conclusion, the learned Counsel argued that evidence of PW2 in regard to identification of A2 is not corroborated and as such she did not identify A2.

It is the contention of the State prosecutor that a case of rape against A1 and A2 is proved beyond reasonable doubt. Evidence of the victim PW2, asserts that on the material day, A1 and A2 raped her in the banana plantation and also inside A1's house. It is submitted that element of penetration of vagina without consent is proved by the evidence of the victim herself, PW2 and the doctor who examined her, PW5 and the medical report to that effect, exhibit P2.

It is also the submission of the State Counsel that A1 and A2 had carnal knowledge of PW2 without her consent. Evidence of the victim PW2, the doctor who examined her, PW5, her native doctor to whom she made the first report, PW3 and the medical report, exhibit P2 all proves the element of having carnal knowledge without consent. In fact evidence of PW3 is that PW2 went to his home half naked, crying and dirty which negatives an assertion of consent: Uganda Vs. Opio Richard (1986) HCB 19.

As regards corroboration, the learned State Counsel relied on the principle laid in Njunguna s/o Wangurimu Vs. R. Vol. XX 1953 at page 196. It is her submission that corroboration is a rule of practice rather than rule of law. However, in the instant case, evidence of PW3 that PW2 went to his home half naked, crying and dirty corroborates PW2. Evidence of PW4 who recovered the blouse and skirt of PW2 in the bed of A1, exhibit P1 is yet another corroborative evidence which is not effectively challenged by the defence.

On the issue of any contradictions, it is submitted that these could arise out of lapse of time and weakness of memory. However, the contradictions complained of by the defence are minor and should be disregarded. The defence is a total denial. A1 said that he never knew PW2 before the incident and yet he says PW2 had a grudge against him. The so-called grudge between A1 and PW3 should also be disregarded because it is not only untrue but because also he did not report the alleged love affairs between PW3 and his wife to any authority. In any case A1 has no wife as per evidence of PW4. Worse still A1 says he does not know A2 yet A2 used to drink at his home quite often. It is on the basis of all that the defence total denial of the offence charged does not hold water.

Having heard both sides, it is to be noted at the outset that the essentials of the offence of rape are carnal knowledge of a woman or girl and lack of consent and both these ingredients must be proved beyond reasonable doubt by the prosecution in order to be accepted by the court before a conviction for rape can be arrived at: John Kayibanda Vs. Uganda (1976) HCB 253.

In the instant case, the testimony given by the victim - PW2 is that A1 and A2 on 20.11.88 had carnal knowledge of her in turn both in the banana plantation and in the house of A1. Evidence of the doctor who examined PW2 on 21.11.88 is that she had a freshly ruptured hymen. She also had injuries and inflammation around her vagina. In addition, she had a tear on the left labium majus which was consistent with having been sexually used. All these injuries at the time of examination were less than a week old. In the doctor's opinion, the rupture of the hymen must have been caused by use of a penis. Medical report to that effect was tendered as exhibit P2. In the light of all that this court is satisfied that somebody had had carnal knowledge of PW2. She was a virgin according to the evidence on record before the incident happened. Evidence of PW2, PW5 and exhibit P2 reflects that assertion.

At this stage, evidence on record must establish the person(s) who had unlawful carnal knowledge of PW2. Her evidence is that on 20.11.88 at around 10 a.m. she met A1 and A2 in Bumboi village on her way to the home of PW3 who was her native doctor since 1987. A1 held her by the neck and A2 held her hands. The 2 accused dragged her by force into a nearby banana plantation where they stripped her naked and started having sexual intercourse with her in turn. After that both accused by force took her to a house in the vicinity which house she later learnt to be that of A1. Again in that house A1 and A2 had sexual intercourse with her.

In the morning of 21.11.88 when she was availed the opportunity to escape, she started running towards the home of PW3 dressed in a half petty only. Evidence of PW3 is that on 21.11.88 at about 9 a.m. PW2 went to his home half naked, crying and dirty - and immediately informed him that she was raped. PW3 who comes from the same village with A1, knew him for a period of over 10 years. He was therefore able to identify the house in which PW2 was raped. According to PW2, when A1 and A2 first took her into the banana plantation, she heard A2 say, "Gudo! you have sexual intercourse with her first." In court, she identified the said Gudo! as A1. When Gudo! had finished to have sexual intercourse with her, she heard him say, "Mafabi I have finished with her you also do your part." Again she identified the said Mafabi in court as A2. When she ran to the home of PW3, she mentioned those names to him as the people who raped her and as PW3 knows both accused persons, he was able to identify them not only in court but also assisted the Police in that regard in their investigations leading to the arrest of A1 and A2.

In fact evidence of PW1 also goes to prove the identities of both A1 and A2 taking into account that he was R.C. Secretary for defence.

As this offence was committed on 21.11.88 at around 10 a.m., in broadday light and the victim faced the ordeal until it became dark, this court is convinced that she had more than ample time for the identification of A1 and A2. Moreover A1 spent the whole night with her until the following morning of 21.11.88 at 9 a.m. when she escaped and reported the matter to PW3. Evidence of PW1 and PW3 supports the evidence of PW2 in the identification of both accused persons. Evidence on record points a finger on A1 and A2 as the people who raped the victim, PW2.

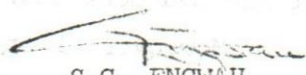
Having said all that, the next ingredient is that the prosecution must prove beyond reasonable doubt that A1 and A2 had carnal knowledge of PW2 without her consent. Evidence of PW2, PW3, PW5 and the medical report exhibit P2 as outlined above proves that the 2 accused persons had carnal knowledge of PW2 without her knowledge.

On the issue of corroboration, the principle is that testimony given by the victim of a sexual offence requires corroboration or else the court should warn itself of the danger of convicting without such corroboration. Having so warned itself, the court may convict in the absence of corroboration if satisfied that her evidence is truthful. In the instant cast, this court has taken this precaution in mind. According to evidence of PW2, this court would convict A1 and A2 of the offence charged even when there was no corroboration because her evidence is truthful. However, there is corroboration of her evidence in the testimony of PW3 and PW4 and exhibit P1, which puts this court to a safe corner for conviction. The defence submissions that there is no corroboration in the present case do not hold water.

Regarding contradictions and any inconsistencies as submitted by both defence Counsel, in a nutshell this court agrees with the State Counsel that they are minor and ought to be disregarded and they are hereby disregarded. The gentlemen assessors also share the same view.

In conclusion, this court finds that the prosecution has proved beyond reasonable doubt that A1 and A2 have committed the offence of rape contrary to sections 117 and 118 of the Penal Code Act and convict them of the same accordingly.

The gentlemen assessors also in their opinions share the same view and advised court accordingly which opinions the court readily accepted in the circumstance of the case. Both accused are guilty of rape as charged and convicted accordingly.


S.G. ENGWAU

JUDGE

22.7.93.

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10.8.93: Both accused present in court.

Mr. Ochwo for A1 is dead.

Mr. Oworu for A2 present.

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Khiisa for the State present.

Judgment delivered in open court.

S.G. ENGWAU

JUDGE

10.8.93.

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Khiisa: Both accused persons have no known records. They are to be treated as first offenders. However, this is a very serious offence which at the time of its commission carried a maximum sentence of life imprisonment. The circumstances in which the offence was committed were most brutal to the victim and most demeaning her person as she was a young girl and virgin. She was lucky to actually get married.

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Female community must be protected from the likes of the accused persons. Pray for the maximum sentence be imposed on both accused persons. In case that does not succeed, in R. Vs Lachman Singh (1947) E.A.C.A. XIV 56 where 2 rapists who before raping the girl, gagged her mouth to stiff off her cries for assistance, were sentenced to 9 years 7 months' imprisonment with hard labour. Appeal against sentence was dismissed.

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S.G. ENGWAU

JUDGE

A1: I am a sick person who now under goes treatment.
I move by use of boda-boda people. I leave the
whole matter to court.

S.G. ENGWAU

JUDGE

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Mr. Oworì for A2:

A2 is 32 years old now. Has been on remand custody
for 5 years. Married with 3 children. He is
repentant for what happened. Custodial sentence
which should not keep him too long be imposed.

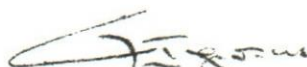
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S.G. ENGWAU

JUDGE

Court: Each accused is sentenced to 7 years' imprisonment
with 4 strokes of the cane. Female society must
be protected and with Aids now at its peak,
deterrent sentence would keep rapists out of the
society for the better.

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S.G. ENGWAU

JUDGE

8.8.93.

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