

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HIGH COURT CRIMINAL SESSION CASE NO. 0136 OF 2001

UGANDA.....PROSECUTOR

VERSUS

BOGERE MOSES.....ACCUSED

BEFORE: The Hon. Mr. Justice E.S. Lugayizi

JUDGMENT

The accused was indicted for aggravated robbery and rape. The particulars of the two counts read as follows.

“COUNT 1:

BOGERE MOSES during the night of the 9th day of April 2001 at Kakooge Trading Centre in the Nakasongola District robbed one MASITULA KYAGAZA of cash Uganda Shillings six thousand eight hundred U. shs 6,800/= only) and during, immediately before or immediately after the said robbery threatened to use a deadly weapon; to wit a panga, upon the victim of the said robbery, one MASITULA KYAGAZA.

COUNT 11:

BOGERE MOSES during the night of the 9th day of April 2001 at kakooge Trading Centre in the Nakasongola District had unlawful sexual intercourse with one MASITULA KYAGAZA without her consent.”

The accused denied the offences in both counts and was, therefore, tried. The prosecution called 5 witnesses in a bid to prove its case against the accused. Those witnesses were Masitula Kyagaza (PW1); Tayib Sesazi (PW2); No. 32956 Police Constable James Segwanyi (PW3); Samuel Kasozi (PW4); and Detective Assistant Inspector of Police Nicodemus Ekiat (PW5).

The accused relied on one witness; and that was himself (DW1).

In brief terms the prosecution case was as follows. During the night of 9th April 2001 at around 1.00 a.m. as Masitula Kyagaza slept at her home at Kakooge the accused gained entry to her house and robbed her of shs. 60,700/=. He also threatened to cut her with a panga if she did not give him more money. He then raped her and went away. Masitula reported the matter to the police; and the accused was arrested.

In his defence. Which he made on oath the accused denied the above story.

In order for the prosecution to succeed under the indictment, it has to prove these ingredients beyond reasonable doubt: for aggravated robbery,

- (a) That the attacker committed a theft against the victim during the night in question;
- (b) That the attacker used violence or threatened to use violence against the victim during the theft;
- (c) That the attacker used or threatened to use a deadly weapon against the victim at or immediately before or immediately after the said offence and
- (d) That the accused is the person that committed the said offence. (See sections 272 and 273(2) of the Penal Code Act.)**

For rape.

- (a) That a male person had sexual intercourse with the victim during the night in question;
- (b) That the sexual intercourse was without the victim's consent; and
- (c) That the accused is the person that committed that offence. (See sections 117 and 118 of the Penal Code Act.)**

Be that as it may, at this point Court wishes to point out that although it admitted a confession Detective Assistant Inspector of Police Ekiat recorded from the accused (as Exhibit P5), it will not consider it as part of the relevant evidence in this case. Court has come to that conclusion because it admitted the said confession wrongly, without taking into account Article 23(4)(b) of the Constitution. The police arrested the accused on 9th April 2001 and Ekiat recorded the said confession 3 days later, on 12th April 2001. It is, therefore, clear that the confession was recorded outside the 48 hours time limit that a suspect must, lawfully, spend in police hands. For that

reason, the said confession was illegal and unconstitutional. (See Uganda v Katongole Lukyamuzi High Court Criminal Session Case No. 329 of 2001.)

Court will now proceed to discuss the ingredients of the above offences in order in which they occur in the light of the law and the evidence on record.

With regard to the first ingredient of aggravated robbery, that is to say, that the attacker committed a theft against the victim during the night in question, Court has this to say. It is, first of all, important to understand that in defining the offence of “theft” our law refers to it as “stealing”. Secondly, for the purposes of this case Court will restrict itself to the relevant parts of section 245 (1) of the Penal Code Act, which define theft as follows,

“A person who fraudulently and without claim of right takes anything capable of being stolen...is said to steal that thing.”

Under subsection (2) of the above section the fraud referred to is deemed to exist if a person who takes “anything capable of being stolen” does so,

“(a) with an intent permanently to deprive the ... owner of the thing of it.

(b).....

(c)....

(d)....

(e) in the case of money with intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.”

In the instant case, the prosecution mainly relied on Masitula’s evidence to prove this aspect of its case. Masitula testified as follows. On 9th April 2001 at around 1:00 a.m. while she was sleeping at home in Kakoonge village some one knocked at her door. She did not open for him. Instead, the man gained entry to her house and afterwards took away a sum of shs. 60,700/= which belonged to her. Sesazi (Masitula’s grandson) testified that the attacker entered their house during the night in question and took Masitula’s money.

The accused denied that evidence.

Despite some disharmony between Masitula's evidence and the indictment as to how much money she lost at the hands of the attacker. Court thinks that Masitula's house at such odd hour of the night and entered it without her consent shows that the attacker intended to use Masitula's money (Whatever sum it was) at his will despite that he had no claim of right on it. That means the attacker stole Masitula's money. In the circumstances, Court is satisfied that the prosecution proved, beyond reasonable doubt, that the attacker committed a theft against Masitula Kyagaza during the night of 9th April 2001.

With regard to the second ingredient, that is to say, that thence or threatened to use violence against the victim during the theft, Court has this to say. Webster's new World Dictionary (2nd College Edition) defines violence as "***physical force used so as to injure damage or destroy: extreme roughness of action... or explosively powerful force or energy***". In the instant case, the prosecution relied on Masitula's evidence to prove this aspect of its case. Masitula testified that the attacker who took her money gained entry to her house by kicking the door. The attacker immediately got hold of Masitula and took her money, which was, at the time, tied on a piece of cloth that was on Masitula's body.

The accused denied the above story.

Masitula's evidence referred to above was not shaken in cross-examination. Therefore, Court thinks that it represents the truth. That evidence shows that the attacker used physical force to damage Masitula's door, and he acted with extreme roughness during the whole process of stealing her money. In the circumstances, Court is satisfied that the prosecution proved, beyond reasonable doubt, that the attacker used violence against Masitula during the theft.

With regard to the third ingredient, that is to say, that the attacker used or threatened to use a deadly weapon against the victim at or immediately before or immediately after the time of the said robbery, section 273 (2) of the Penal Code Act defines a deadly weapon as

“a deadly weapon” includes any instrument made or adapted for shooting, stabbing, or cutting and any instrument which, when used for offensive purposes is likely to cause death.”

In this case, the prosecution relied mainly on Masitula's evidence to prove this aspect of its case, Masitula testified that the attacker, who had a panga, used it to cut a piece of cloth that she on her body and took the money that was kept in it. Thereafter, the attacker told Masitula that if she did not give him more money he would cut her.

The accused denied that story.

Court thinks that Masitula's evidence referred to above was not shaken in cross-examination. Therefore, that evidence represents the truth. Indeed, that evidence shows that the attacker used a panga to get access to Masitula's money and to capable of causing death if used offensively against a person. In the circumstances, Court is satisfied that the prosecution proved, beyond reasonable doubt, that the attacker used or threatened to use a deadly weapon against Masitula's Kyagaza at the time in question.

With regard to the fourth ingredient, that is to say, that the accused is the person that committed the offence in question Court has this to say. In her testimony Masitula maintained that she did not identify her assailant. Therefore the prosecution, solely, relied on Sesazi's evidence to prove this aspect of its case. Sesazi testified that it was the accused that committed the offence in question. He insisted that he saw him during the attack and that he was able to recognize him. Sesazi explained that the accused carried torch that he flashed into his eyes as he hid 7 metres away from him outside the house.

The accused denied the above story.

Court is of the opinion that Sesazi was a truthful witness. However, because difficult conditions obtained at the time of the attack, more is required of him than mere truthfulness. Court must be satisfied that Sesazi's evidence of identification was free from the possibility of error before acting on it. **(See Roria v Republic (1967) E.A. 583 and Nabulere v Uganda (1979) HCB 77.)**

After carefully considering all the prevailing circumstances at the time of the attack Court remains with some doubt as to whether Sesazi's evidence of identification was free from the possibility of error. The attack took place at night. Sesazi admitted that apart from the fleeting moment when activities, which were connected with the incident, took place in darkness. In addition, Sesazi did not know the name of the attacker; and it is not clear whether he had seen the

attacker before. For in some parts of his evidence he gave the impression that he had seen the attacker before, but in other parts he gave a different impression.

All in all, with the above type of evidence Court cannot be positive that Sesazi correctively identified the accused as Masitula's attacker. In the circumstances, Court has no choice but to find that the prosecution failed to prove, beyond reasonable doubt, that it was the accused that committed the offence in question. In agreement with the assessors Court finds that the accused is not guilty of the offence of aggravated robbery. He is therefore hereby acquitted of that offence.

That takes Court to the ingredients of rape.

With regard to the first ingredient, that is to say, that a male person has sexual intercourse with the victim during the night in question, Court will first of all define what, in law, amounts to sexual intercourse. According to Archibold on Criminal Pleading 30th Edition page 1124 at paragraph 2873, sexual intercourse is complete where a male person's organ penetrates a female person's organ. The slightest penetration is enough. Our Courts have time and again applied that principle with approval. (See Habyarimana Ronald v Uganda (CA) Criminal Appeal No. 35 of 1997.) In this case, the prosecution relied on Masitula's testimony to the effect that on 9th April 2001 as she slept at her home in Kakooge village an attacker gained entry to her house. After sometime the man threw her down and had sexual intercourse with her. Sesazi's testimony was similar in nature to Masitula's testimony. Kasozi who is a clinical officer attached to Nakasongola hospital examined Masitula on 9th April 2001. Among other things, he found that she had a tear in the opening of her private parts. In his view, that injury was 1 day old and was consistent with sexual intercourse.

The accused denied the above evidence.

Masitula's, Sesazi's, and Kasozi's evidence referred to above was not contradicted in cross-examination. Therefore, Court thinks it represents the truth. Indeed, that evidence shows that a male person's sexual organ penetrated Masitula's sexual organ thereby completing the act of sexual intercourse. In the circumstances, Court is satisfied that the prosecution succeeded in proving that a male person had sexual intercourse with Masitula during the night in question.

With regard to the second ingredient, that is to say, that the sexual intercourse was without Masitula's consent, the prosecution relied on Masitula's and Kasozi's testimony to prove that aspect of its case. Masitula testified that she did not consent to the sexual intercourse she was subjected to during the night of 9th April 2001. Kasozi who examined her soon afterwards found a tear in the opening of her private parts. He also found that Masitula had chest pains. In his view, those injuries were consistent with forced sexual intercourse.

The accused denied the above evidence.

Masitula's and Kasozi's evidence referred to above was not shaken or contradicted during cross-examination. Therefore, Court thinks that it represents the truth. Indeed, that evidence shows that the said sexual intercourse was without Masitula's consent. In the circumstances, Court is satisfied that the prosecution succeeded in proving, beyond reasonable doubt, that the sexual intercourse was without Masitula's consent.

With regard to the third ingredient, that is to say, that it was the accused who committed the offence in question Court has this to say. It should be remembered that the offence in the first count took place at the same place where the offence now under consideration took place. In fact, both offences were committed successively by the same person against Masitula. Therefore, Sesazi's evidence of identification in respect of the accused under the first count applies to the second count. Equally so, because Court concluded under the first count that Sesazi's evidence of identification was doubtful the same finding must be made in respect of the second count. In the circumstances, court is satisfied that the prosecution failed to prove, beyond reasonable doubt, that it was the accused that committed the offence in question. In agreement with the assessors Court hereby finds that the accused is not guilty of the offence of rape. He is therefore acquitted of that offence too.

All in all, the accused is hereby set free unless he is being held on some other lawful charges.

E.S. Lugayizi (J)

20/12/2001

Read before: At 3:41 p.m.

The accused

Mr. Ndamurani for the state

Mr. Arthur Katongole for the accused

Mr. Sewanyana c/clerk.

E.S. Lugayizi (J)

20/12/2001