

THE REPUBLIC OF UGANDA
IN THE HIGHCOURT OF UGANDA AT MASAKA
CRIMINAL SESSION CASE 005 OF 2002

UGANDA:.....PROSECUTION

VERSUS

- 1. YIGA HAMIDU**
- 2. No. 467 SPC BASHEIJA MOSES, ALIAS SOLOGOMA**
- 3. BUKENYA TWAIBU**
- 4. KASIITA SWAIBU:.....ACCUSED**

BEFORE: V.F. MUSOKE-KIBUUKA (JUDGE)

JUDGMENT:-

INTRODUCTION:

The first, third and fourth accused were indicted for rape contrary to sections 123 and 124 of the Penal Code Act (Revised Edition 2000). The particulars in count No.1 alleged that, Yiga Yasin, on 13th day of August, 2001, at Lwabaama village, in Ssembabule District, had unlawful sexual intercourse with Nasuuna Rehema, a girl without her consent. The particulars in count No.2 alleged that Kasozi Yasin, A3, Bukenya Twaibu, A4, on 13th August, 2001, at Lwabaana village in Ssembabule District, did aid Yiga Yasin, alias Yiga, to have carnal knowledge of Nassuna Rehema, a girl without her consent.

In count No. 3, A2 and A5 were indicted for abduction contrary to section 126 of the Penal Code Act, (2000 Revised Edition).

The particulars of the offence in count No.3, stated that SPC Basheija Moses, alias Sologoma, A2, and Kasiita Swaibu, A5, on 13th August, 2001, at Ssembabula township, in

Ssembabule District, with intent to cause Nassuna Rehema to be married by Yiga Hamidu, took her against her will.

In all Criminal trials in Uganda, the burden of proving the guilt of an accused person lies upon the prosecution. The defence bears no duty to prove anything, except where the law specifically requires. An accused person cannot be convicted upon the absence or the weakness of his or her defence. He or she can only be convicted upon the strength of the case, prosecuted before the court during the trial, through evidence led by the prosecution. The standard of proof is proof beyond reasonable doubt.

Uganda Vs. Oloya s/o Yovan Omeka [1977] HCB 4.

PROSECUTION CASE:

The prosecution led evidence from eight witnesses. The prosecution's case, as presented through the evidence of the eight witnesses is, briefly, set out below.

PW2, Nasuuna Rehema, the complainant in this case, lived with her father Musa Kateregga at Kawanda village, Lusugusulu sub –county, in Ssembabule District. Some time before 12th August, 2001, A1, Hamidu Yiga, visited the home of Musa Kateregga and there appears to have been a full agreement that PW2 and A1 would wed on Sunday, 12th August, 2001. Before that date, PW2 learnt that A1 had, earlier, lost his wife. There was suspicion that she could have died of AIDS. The wedding which had been fixed for 12th August, 2001, was cancelled. It was decided that the couple would wed only after they had tested on three separated occasions for HIV.

On Sunday, 12th August, 2001, before the testing for HIV had been duly carried out, A1 went to PW2's home to collect her. PW2 and members of her family refused. A1 took up the matter with the police at Ssembabule claiming that Musa Kateregga, the father of PW2, had refused to hand over PW2 to A1 as his wife. The police advised A1 to file a Civil Case against Musa Kateregga or have the matter solved through the Local Council system.

A1 could however, not accept defeat, he went ahead and hired A2 and A5 to apprehend PW2 and deliver her to his home at Kigando, Lwabaana, as his bride. A2 and A5 captured PW2 on her way from the police station to her home, and locked her up in a house belonging to one

Nabakooza, an elderly lady whom A5 promised to pay later for the service. PW2 was later collected from Nabakooza's house by A1, A2, and Musa Kateregga, her father and taken to A1's home at Kigando.

On reaching A1's home, PW2 refused to get out of the car but her father persuaded her to do so. She sat in the sitting room of A1's house and refused to enter the bedroom but A2 lifted her from the sitting room into the bedroom. In the bedroom, PW2 refused to get onto the bed despite A1's pleas. PW2 and A1 struggled for a very long time in the bedroom. A1 wanted to have sexual intercourse with PW2 but she refused. After failing to overcome PW2 on his own, A1 went out of the bedroom and called two young men to assist him overcome PW2. The two men held PW2 by the hands and legs while A1 had sexual intercourse with her. When A1 closed off his business with PW2, he locked her in the bedroom and went outside.

PW2 was rescued from the locked bedroom of A1, by a team of police officers led by PW8, I.P. Jimmy Katanyererra, who led a team of officers to the home of A1. That was after PW5, Mulwanyansanka Damasante, who witnessed the removal of PW2 from Nabakooza's house and to whom A1 had, earlier in the day, confided that he was going to hire people to capture PW2 and deliver her to his home had recorded a complaint at Ssembabule Police Station. PW8 found PW2 locked inside the bedroom which was locked from outside. She was lying on the floor crying and dejected. Her clothes were full of dust. There was blood on her clothes and petty coat. PW2 told PW8 that A1 had raped her, with the assistance of two male relatives.

PW4, Zalwango Robina, kept PW2, in her residence at Ssembabule Police Station. The following day PW4 took PW2 to Dr Muhumuza, PW1, who examined her against Police Form 3, exhibit P1. The doctor found PW2 aged 18 years. Her hymen was freshly ruptured. The rapture had happened less than 48 hours previously. There were injuries and blood in and around PW2's private parts. The injuries were consistent with force having been used against PW2 sexually.

A1 was arrested by PW7, Dt. Sgt. Balabyeki, who charged him with the offence of rape. The other accused persons were also subsequently arrested and charged.

DEFENCE CASE:

A3 was acquitted under the provisions of section 71 (1) of the Trial on Indictments Act, Cap. 23 (Now Section 73). That was because the evidence PW2 gave during the trial did not implicate A3 in committing the offence of aiding A1 to rape PW2. Her evidence, as it appears on the record, was that A1 was helped by A4 and A5. That evidence left A3, with no case to answer.

In his evidence A1 agreed that on 13th August, 2001, he had sexual intercourse with PW2, Nasuuna Rehema. He stated that he did so as her husband because the two were husband and wife.

A1 testified on 5th July, 2001 he paid dowry of shs.100, 000/= to PW2's father and that a wedding between him and PW2 had taken place on 12th August, 2001. PW2, was delivered to A1's home accompanied by her father after Ahmed Muleega, a Mwalimu, had performed the Islamic marriage rites for them. A1 denied that he had struggled with PW2 for sexual intercourse. Instead, he stated that PW2, willingly consented to the sexual act between A1 and herself.

On his part, A2 stated that on 13th August, 2001, at about 10.00a.m., his boss, one Wahab, asked him to drive some people from Ssembabule town council to Kigando. Among them was A1 and Musa Katerega. He drove to Kigando and returned to Ssembabule with Musa Katerega. The following day, 14th August, 2001, he was arrested by police and charged with abduction. He stated that he saw PW2 for the first time in court. In cross-examination, he conceded that she was among the people he had taken to Kigando on 13th August, 2001.

A4 denied that he assisted A1 to rape PW2. He said that he could not assist A1 because he, A1, was his uncle. He denied that he was at the home of A1 on 13th August, 2001. He denied that had ever seen PW2 anywhere except in court during this trial. In cross-examination, he admitted that on 12th August 2001, he went to the home of A1 for the wedding. He did not see any bride so he went away to his home at about 10.00p.m. He never returned to A1's home on 13th August, 2001. He said that PW2 told court lies when she testified that he had assisted A1 to rape her.

A5, Kasiita Swaib, was a very evasive witness, in his defence. He testified that he knew nothing about what happened to Nassuna on 13th August, 2001. He did not know Nassuna or any of his co-accused as of that date. He first saw his co-accused while in police custody. He said that he lived at the home of his elder brother, one Swaib Matovu. On 13th August, 2001, he was very sick and could not leave the house. He also told this court that he learnt of the offence against him for the first time when the indictment was read to him by this court.

ANALYSIS:

The offence charged in courts one and two is rape contrary to sections 117 and 118, of the Penal Code Act, that offence has three essential ingredients:-

- a) Act of sexual intercourse.
- b) Lack of consent on the part of the girl or woman.
- c) Participation of the accused.

In respect of A1, he has conceded two of the three essential ingredients of the offence of rape. He admits that he had sexual intercourse with the complainant on 13th August, 2001. The evidence of PW2 and PW1, in my view, proves that essential ingredient beyond reasonable doubt. A1 also admits that he was the person who had sexual intercourse with the complainant. Whom he referred to as his wife. The evidence of PW2 is also to that effect. PW2 was a very reliable witness. She knew A1 very well. She could not have been mistaken. I, therefore, find that the first and third essential ingredients of the offence of rape have been proved beyond reasonable doubt against A2.

The second ingredient of lack of consent on the part of Nassuna was seriously contested by the accused and his counsel.

In his evidence, upon oath, A1 stated that the complainant willingly and gladly consented to what A1 called the consummation of their marriage. But the complainant stated that she never consented as she was not certain of the HIV status of A1. She testified that she fought off A1 for a long time until she defeated him. A1 then sought assistance of two persons who held the complainant by the hands and legs while A1 raped her. In my considered view, the evidence of PW1, who observed, in exhibit P1, that he found evidence of forced sexual

intercourse, that of PW4, Dt. Zalwango Robinah and that of PW8, I.P. Jimmy Katanyerera, who saw the complainant covered with dirt and blood and who found the complainant lying on the floor of A1's bedroom crying and dejected, suffices to prove, beyond reasonable doubt that the complainant never consented to the act of sexual intercourse with A1. See Kayondo Robert Vs. Uganda, Court of Appeal Criminal Appeal No. 18/96 (unreported) where their Lordships observed.

“Among the corroborating circumstances almost generally present in cases of rape, are the signs and marks of struggle upon the complainant which strengthens her evidence of lack of consent”

Mr Mulindwa, learned counsel for the defence, submitted at length on this particular essential ingredient of the offence of rape. He relied upon Section 9 of the Penal Code Act, covering the doctrine of honest belief.

The doctrine is embodied in the maximum, “actus non facit reum, nisi mens sit rea”. Mr. Mulindwa submitted that when A1 had sexual intercourse with the complainant he honestly believed that she was his wife since A1 had paid bride price to the complainant's parents and a customary marriage had thereby been sealed. He cited the English authorities of R Vs Tolsom [1889]23 Q.B.D. 168 and D.P.P Vs Morgan [1976] Ac 182 (House of Lords) which discussed the doctrine of mistake of fact or honest belief. The general rule enacted in section 9 (1) of the Penal Code Act is that a belief in the existence of the circumstances which, if true, would make the act or omission in respect of which the defendant is accused an innocent act or omission, will negative guilt.

However, Mr Mulindwa also pointed out the provisions of Section 9 (2) of the Penal Code Act. That provision of the law reads:

“(2) The operation of this section may be excluded by the express or implied provisions of the law relating to the subject”.

Mr Mulindwa submitted that a husband, under the Ugandan laws cannot rape his own wife. He did not cite any express laws to that effect. He prayed this court to find A1 not guilty of the offence of rape.

There are two main reasons why this court cannot agree with learned counsel, Mr. Mulindwa in relation to the main defence he presented in respect of A1.

The first reason is factual or evidential. This court is not satisfied that there was any dowry paid by A1 to the parents of the complainant. The evidence on record reveals that it is only A1 who gave evidence that he gave shs. 100,000/= to the complainant's father and another 100,000/= to her mother. The father of the complainant was not called to testify whether any dowry in respect of his daughter was fixed and paid or delivered to him. It is a matter of public knowledge today that, in Buganda, generally a large number of parents no longer fix or demand dowry in respect of their daughters. In addition, the evidence shows that the marriage which was intended to take place between the complainant and A1 was one in accordance with the Islamic faith. It is clear that no such marriage ever took place. A1 clearly told a lot of lies in his statement upon oath. He is not a credible witness, in my humble view.

In the examination-in-chief he stated that he had met the complainant, for the first time in Ssembabule town on 1st July, 2001. In cross-examination he agreed that it was Musa Katerega who introduced him to the complainant. In his evidence in chief he denied that he ever lost a wife through death and that the only wife he married in 1984 was still alive and living with him as his wife. In cross-examination, he agreed that he had actually separated with his first wife who subsequently died. In the examination-in-chief A1 claimed that he and PW2 were married on 12th August, 2001, under Islamic law and that a Mwalimu by the name of Muleega had married them. He said that PW2 was dressed in bridal attire and delivered to his home. That was a clear lie. Such a witness can hardly be delivered to any reasonable degree.

In those circumstances, this court is not satisfied that any customary or any other form of marriage ever took place on 5th July, 2001 or on other subsequent date between A1 and the complainant. The evidence shows that A1 went to visit the parents of the complainant on 5th July, 2001, only with his brother.

The very conduct A1 on 13th August, 2001, shows that he did not genuinely believe that the complainant was his customarily married wife. He hired services of A2 and A5 to apprehend her. The evidence of PW5 is quite clear about that. PW5 was credible witness, in my view. A1 also got the complainant's father to accompany her to Ai's home. As soon as the complainant was

delivered to A1's home, which was late morning or early afternoon, the first and only thing A1 could think of was to immediately have sexual intercourse with her. He could not wait for the widely coveted magical "bridal night" which any man and woman getting a wife or husband normally anxiously looks forward to.

No sane person who regards any woman as his wife would wish to have her exposed to such shame as A1 put the complainant in this case to by inviting two men to hold her while he was having sexual intercourse with her. No husband, worth the name, would leave his bride lying in dirt on the floor of his bedroom crying and dejected, on the first day of their marriage which normally marks the peak of their love. No husband would lock up his loving bride in his bedroom like a prisoner of war on their first day of their marriage.

That strange conduct, on the part of A1, renders it clear to me that A1 did not believe, deep in his heart, that the complainant was his bride. For after treating her in that savagery manner, he could never hope to have any love from her. His having sex with her at such a time of the day in such a fashion, was a mere release of vengeance upon her having refused to get married to him. He did not care what would follow.

The second reason why this court cannot uphold the submissions of learned counsel, Mr. Mulindwa, is constitutional.

In my humble view, even if it was true that A1 and the complainant had been customarily or otherwise truly married and were, therefore husband and wife, or even if it was true that A1 honestly believed that the complainant was his customarily wedded wife, still the facts and circumstances of this case would render A1 guilty of rape.

Section 117 of the Penal Code Act (now section 123 of the Penal Code Act) does not make any exception to a married person. It is a common law presumption that a man cannot rape his wife because consent is always presumed on the part of the wife. Some jurisdictions such many states in the USA have expressly constituted the offence of marital rape to expressly negative the antiquated presumption of consent during the subsistence of marriage.

It clearly appears to me that the existence of a valid marriage between an accused and complainant or an honest belief that a valid marriage between the two does/can exist in Uganda,

no longer constitute a good defence against a charge of rape after the promulgation of the Constitution of the Republic of Uganda, 1995. Article 31 of the Constitution provides, in its clauses (1) and (3) as below:

“31 (1) men and women of the age of eighteen years and above, have the right to marry and to found a family and are entitled to equal rightd in marriage, during marriage and at its dissolution.

.....

.....

(3) Marriage shall be entered with the free consent of the man and woman intending to marry”

Apart from Article 31 (1) and (3), there is also Article 33 (1) and (6), of the Constitution. Those provisions read:

“33 (1) Women shall be accorded full and equal dignity of the person with men.

.....

.....

(6) Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution”

One of the fundamental pecurialities of the Constitution of the Republic of Uganda, 1995, is that the rights and freedom entrenched in it, under chapter four are not limited to governmental activities as is the case in some other countries. Those rights equally apply or are enforceable against both governmental and individual activities as Article 20 (2) of the Constitution provides.

It therefore appears to me that in light of the existence of all those provisions of the Constitution which I have mentioned above, Article 273 (1) of the Constitution has an amending effect on section 9 (1) of the Penal Code Act. In other words, article 273 (1) of the Constitution expressly excluded the operation of the provision of section 9 (1) to the subject matter of this case because its operation would certainly be inconsistent with the Constitution Article 273 (1) provides:

“273 (1) subject to the operation of this Article, the operation of the existing law after the coming into force of this Constitution shall not be effected by the coming into force of this Constitution but the existing law shall be constituted with such modifications, adaptations, qualifications and expectations as may be necessary to bring it into conformity with this Constitution”.

The presumption of consent, even where a man and woman are validly married, in my humble view, appear to be wiped out by the provisions of the Constitution which I have. Husband and wife enjoy equal rights in marriage. They enjoy equal human dignity. No activity on the party of any of the two which is affront to those rights in relation to the other, can be sustained by a court of law; For the existing law, whether written or must, by virtue of section 273 (1) of the Constitution, be interpreted to conform with the provisions of the Constitution.

The complainant in this case was subjected to the highest level of human indignity. A1 struggled with her for a long time wishing to have forced sexual intercourse with her. She put up a brave fight. A1 was clearly defeated. He then went outside the room and called two men who came into the room. One of the two men held the hands of the complainant while the other held her legs. They removed her knickers and A1 set upon her to have sexual intercourse against her will and in the full view of those two men. After he satisfied his beastly lust, the three left the complainant lying on the floor with her clothes covered with blood and dirt. They locked the room from outside. She remained there crying and dejected. It was a unique and extraordinary show of sexual savagery. The complainant was treated like a mere sexual instrumentality. Her right to human dignity was trampled upon significantly.

In those circumstances, A1 cannot present the fact of the complainant being his wife or his honest belief in the truthfulness of that fact, as a defence. That defence is not sustainable. It is ruled out by the Constitution which comes into play to protect the rights and human dignity of the complainant and in fact amends section 9 (1) of the Penal Code to exclude its application to a case of this nature.

With regard to the offence in count No. 2. A3 and A4 charged jointly for aiding A1 to rape PW2. A3 was acquitted under section 73 of the Trial on Indictments Act for the reason which I have already given in this judgment.

A4 denied the charge and put upon alibi that he was at the home of A1 on 13th August, 2001 but at his own home. He could find no explanation why PW2 pointed at him as one of the two men A1 called to assist him to hold her when A1 had sexual intercourse with her.

I have already stated that I found PW2 to be a truthful witness. She in my view, clearly identified A4 as one of the two men who held her while A1 raped her. The time was day time which permitted correct identification of the accused. There was therefore no possibility of mistaken identity.

A4 had no duty to prove his alibi. The prosecution had to destroy it by evidence placing the accused at the scene of crime. Ssebyala and Others Vs Uganda [1969] EA 204. The evidence of PW2 places the accused at the scene of crime. Once an accused is placed at the scene of crime then his or her claim that he was elsewhere must fail. Alfred Dumbo Vs Uganda SC CA N0. 28 of 1994 (reported in KARL (1995 Vol.1 57)).

For those reasons, I find that the prosecution has proved the charged in count No. 2, against A4 beyond any reasonable doubt. He is therefore, a principle offender within the meaning of section 19 of the Penal Code Act.

The offence of abduction contrary to section 126 (a) of the Penal Code act was against A2 and A5, in count No.3. There is sufficient evidence in the testimony of PW2, PW3 and PW5, to prove that PW5 abducted PW2 and detained her in the house of one old woman called Nabakooza, within Ssembabule town council. There is also sufficient evidence to show that A2 took PW2 away from the home of Nabakooza to the home of A1. That is proved by the evidence of PW2, PW5 and A1 himself.

However, it is not enough to lead evidence showing that the accused either took away the victim or detained the victim. The evidence must go further to prove the intention of the abduction or the taking away. The prosecution in the instant case failed to prove intention to be married which is an essential ingredient of the offence under section 126 (a) of the Penal Code Act. The evidence of PW5 is that A2 and A5 were hired by A1 to capture PW2. A5 captured her when she was left alone by her brother, PW3, Kayemba Ssalongo Muhamed, with whom they were walking home from Ssembabule Police Station. A5 then locked her up in Nabakooza's house promising to collect her later and pay Nabakooza her dues for the service. It is not clear whether

in doing that A5 knew the purpose for which PW2 was being captured or he himself had the intention of capturing PW2 of having her married to A1 or that A1 has sexual intercourse with her. There is a high possibility that A5's intention was purely monetary. His only interest may have been just to earn the 10, 000/= which A1 paid to him.

The same reasoning appears to me to apply to A2. The evidence on record is that A2 was a hired driver. He was also an SPC and when he took PW2 from Nabakooza's house, he was adorning an SPC's uniform. It is, therefore, not clear whether A2 was a mere driver whose purpose was to earn money or he had the intention of taking PW2 away so that she is married to A1 or that A1 has sexual intercourse with her. No witness knew what A1 told A2 and A5 when he was hiring them. There is no evidence of what transpired at Nabakooza's house. Nabakooza was never called as a witness for the prosecution.

For those reasons, I find that the prosecution has not proved beyond any reasonable doubt that either A2 or A5 abducted or took away PW2 to A1 with intention of having her married to him or for him to have sexual intercourse with her. Intention is an essential ingredient of the offence under Section 126 (a) of the Penal Code Act.

The single remaining gentleman assessor, Mr Muluya Haruna, advised me to convict A1, A2, and A5 as charged and acquit A4. I partly agree with his opinion.

The case was a complex one. In count No.2 the gentleman assessor did not take into account the centrality of intention for abduction as an essential ingredient of the offence.

In the circumstances, A2 and A5 are acquitted of the offence of abduction contrary to section 126 (a) of the Penal Code Act, Cap, 120. Both A1 and A4 are convicted of the offence of rape contrary to section 123 and 124 of the Penal Code Act.

V.F. MUSOKE-KIBUUKA

(JUDGE)

9/2/2004

