THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0074 OF 2004

UGANDA …….....

PROSECUTOR

VERSUS

1. BASAIJA MUZAMIL }

2. KYALIGONZA RICHARD } ::

ACCUSED

BEFORE:- THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO

JUDGMENT

Basaija Muzamil, hereinafter called A1, and Kyaligonza Richard, herein after called A2, and both of whom are together referred to herein as the accused, were jointly indicted for the offence of rape c/s 123 and 124 of the Penal Code Act. The particulars of the offence were that the accused, on the 23rd day of April 2003, at Kamengo village, Busoro - Sub County, in Kabarole District, had unlawful sexual intercourse with Nyakake Jane. It was to these particulars of the charge that the accused, each, pleaded not guilty; when the same was read out and explained to each of them in Court. A trial then ensued.

The offence of rape is provided for, in the Penal Code Act, under Chapter XIV – Offences Against Morality. Section 123 of the said Act states as follows:

*"**123. Definition of rape.***

Any person who has 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 threats or 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, commits the felony termed rape."

The offence of rape, therefore, has three ingredients; each of which the prosecution must prove, beyond reasonable doubt, to secure a conviction. These elements, as held in ***Katumba James vs. Uganda, S.C. Crim. Appeal No. 45 of 1999***, are:-

(i) Carnal knowledge (penetration of the vagina) of a woman of the age of 18 years, or more.

(ii) Lack of consent by the victim (woman) to the carnal knowledge (sexual intercourse).

(iii) The accused had the carnal knowledge of (sexual intercourse with) the said victim.

In ***Nakholi v. Republic [1967] E.A. 337***; which was a case of forcible sexual intercourse, the Court, citing the provision in the Kenya Penal Code on rape which is textually the same as that of Uganda, held at p. 338 (I) to p. 339 (A), that:

> *"The two essentials are therefore carnal knowledge of a woman or girl and lack of consent and both these essentials must be established by the prosecution and accepted by the court before a conviction for rape can be arrived at."*

Stating that the law in England was the same as that of Kenya on this matter, the Court, at p. 339 (D - E), quoted a passage from the decision of the English Court of Criminal Appeal in the case of ***R. v. Ronald Harling (1937), 26 Cr. App. R. 127,*** at p. 128 which runs as follows:

> *"In every case of rape it is necessary that the prosecution should prove that the girl or woman did not consent and that the crime was committed against her will."*

In an endeavour to discharge the burden of proof, which lay on it to prove the guilt of each of the accused as alleged, the prosecution called two witnesses: Jane Nyakake - PW1, the victim of the crime charged; and Agnes Gucwamaningi – PW2, the mother of PW1; and, as well, two documents were by consent of the parties, admitted in evidence.

After the close of the case on either side, and in the course of my looking up the law in preparation for the judgment, I realised that the particulars of the offence as set out in the

indictment was defective in a material particular; namely that it did not specify that the sexual intercourse complained of had in fact been so perpetrated against the complainant without her consent. This is an essential element in the offence of rape; and of which the accused are entitled to be informed in the charge, to enable them prepare their defence accordingly.

The genesis of this problem was that initially the accused had been charged with, and committed to the High Court for the offence of defilement. There seems to have arisen some doubt about what the actual age of the complainant was at the time the incident complained of took place. The medical evidence placed it as having been 18 years at the time. Her parents however asserted that she was then 16, and claimed they could prove it. This proof, it would appear, was not forthcoming; hence the prosecution proceeded on the strength of the medical findings.

Confronted with the fact of the defective indictment, and out of fear of, and in order to avoid the danger of the whole trial suffering a reversal or even rendered a nullity for having been conducted on an incurably defective indictment, I, on my own motion, invited the counsels on either side to address me on the matter; whereupon Ms Ann Kabajungu, State counsel who had taken over conduct of the case, sought an amendment of the indictment to make express inclusion of the element of lack of consent, by the complainant, to the sexual intercourse in issue.

Counsel pointed out that section 50(2) of the Trial on Indictments Act, clothes this Court with powers to make an order for the alteration of an indictment at any stage of the trial, so as to meet the ends of justice. She argued that the alteration sought would not occasion any injustice to the accused at all as, in the instant case, the accused are represented by counsel; and had been informed in the summary of evidence appended to the indictment, that the complainant had resisted the sexual intercourse. Furthermore, the trial had in deed proceeded with the knowledge on either side, that it was a case of rape, and nothing else.

Defence counsel conceded that this amendment sought would not occasion any miscarriage of justice. He however prayed that the prosecution be condemned to pay costs in accordance with the provision of section 51 (3) of the T.I.A., for their failure to bring a proper indictment, resulting in this embarrassment and inconvenience. Court pointed out to counsel that it would be difficult to apportion blame in the circumstance of this case, as the prosecution, the Court, and as well the defence had the duty to ensure that the indictment met the requirements of the law.

Provision on the form and substance an indictment ought to take is contained in the Trial on Indictment Act (Cap. 23, Laws of Uganda Revised Ed. 2000), herein after referred to as the T.I.A. Section 22, and section 25 of the said Act provide as follows:

"22. Contents of indictment.

Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. …

25. Rules for the framing of indictments.

The following provisions shall apply to all indictments and, notwithstanding any rule of law or practice, an indictment shall, subject to this Act, not be open to objection in respect of its form or contents if it is framed in accordance with this Act –

(a) a count of an indictment shall commence with a statement of the offence charged, called the statement of offence;

(b) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence, and it shall contain a reference to the section of the enactment creating the offence;

(c) after the statement of the offence, particulars of that offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary; but where any written law limits the particulars of an offence which are required to be given in an indictment, nothing in this paragraph shall require any more particulars to be given than those so required;

…

(n) subject to any other provisions of this section, it shall be sufficient to describe any place, time, thing, matter, act or omission whatsoever to which it is necessary to refer in any indictment in ordinary language in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to; …".

It is noteworthy that these provisions of the TIA are textually the same with those then contained in the Criminal Procedure Code Act (1964 Edn.), which preceded the TIA and was the law in effect when many of the authorities reviewed hereunder on the matter, were decided upon. Section 50 of the Trial on Indictments Act provides as follows:

"50. Orders for alteration of indictment.

(1) Every objection to an indictment for any formal defect on the face of the indictment shall be taken immediately after the indictment has been read over to the accused person and not later.

(2) Where before a trial upon indictment or at any stage of the trial it is made to appear to the High Court that the indictment is defective or otherwise requires amendment, the court may make such an order for the alteration of the indictment (by way of its amendment or by substitution or addition of a new count) as the court thinks necessary to meet the circumstances of the case, unless having regard to the merits of the case, the required alterations cannot be made without injustice; except that no alteration to an indictment shall be permitted by the court to charge the accused person with an offence which, in the opinion of the court, is not disclosed by the evidence set out in the summary of evidence prepared under section 168 of the Magistrates Courts Act."

Numerous authorities have dealt with situations similar to the one before me now; and they are by no means agreed on the course of action a trial Court, faced with such a situation, should take. In ***Terrah Mukindia v. Republic [1966] E.A. 425,*** an important ingredient of the offence of false pretences, namely: *'with intent to defraud'*, had not been specified in the particulars of the offence the appellant had been charged with. The Court, citing several authorities on the matter, held as follows:

> *"There can be no doubt that an intent to defraud is an essential ingredient of the offence of obtaining by false pretences, and that it must be alleged in the particulars of the offence in a count charging that offence, …The question is, whether the omission of these words is a fatal defect, or a curable irregularity. In* ***R. v. James (1871) 12 Cox C.C. 127, LUSH J****., held that such an omission was fatal to the prosecution and quashed the indictment. … As this Court observed in* ***Mattu Gichimu v. R. (1951) 18 EACA 311*** *at p. 316, there is*

remarkable absence of direct authority on the point. The judgment of the court goes on to say:

> *'If, in fact, the charge or information discloses no offence in law, and cannot be or is not sufficiently amended, then either it will be quashed by the court of first instance and an order of acquittal entered or, if a conviction has been recorded, an appellate Court may quash it and substitute an Order of acquittal.'*

In our opinion the charges … disclosed no offence in law, a defect which could have been, but was not, corrected by amendment. In the absence of amendment, we consider the defect to be fatal to the conviction and not one which is curable… "

In **Chimilo s/o Baukunda v. Rex (1951)18 E.A.C.A. 160**, the charge was murder, but the particulars thereof had however alleged that the appellant had 'unlawfully killed' instead of 'murdered' his sister-in-law. Court, pointing out that section 135 of the Criminal Procedure Code requires that the particulars of the charge must be as may be necessary for giving reasonable information as to the nature of the offence charged, held at p. 161 to 162 that:

"…there can be no doubt, in our opinion, that the failure to allege, in the information in the present case, that the appellant murdered his sister-in-law was in breach of section 135 and renders the information defective. The question therefore arises as to whether this defect is fatal to the validity of the trial, and ought to lead to the quashing of the conviction, or at least to an order for a new trial. …

We do not consider that the error in the information has in fact occasioned a failure of justice in this case, … we do not, therefore propose to quash the appellant's conviction, or order a new trial, on account of that error. …the Court of Criminal appeal has said:

> *'We think it desirable to point out that the responsibility for the correctness of an indictment lies in every case upon counsel for the prosecution, and not upon the Court. No counsel should open a criminal case without having satisfied himself upon that point.' (**Smith and Others, 34 Cr. App. R. 168 at page 183.**)*

The responsibility of counsel for the prosecution is even greater when he himself has drafted and signed the information."

In ***Chila & Anor vs. Republic [1967] E.A. 722,*** the particulars of the charge was that the accused had carnal knowledge of the complainant; but had not specified that the carnal knowledge had been had without the consent of the complainant, the Court on appeal stated at p. 722 [I] to p. 723 [A] that:

"As the information stands, the particulars of the offence are defective in that they disclose no offence in law. On a parity of reasoning with the decision in ***Terrah Mukindia v. Republic [1966] E.A. 425,*** *had we not decided to allow the appeals on another ground, we would have had to consider whether the defect in the charge in the present case would not like wise have been fatal to the convictions."*

In ***Uganda v. Mushraf Akhtar, [1964] E.A. 89****,* the trial magistrate had realised the defect in the charge after the close of the evidence, and when considering the law prior to writing his judgment; but he declined to exercise his discretion to amend the charge. The appellate Court, Slade J. declining to fault the trial judge on his decision not to amend, held that an amendment to the charge as contemplated would not have been borne out by the issues at the trial; and in consequence the respondent would not have had the opportunity to make his defence to any such charge. He said at p. 94 (D - E) as follows:

"…any such amendment would have entailed a major reconstruction of the charge: it would have been necessary so to amend the charge as to formulate two counts of theft of different sums of money, stolen on different dates, the property of an organisation different from the person originally specified. … I think it can hardly be suggested that the learned magistrate erred in neglecting to exercise his discretionary power to amend, when amendment entails reconstructions of such magnitude, particularly when that discretionary power may be exercised only in cases where it is clear that no injustice to an accused person will result."

In ***R. v. Nyamitare s/o Kachumita [1957] E.A. 281***, the particulars in the charge of murder had not included the word 'murdered…' The trial Court – McKISACK, C.J. declining to quash, but instead to allow the amendment of the indictment, said at p. 281 (F-G) as follows:

"The test is whether the amendment can be made 'without injustice,' having regard to the merits of the case. The authorities cited in ***ARCHBOLD*** *(33rd Edn.), at p. 54, show that an amendment may not properly be made where it alters the substance of the offence charged. But in the present case, having regard to the statement of offence, I do not think that the defence can have been left in any doubt that the act charged against the accused on the specified date, at the specified place, and in respect of the specified person, was murder and nothing else. I do not consider that there has been injustice to the accused, extraordinary though this omission has been."*

In ***Sosipeter Opale s/o Idiawo [1962] E.A. 661***, the appellant had been convicted on a charge of arson which had not specified that the arson had been committed unlawfully and wilfully. The High Court, BENNETT, J., held that the facts as alleged in the particulars of the offence did not constitute the offence of arson; but nevertheless dismissed the appeal on the ground that no prejudice or embarrassment had been occasioned to the appellant by that omission. He cited at p. 662, the English case of ***R. v. McVitie [1960] 2 All E.R. 498; 44 Cr. App. R. 201,*** and quoted a passage in which the Court had said:

"The indictment in the present case conformed to these provisions, save only in one respect. If the words in s. 3, 'necessary for giving reasonable information,' import an objective test (which we think they do) then the word 'knowingly' should have been included in the particulars. In our opinion, this did not make the indictment a bad indictment, but simply a defective or imperfect one. A bad indictment would be one disclosing no offence known to the law, for example, where it was laid under a statute which had been repealed and not re-enacted.

In the present case the indictment described the offence with complete accuracy in the 'Statement of Offence'. Only the particulars, which merely elaborate the 'Statement of Offence', were incomplete. The question of applying the proviso is to be considered, therefore, not upon the basis that the indictment disclosed no known offence, but that it described a known offence with incomplete particulars."

In ***Mwasya v. Republic [1967] E.A. 345***, the statement of offence and the particulars thereof, had not properly been set out. It had in fact referred to a paragraph of the section; and yet the facts

had constituted an offence under a different paragraph of that section, and under which the conviction was based; though the charge was not a good one under that paragraph. The Court held that although no objection had been raised to the charge, and since the appellant had not had the services of learned counsel, a failure of justice had occurred and the appeal was allowed. It said at p. 347 (E - G), that:

> *"A defective charge, however, does not necessarily render a conviction unsustainable. The defect is not fatal to the conviction if the case falls within the provisions of s. 382 of the Criminal Procedure Code which reads:*
>
> > *'Subject to the provisions hereinbefore contained no findings, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint summons, warrant, charge proclamation, order, judgment or other proceedings before or during the trial or in any enquiry or other proceedings under this Code, unless such error, omission (or) irregularity has in fact occasioned a failure of justice:*
> >
> > *Provided that in determining whether any error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage of the proceedings'."*

In the case of ***Yozefu and Another v. Uganda [1969] E.A. 236***, where the charge had not included the salient elements of the crime that the animal items found in the possession of the accused had been obtained in contravention of the relevant Act, the Court held at p. 238 (F - H) that:

> *"It is fundamental that every charge should allege all the essential constituents of an offence. In the present case…, we think that the allegation that the pieces of skin came from an animal killed in contravention of the Act was an essential ingredient, and that its omission makes the charge defective.*
>
> *Mr Khan submitted that even if the charge were defective, no injustice had resulted, as it was clear the appellants had known and understood what was the allegation against them. Here, again we cannot agree. It is apparent from the record that the appellants' defence,*

had they been properly charged and tried, would have been that the trophies in question had been bought lawfully in Kenya. If they could have proved that, they would have had a good defence to a charge under s. 14. The defect was, therefore, most material."

In ***Seidi v. Republic [1969] E.A. 280***, the particulars of the offence had not been set out clearly, and had joined in one count the charge of causing death to three separate persons, and the injuries of twelve others; hence the charge was defective. The Court, SEATON. J., held at p. 283 (H - I), that:

"It is a matter for regret that the charge was so indifferently worded. For, while the particulars in the charge on the first count only refers to the reckless and dangerous manner of the appellant's driving, … equally important facts relied on as constituting the reliability of the appellant were the condition of the vehicle and the speed at which it was driven – and these were omitted from the charge.

However, it does appear from the record of the proceedings that the appellant was fully aware of the substance of the case he had to meet and the defects in the charge have not in fact occasioned a failure of justice. The defects are therefore curable under s. 346 of the Criminal Procedure Code."

In ***Meghji Nathoo v. Rex (1946) 13 E.A.C.A. 137***, the trial Court had omitted to explain to the accused the nature of the charge and his right to give evidence. It was argued for him in appeal that this omission which was in non compliance with a mandatory provision of the Criminal Procedure Code was an illegality which was incurable, on the authority of ***Subrahmania Ayyar v. King Emperor (1926) 25 ALJ 117***, which was an appeal from a trial the charge of which had contained a multitude of no less than forty one counts.

The appeal Court, held that this would confuse the jury, and embarrass both the Judge and the accused; and as quoted at p. 137 of the ***Meghji Nathoo*** case, it said:

"It is likely to cause confusion and to interfere with the definite proof of a distinct offence, which it is the object of all criminal procedure to obtain. The policy of such a provision is manifest and the necessity of a written accusation specifying a definite criminal offence is of the essence of criminal procedure. Their Lordships think that the course pursued and

which was plainly illegal cannot be amended by arranging afterwards what might or might not have been properly submitted to the jury."

The Court in the ***Meghji Nathoo*** case distinguished the ***Subrahmania Ayyar*** case above, and stated at p. 138 that:

"In the present case the position is entirely different. The object of section 209 (1) is to ensure that the accused shall fully understand the nature of the charge which he has to answer, and that it is open to him to give evidence, etc. the appellant was represented by an experienced advocate who opened his final address by stating that it was a question of fact whether an invoice was given or not. That shows that the nature of the charge was fully appreciated. Since also the appellant gave evidence it is clear that the omission of the Magistrate to explain to him his right to give evidence did not occasion any prejudice or embarrassment to the appellant in his defence."

The ***Subrahmania Ayyar*** case had in fact been distinguished by the decision of the Privy Council in the case of ***Abdul Rahman v. King Emperor (1926) 25 A.L.J. 117*** at p. 125. Following from this, the Allahabad full bench, in ***Kappor Chand v. Suraj Prasad 55 All. 301***, had inferred that the real ratio decidendi in the ***Subrahmania Ayyar*** case was that the defect in the procedure therein could not be cured, because the Indian Criminal Procedure Code had contained a provision that an irregularity which had worked injustice to the accused, could not be cured.

The full bench of the Court in the ***Kappor Chand*** case, in a passage at p. 312; and quoted with approval in the ***Meghji Nathoo*** case at p. 138, had said:

"We do not think that we should introduce a distinction between 'illegality' and 'irregularity'. The sole criterion given by section 537 is whether the accused person has been prejudiced or not. The object of procedure is to enable the Court to do justice, but if in spite of even a total disregard of the rules of procedure, justice has been done, there would exist no necessity for setting aside the final order, which is just and correct, simply because the procedure adopted was wrong."

It is important to point out here that in the instant case, at the beginning of the trial, I read out to each of the accused, the charge of rape contained in the statement of offence, and the particulars

thereof as contained in the indictment. I explained to both of them that the offence of rape for which they were indicted meant that they had had sexual intercourse with the complainant without her consent. The accused had then, each, asserted they had understood the charge; and had pleaded not guilty.

Indeed, the trial had consequently proceeded on the premise that this was a trial on an allegation of rape. The evidence adduced by the prosecution and the thrust of the defence case as conducted by counsel for the accused, both centred on and dwelt, respectively with the issue of proof and denial of rape. At one point, in cross examining PW1 the complainant, defence counsel had directly put it to her that she had in fact consented; a matter which the complainant vehemently refuted. In their final submissions, counsels on either side addressed the ingredients that comprise the crime of rape as the exclusive issues at the trial.

Furthermore, the summary of evidence had clearly brought out the fact of the complainant having resisted, in vain, the sexual assault complained of. The substance of the offence charged, therefore, afforded both accused sufficient information of the case against them; and to my mind, in the circumstances, no miscarriage of justice could have been occasioned by the omission from the particulars of the indictment, that the sexual intercourse complained of had been perpetrated without the complainant's consent.

Nonetheless, I considered it both wise and safer to order an amendment so as to avoid any unpleasant eventuality. The indictment was then accordingly amended as desired; and thereafter, fresh pleas were taken by each of the accused. The Court explained to the accused their right, in accordance with section 51 of the Trial on Indictments Act, to seek a recall of any prosecution witness, or call witnesses of their own, in view of the amendment and fresh plea. The accused however saw no need for, and therefore chose not to exercise that right; upon which the trial then concluded.

To prove the occurrence of sexual intercourse complained of, the prosecution adduced the evidence of the victim herself. She gave a vivid account of what both accused did to her that fateful day given in the indictment. She narrated how around 1.00 p.m. - at high noon as it were - the accused had pounced on her from her grand parent's house, where she had gone on an errand to fetch water for her uncle, threw her down on her uncle's bed, and without her consent, and in

turn, subjected her to forcible sexual intercourse. In both cases, she felt pain, was injured, and her knickers got spoilt with blood.

The law is that in matters of sexual offences, there is need to look out for corroboration of the evidence of the complainant. In the ***Chila*** case (supra), where the trial judge had neither warned the assessors nor himself of the need to look for corroboration of the complainant's evidence in a material particular implicating the accused, but had convicted the appellants because he believed the complainant to be a truthful witness, the Court held at 723 [B - C] that:

> *"The law of East Africa on corroboration in sexual cases is as follows: The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice."*

In ***Kibale Isoma vs Uganda, S.C. Crim. Appeal No. 21 of 1998, [1999]1 E.A. 148*** the Supreme Court cited the above quoted passage from the judgment in the ***Chila*** case (supra) with approval, and held that this decision is: *'…still good law in Uganda.'*

The medical report on the complainant, adduced in evidence by consent, showed that the examination was carried out one month after the event complained of. The medical officer established that the victim was 18 years of age, her hymen had been ruptured about four months earlier, and there was slight penetration. He did not find any signs of physical injuries. He remarked that the victim was strong and sturdy. I am in deed concerned and have to point out that this report is most unsatisfactory.

This report is a clear example of how not to carry out a medical examination. It is evident from the report that this medical examination was carried out in a most perfunctory manner; and does not serve or advance the cause of justice. Where the standard questionnaire in the police form asked how long ago the victim's hymen had been ruptured, the medical officer answered: *'Long Time – 4 months'*. In response to the question on how old the injuries found on the victim were, the good medical officer entered: *'18 years'*.

When victims are forwarded by police to the medical officers for verification, it is so done for a particular purpose; and is of essence in the administration of justice. The medical officers, as is their professional obligation to do, need to devote adequate attention to the process and thereby help advance the cause of justice. As it is, the medical evidence on record is of little weight and evidential value. However the Court has clarified on the place of medical evidence on matters of corroboration in such a situation when it held in the case of ***Abbas Kimuli vs Uganda C.A. Crim. Appeal No. 210 of 2002*** (unreported), as follows:-

> *"We further observe that in cases of this nature, doctor's report is desirable but it is not mandatory. Corroboration is also desirable but not mandatory (**Bassita Hussain** case followed)".*

I did warn the lady and gentleman assessors, in keeping with the authority of ***Kibale Isoma vs Uganda, S.C. Crim. Appeal No. 21 of 1998 [1999]1 E.A. 148****;* a matter to which I am myself now alive, of the danger in acting on the uncorroborated evidence of the complainant PW1; and of the need, as a matter of prudent practice which has acquired the force of law, to look for evidence which would corroborate the testimony of the complainant; but that, nevertheless, they could still advise this Court to found a conviction solely on the evidence of PW1, even when it is not corroborated, if they are satisfied that she has been a witness of truth.

PW2 testified that her daughter PW1 came back home around 2.00 p.m. on the day of the alleged rape, in a distressed state, and crying; and reported to her that the accused had raped her in turn. She immediately checked the victim and established that she was injured and bleeding in her private parts, the right side of her knickers had been cut and the knickers was stained. It has been held in ***Sebuliba Haruna vs Uganda – C.A. Crim. Appeal No. 54 of 2002***, that findings by a mature woman of evidence of sexual intercourse, upon examination of the private parts of the victim, is as good as medical evidence.

In a passage from ***R. vs. Alan Redpath (1962) 46 Crim. Appeal 39***, and reproduced by the Court of Appeal for Eastern Africa in the rape case of ***Kibazo vs. Uganda - C.A. Crim. Appeal No. 189 of 1964; [1965] E. A. 507***, the Court had said:

> *"In sexual offences, the distressed condition of the complainant is capable of amounting to corroboration of the complainant's evidence."*

It is the law, as stated in ***Adamu Mubiru - vs – Uganda, C.A. Crim. Appeal No. 47 of 97*** (unreported), and ***John Banyenzaki vs. Uganda, S.C. Crim. Appeal No. 18 of 1996***, that however slight the penetration may be, it will suffice to sustain a conviction for the offence of defilement. In ***Hussein Bassita vs. Uganda; S.C. Crim Appeal No. 35 of 1995***, the Supreme Court of Uganda stated as under:-

> *"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case such evidence must be such that is sufficient to prove the case beyond reasonable doubt."*

This authority with regard to the law on penetration is as good for rape as it is for defilement; both of which are merely variants of the same form of sexual offence. The evidence adduced by the victim did sufficiently establish, even without the need for corroboration, that sexual intercourse had been perpetrated on her that fateful day. That evidence has, however, also been satisfactorily corroborated by that of the mother. I am satisfied and in agreement with the assessors that the prosecution has duly established that ingredient of the offence.

On the ingredient of lack of consent it is the evidence of the victim PW1 to go by. In her evidence she stated that she had gone to the place where the incident took place, to collect drinking water for her uncle who was in a neighbouring home. She testified that it was A2 who first grabbed her and threw her on her uncle's bed and had sexual intercourse with her, while A1 was holding her; and that when A2 was done, they reversed roles with A1. In her own words during examination in chief she said:

> *"Kyaligonza caught me and threw me on the bed and started having sex with me, meanwhile Muzamil was holding me. I did not consent to the sexual intercourse. Kyaligonza caught me by force. He took 30 minutes having sex with me. All this time Muzamil was holding me. It was a fight. After this Kyaligonza left me and Muzamil started*

having sex with me; meanwhile Kyaligonza was holding me. … I tried to run away from them but I could not because they were men and they were two."

In cross examination she firmly repeated her case and said:

"It was Kyaligonza who grabbed me. He grabbed me by holding my hands. I tried to make an alarm but Muzamil covered my mouth. They took me to my uncle's bed. There were six beds in the house. I tried to resist, I fought but they overpowered me. I tried to break away but they overpowered me."

Further in cross examination, when it was put to her that she had consented to the sexual intercourse, she vehemently denied this saying:

"I am telling the truth. I never agreed to have sex with even one of them."

On the authority of ***Uganda vs. Opio Richard [1986] HCB 19***, the maltreatment the complainant herein was subjected to by both accused: her being grabbed and thrown on the bed, her knickers having been torn, needless to say to gain access, her being held down as each of the accused ravished her in turn, and all this against her futile resistance, manifested non - consensual sexual encounter.

As to the identity of the person who perpetrated the sexual intercourse complained of, the only direct evidence on the matter is that of PW1 - the victim. PW1 came out clearly in her testimony, which was corroborated by that of PW2 – her mother, that she knew the accused. The accused were her village mates; and that A1 used to work for her grandfather; while A2, a nephew to PW1's grandmother, used to stay at the latter's home. The sexual offence she complained of took place at around 1.00 p.m. which was broad daylight.

PW2 corroborated this by stating that both A1 and A2 used to stay at her father in law's home; where A1 was an employee, and A2 was a relative of her mother in law (grandmother of PW1). Further to this, the accused themselves confirmed in their testimonies, that in deed they, PW1 and PW2, know one another very well. A1 testified that his home and that of the victim neighbour one another. A2 corroborated what PW1 and PW2 had stated, that in deed he had grown up with the grand parents of the victim – PW1, (the parents in law of PW2).

In treating evidence of identification such as arises here, on authority of ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997***, the inculpatory evidence of identification adduced by the victim of the criminal act is the best evidence**.** The Supreme Court of Uganda decided in ***Isaya Bikumu vs. Uganda; S.C. Crim. Appeal No. 24 of 1989,*** and **Remigious Kiwanuka vs. Uganda Crim Appeal no. 41 of 1995,** that where the offence complained of is committed during broad day light, by some one fully known to the witness, the conditions for proper identification is favourable.

Since proof of the last ingredient herein rests on evidence of identification, and by a single witness, this Court must approach that evidence with caution in accordance with the warning in ***Roria vs. Republic [1967] E.A. 583,*** in a passage at p. **584**, and reproduced by the Supreme Court of Uganda in ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997***; and states as follows:-

> *"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner L.C. said recently in the House of Lords in the course of a debate…' There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of the ten – if they are as many as ten – it is on a question of identity' … That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification."*

In ***Nabulere vs. Uganda – Crim. Appeal No. 9 of 1978; [1979] H.C.B. 77***; a passage from which was reproduced with approval by the Supreme Court in the **Bogere** case (supra), the Court had stressed that the need to exercise care, applies to both situations of single or multiple identification witnesses. It said:

> *"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the Judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason*

for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number of such witnesses can all be mistaken.

The Judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger…..

When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution."

The Supreme Court of Uganda has re-affirmed this position of the law in its decision in ***George William Kalyesubula vs. Uganda, S.C. Crim. Appeal No. 16 of 1997***, where it emphasised that there is need to test with the greatest care the evidence of an identifying witness especially when the conditions favouring identification are difficult. The Court went on to say that:

"In such circumstances what is needed is other evidence pointing to guilt from which it can reasonably be concluded that the evidence of identification can safely be accepted as free from the possibility of error."

In ***Moses Kasana vs. Uganda – C.A. Crim. Appeal No. 12 of 1981; [1992-93] H.C.B. 47***; and in a passage reproduced in the ***Bogere*** case (supra), the Court held, at p. 48, that:-

"Where the conditions favouring correct identifications are difficult, there is need to look for other evidence, whether direct or circumstantial, which goes to support the correctness of identification and to make the trial court sure that there is no mistaken identification. Other evidence may consist of a prior threat to the deceased, naming of the assailant to those who answered the alarm, and of fabricated alibi."

In the ***Bogere*** case (supra), the Court stated as follows:-

"We have to point out that the supportive evidence required need not be that type of independent corroboration such as is required for accomplice evidence or for proving sexual offences (See ***George William Kalyesubula vs. Uganda*** *(supra)). Subject to the circumstances of each case, any admissible evidence which tends to confirm or show that the identification by an eye witness is credible, even if it emanates from the witness himself, will suffice as supportive evidence for the purpose."*

In the instant case, the factors that go towards facilitating correct identification were in place: broad daylight, the accused being well known to the victim, and the combined sexual assaults complained of having taken as long as one hour to be accomplished. Against this is the evidence by the accused in which each of them denied having committed the offence; and set up an alibi. The accused were of course, on the authorities, under no obligation to prove their alibi.

The evidence of the complainant is clear, and places both of them at the scene of the crime. She gave an elaborate account of her ordeal in the hands of the accused that day. I believe her. The evidence by both prosecution witnesses that the accused first ran away on seeing the grand parent of the victim, and later on seeing the parent of the victim, is conduct by the accused pointing towards their guilt; and is evidence corroborative of that of the complainant, on the authority of ***Katumba James*** (supra). I am therefore unable to accept the alibi raised by the accused.

There is no allegation of any grudge between the accused and the complainant; or with any member of her family. In the absence of any motive therefore, it would be strange for the victim to pick on the accused and no one else as the villains of this incident. Since the incident took place at broad daylight, there is no possibility of mistaken identity. Therefore, on the authority of ***George Bangirana vs. Uganda [HCB] 361***, since I have found the complainant to be a witness of truth, this court can convict the accused on her evidence alone.

But that notwithstanding, there has in fact been abundant corroboration of the requisite elements of the crime charged. Whatever inconsistencies that are discernible in the complainant's evidence can easily be explained away due to the fact that she is giving her testimony in Court five years after the event; and in any case, certainly, none of such inconsistencies can be said to have been deliberate falsehood intended to secure a conviction.

I am in full agreement with the lady and gentleman assessors that the case against both the accused has been proved by the prosecution, in all the elements of the crime, beyond reasonable doubt; with the result that I find the accused, each, guilty of the offence of rape as charged; and I therefore hereby convict each of them accordingly.

Chigamoy Owiny - Dollo
RESIDENT JUDGE; FORT PORTAL
15 – 10 – 2008

Mr. Bernard Musinguzi for the accused.
Ms. Ann Kabajungu for the State.
Both accused in Court for judgment.
Clerk Irumba Atwoki.

Judgment delivered in open Court.

Chigamoy Owiny – Dollo
Judge.
15 –10 – 2008.

Ann Kabajungu: Both convicts have spent 5 years, 6 months and 17 days on remand. First convict is 27 years old, and second convict is 25 years old. They are both young. They have been convicted of rape. Section 124 of the Penal Code Act provides for the liability to suffer death. As far as we know, the convicts are first offenders. The victim PW1 trusted both convicts. Second convict is her relative. First convict was employed by her grandfather. The convicts behaved like animals in combining on the victim. There is need for deterrent custodial sentence.

Bernard Musinguzi: I concur with the prosecution on the length of time convicts have stayed on remand before conviction. They are first offenders and are remorseful. Both are young and can still reform. Each is married and has one child. They are each sole bread winners. They can still be useful to society, and should be given the opportunity to reform. So pleads for leniency.

Court: (after establishing from the convicts that they do not have anything to say on top of the submissions by the counsels) – The offence for which the convicts face sentence is about protecting the honour of a woman. A woman is not the object of satisfaction of male lust. The order of things is that a man wins the heart of the woman and then sexual intercourse may result. For the convicts to have behaved like dogs to subject their victim to joint sexual assault was most inhuman. There is need to impose such sentence as would serve as a deterrent not only to the convicts, but to all other men to preserve the honour of women.

Taking into account the period the convicts have spent in detention already, I hereby sentence each of them to 8 (eight) years imprisonment. Right of appeal explained.

Chigamoy Owiny – Dollo
Judge.
15 –10 – 2008