THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No. 0113 OF 2005; HELD AT KYENJOJO

UGANDA …….....

PROSECUTOR

VERSUS

BYAMUKAMA ERIGINIO ……..…….

ACCUSED

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

JUDGMENT

Byamukama Eriginio, hereinafter referred to as the accused, has stood trial having been indicted for the offence of rape c/s 123 and 124 of the Penal Code Act. In the particulars of the offence it was alleged that the accused, on the 5th of September 2004, at Rwakiraita village, Katooke - Sub County, in Kyenjojo District, had unlawful sexual intercourse with Kabonesa Frazia without her consent. The accused pleaded not guilty to these particulars of the charge when the same was read out and explained to him; with the result that this trial followed.

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."

It is clear from the above-cited definition of rape that the offence 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 of (sexual intercourse with) a woman of the age of 18 years, and above.

(ii) The carnal knowledge having been carried out without the consent of the victim (woman).

(iii) The accused having perpetrated the aforesaid carnal knowledge.

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 the accused as alleged, the prosecution adduced evidence from two witnesses: Kabonesa Frazia - PW1, the victim of the crime charged; and Richard Twesige – PW2, the son of PW1. In addition to this were the facts and documents admitted in evidence by consent. For proof that it was the accused who committed the sexual intercourse complained of, the prosecution adduced the direct evidence of the victim – PW1 herself, and that of her son - PW2.

PW1 gave a lurid account of what transpired that tragic night named in the indictment. She had already gone to bed when the accused, her own brother and second in the line of her followers by

birth, woke her up around 10.00 p.m., asking for water mixed with sugar. Believing that the accused needed this for some urgent relief, she got up, lit a candle, and opened the door allowing him in the house. She then made the requested concoction and when she was stirring it she realised that he was armed with a panga on which he was squatting. When she recalled that the accused had earlier threatened to cut her with a panga, she gave him the concoction and then tactfully left the house as if answering the call of nature.

She testified that she bided her time in the hope that he would leave, and thus remained outside beyond the period permissible for a short call of nature. When the accused apparently realised this he rushed out, pounced on her, threw her down and subjected her to forcible sexual intercourse; very much against her will. PW2 who was woken up by the cries of his mother - PW1, testified to having seen the accused, his own maternal uncle, at their home that night, fighting with his mother – PW1; to which he sounded the alarm. The evidence of these two witnesses is that of identification.

The three are people who know one another very well as they are not only brother, sister, son and nephew; but were in fact also close neighbours. From her testimony, PW1 had recognised the person calling her as being the accused; hence her opening the door for him. Although the incident took place at night, she had sufficient time and opportunity both inside the house, and outside when she had the heart-rending encounter with her brother the accused, to have been able to identify him positively. Her son's testimony was also direct evidence of identification.

Regarding evidence of identification such as is the case here, the case of ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997***, is authority for the proposition of law that the inculpatory evidence of identification adduced by the victim of the criminal act is the most reliable, hence best evidence**.** Since proof of the participation of the accused in the crime charged herein is anchored on evidence of identification, and was made at night, this Court must approach that evidence with caution in accordance with the warning in ***Roria vs. Republic [1967] E.A. 583,*** at p. 584; and followed by the Supreme Court of Uganda in ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997***; and a host of other cases.

The rule in the cases above is that to rely solely on identification evidence as a ground for founding a conviction, while permissible, causes unease; and therefore it is the duty of Court to satisfy itself that in all the circumstances it is safe to act on such identification. I accordingly

warned the gentlemen assessors of that need for caution. In ***Nabulere vs. Uganda – Crim. Appeal No. 9 of 1978; [1979] H.C.B. 77***; a decision which has been followed with approval in many cases and a passage from it reproduced 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."*

In ***George William Kalyesubula vs. Uganda, S.C. Crim. Appeal No. 16 of 1997***, the Supreme Court of Uganda emphasised the need to test with the greatest care the evidence of an identifying witness especially when the conditions favouring identification are difficult. The Court stated that in circumstances such as this, what is necessary is other evidence that points to the guilt of the accused, and from which a reasonable conclusion can be arrived at, that it is safe to rely on and accept the evidence of identification as devoid of the possibility of error. This was re-stated in ***Moses Kasana vs. Uganda – C.A. Crim. Appeal No. 12 of 1981; [1992-93] H.C.B. 47***; where, 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 on what form the evidence of corroboration should take 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, although the incident took place at night, the factors that favoured correct identification were in place: the witnesses and the accused knew each other perfectly well, and PW1 in fact identified the accused by recognising his voice even before opening the door for him. The accused took sufficient time with PW1, both inside the house where there was candle light, and outside where there was moonlight; and this must have served to minimise, if not altogether rule out, the possibility of mistaken identity or error in identification. Her son's testimony supports hers.

The accused for his part raised the defence of an alibi, stating that for the whole of the night in question he was at his home where he lived with his father. He attributed the allegation brought against him by PW1 to the dispute they have over the issue of inheritance of their parents' properties. The accused was, of course, under no obligation to prove the alibi he raised. However the prosecution evidence with regard to the identity of the perpetrator of the vile sexual offence charged was clear, and placed the accused at the scene of the crime.

True, there has been bad blood between him and his sister – PW1; but the jail term he served, though it arose from the complaint lodged by his sister, was a consequence of the proof presented to the satisfaction of Court that he was guilty of the offence of arson. It is rather hard to believe that for the purpose of inheriting family property, PW1 would falsely subject herself to the stigma

of the mind-boggling and harrowing claim of the abominable indignity of having had sexual encounter with the accused – her own blood brother. It would indeed take a lot of guts for any normal person to conjure up such evil mischief.

When she made her first report, which was to the Vice Chairman of the village – one Manyindo Rwankwizire, given in a police statement and admitted in evidence at the preliminary stage of the trial by consent as exhibit **CE3**, she was bleeding profusely from the cut wounds she had sustained in the course of fighting her brother off. I believe her and her son; and must therefore reject the defence of alibi, and also the claim that she is driven by ulterior motive to stand in this Court with her son and make such a devastating and self destructive claim against the accused.

The fact that their father was still alive at the material time herein means the accused and his sister could not have been fighting over the inheritance of any property; contrary to the assertion by the accused. As pointed out by one of the gentlemen assessors, the issue of inheritance of property in Tooro culture only arises upon the death of the owner of that property. The evidence by PW1 that the accused was in hiding for two days before his arrest, as corroborated by the aforesaid admitted statement of the LC1 Vice Chairman, is conduct which points to the guilt of the accused; and is evidence in support of the evidence of identification by the prosecution witnesses, on the authority of ***Katumba James*** (supra).

I must therefore reject the alibi raised by the accused; and as well do find the allegation against PW1 of ill-motive unfounded, hence is without basis. Thus, given that there were favourable factors favouring correct identification; and having found that the complainant and her son were witnesses of truth, and have corroborated each other's evidence; and further, there being the other evidence – the statement of the LC1 Chairman, the fabricated alibi and as well conduct of the accused subsequent to the alleged assault – all of which corroborated the evidence of identification, I do find that the accused was placed at the scene of the crime for which he has been charged.

On the ingredient of carnal knowledge, 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***, is that no matter how slight the penetration is, it suffices 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."

While this decision of Court was with regard to penetration in a case of defilement, it is as good authority for, and applicable to the case of rape, as it is for defilement; as the two offences are identical twin limbs of the same thing; namely the sexual offence. It was the testimony of PW1 that the accused grabbed her and threw her down saying:

"Today I have to rape you. If you refuse, I will cut you."

She continued that the accused lay on her, unzipped his trousers, and then:

"He removed his penis and put it in my vagina. I was screaming, saying 'Byamukama what are you doing? Don't kill me.' Instead, the accused was continuing to have sex with me. … I was not hurt in the sexual act. I put up resistance."

In cross examination she stated further that:

"My brother would have fully raped me and ejaculated in me. He did not ejaculate. He entered me. His penis entered my vagina. He entered me for more than one minute. I am not sure of the time."

The law governing sexual offences is that there is need to look out for corroboration of the evidence of the complainant. In ***Chila & Anor vs. Republic [1967] E.A. 722,*** the trial judge had failed to warn either the assessors or himself, of the need to look for evidence that would corroborate that of the complainant's in a material particular, and implicating the accused; but

had convicted the appellants on the grounds that he had found the complainant to be a witness of truth. The Court clarified at p. 723 [B - C], on the position of the law, as follows:

> *"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.'*

Therefore, I warned the gentlemen assessors, and equally do now warn myself, of the danger that lies in acting on the uncorroborated evidence of the complainant PW1; and of the need to, and in compliance with the well established practice which enjoys the force of law, look for evidence corroborating the testimony of the complainant; but also that, nonetheless, the assessors are at liberty to advise me to found a conviction on the evidence of PW1 even when it stands out alone, without corroboration; as long as they find that she has been a reliable witness.

PW1 is an adult with children. It therefore goes without saying, that she is naturally knowledgeable about matters pertaining to sexual intercourse. When she testified that the accused inserted his penis in her vagina, she was expressing in no uncertain language that there was penetration. Her evidence on this matter satisfactorily established, without the need for any form of corroboration, that indeed she was subjected to and suffered the indignity of forcible sexual intercourse that fateful night.

Her evidence was nevertheless also sufficiently corroborated by the evidence of her son – PW2, and that of the LC1 Vice Chairman referred to above; in which he stated that PW1 had that night reported the rape case to him around 12.00 mid night; and that the accused was later arrested while in hiding. He also added that:

"It is Byamukama's habit to rape women. He had even at one time raped his real mother, the late Zoromina. That's he is a known rapist …"

The report on the medical examination of PW1, adduced in evidence by consent, restricted itself only to the injuries she had suffered on her fingers; and had no mention of what finding, if any, was made with regard to the victim's private parts. This makes the medical evidence on record of little weight, if any, as evidence in support of the one adduced in proof of the occurrence of sexual intercourse. However in the case of ***Abbas Kimuli vs Uganda C.A. Crim. Appeal No. 210 of 2002*** (unreported), the Court made the observation 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)".*

In view of the clear testimony of the victim as to the fact of penetration, and in keeping with the authority 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, there is no point in further belabouring this point. Medical evidence could not in the circumstance of an adult woman, such as PW1 - who, due to her being no stranger to sexual intercourse, had sustained no injuries - offer any better proof than her credible word of mouth on the matter.

The Vice Chairperson LC1 of the village, to whom PW1 immediately reported her nasty ordeal, stated in the evidence admitted by consent that she was in a terrible state, and was bleeding profusely from her fingers. In a passage from ***R. vs. Alan Redpath (1962) 46 Crim. Appeal 39***, which the Court of Appeal for Eastern Africa reproduced 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."

The evidence produced above satisfactorily established, even without the need for any form of corroboration, that indeed PW1 suffered the painful indignity of forcible sexual intercourse that fateful night. Her evidence has nevertheless also been amply corroborated by the evidence of her son PW2, and the Vice Chairman LC1 of the village, and as well the conduct of the accused as

stated herein above. I am satisfied, and in agreement with the gentlemen assessors, that the prosecution has duly established that ingredient of the offence.

To establish the ingredient of lack of consent it is the evidence of the victim - PW1 herself and that of PW2 which the prosecution relied on. In her evidence she stated that when the accused declared he had to rape her that day or else he would harm her; and upon throwing her down, unzipped his trousers and inserted his penis in her vagina, she screamed demanding to know what it was the accused was doing, and pleaded with him not to kill her. The accused was however heedless of this objection and plea; and instead continued subjecting her to sexual intercourse. And to show that this was an act she had not consented to, she stated in Court that:

> *"I then got hold of the panga and we got up and we started fighting for the panga. He overpowered me and pulled the panga out of my hand and in the process the panga cut my fingers. He still wanted to cut me but I ran away into the darkness. … I had no knickers on as I had just got out of bed and had put on a dress only. … I was not hurt in the sexual act. I put up resistance."*

In response to a query by one of the assessors, the witness said:

> *"The accused had never had sex with me before; not even consensual sex. The accused came out of me because I was fighting him."*

It is all evident from the testimony of the victim that she could never at all have consented to the sexual encounter. The very thought of it was anathema to her – a taboo for which the accused would, in the past, have been punished with excommunication from their society forthwith. Her plea to the accused not to kill her is also to be understood in the context of a subtle reference to the trauma of this evil deed which she would now be compelled to live with forever; an act that she knew would kill her spirit, and destroy her.

Her account of the events leading to and during the perpetration of the repugnant sexual act was, on the authority of ***Uganda vs. Opio Richard [1986] H.C.B 19***, clear manifestation that this sexual encounter was non – consensual; it was imposed on her. I am in full agreement with the gentlemen assessors that the prosecution has proved its case against the accused in all the

elements of the crime, beyond reasonable doubt; and consequently I find the accused guilty of the offence of rape as charged; and I therefore convict him accordingly.

Chigamoy Owiny - Dollo

RESIDENT JUDGE, FORT PORTAL

15 – 10 – 2008