



**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI**  
**CRIMINAL CASE NO. 0004 OF 2011**

**UGANDA ::: PROSECUTOR**

**VERSUS**

**TIBAGWA BALA ::: ACCUSED**

**JUDGMENT**

**BEFORE HON. JUSTICE MR. RALPH W. OCHAN – RESIDENT JUDGE**

The accused Tibagwa Bala standards indicted on the charge of rape contrary to section 123 & 124 of the Penal Code Act. Particulars in the charge are that the accused on the 15<sup>th</sup> day of June 2010 at Kiina Village, Kyangwali Sub-county, Hoima District had sexual intercourse with one Francine Saleh without her consent.

Rape is an offence that comprises the following ingredients;

1. sexual intercourse involving the victim
2. absent of consent by the victim
3. participation of the accused person

The burden of prove is always on the shoulders of the prosecution requiring them to prove all the ingredients outlined the board beyond reasonable doubt. *See Woolmington versus DPP (1935) AC 463, Andreyo Obonyo & Others Versus R (1962) EA, 550.*

In seeking to discharge the burden placed upon it, prosecution adduced evidence from the following witnesses;

PW1 - Dr. Mathew Mbonye

PW2 – Police Senior Psychiatric Officer who examined the accused and found him to be of a normal mental status.

PW3 – Mr. Muzamir Kasangaki

PW4 – Francine Saleh

PW5 – Zabonimba Swalleh

In seeking to prove these ingredients, the prosecution first adduced evidence from the complainant herself Francine Saleh. The accused told court that the complainant Francine Saleh was his girlfriend. He denied raping her. As the medical report that was admitted in evidence remains uncontested found evidence of penile penetration in form of semen in the complainant's private part, it would be reasonable to infer from the perspective of the accused, that there was consensual sexual intercourse. This therefore entitles me to find that the 1<sup>st</sup> ingredient of the offence, namely, sexual intercourse involving the complainant is supported by sufficient evidence to have been proved beyond reasonable doubt.

With respect to the 2<sup>nd</sup> ingredient, namely, the absence of consent, prosecution relied on the evidence of the victim Francine Sale who testified as PW4. She told Court the accused bought mangoes from her at Kiina Landing Site and requested her to take the mangoes to his home nearby, which he pointed out to her. She obliged. The accused walked behind her. On reaching the house, she entered the house, the door was open. As she put the mangoes down, the accused quickly entered the house, closed the door and pulled her into his bedroom and raped her. She raised an alarm. The chairman and the defence secretary came. According to her the accused refused to open the door. The chairman had the door forcefully opened. The accused was arrested. A big crowd had gathered having heard her alarm.

In his defence, accused insisted that the complainant was her girlfriend. He insisted that as soon as the chairman knocked on his door and identified himself, he opened the door and told him he was with his girlfriend. PW5, the chairman LCI told court immediately he reached the accused's house the complainant told him that the accused raped her.

In his final submission, defence counsel invited Court to find that the evidence on record, the sexual act between the two was consensual. He submitted that this was corroborated by the fact that the medical examination report of the complainant found no injuries to her private parts or indeed to any other part of her body. This according to Counsel is more pertinent in view of the evidence of the complainant that this was her first sexual act. He submits that injuries to her hymen would have been inevitable. Some bleeding would have been detected in that event. The hymen according to the medical report had been ruptured about 6 months prior to the examination. The presence of semen was not evidence sufficient to prove use of force. Counsel submitted that the sole evidence of force was an allegedly torn pair of knickers, which was never exhibited even at the level of police. Also of importance was the access to the accused's house. The victim told court the chairman used force to access the house. The chairman told court the accused opened the door on his own, after he was called upon to do so. The victim came out of the bedroom on her own. It was only after the chairman asked what happened that she told him, the accused had raped her. Counsel Kasangaki submitted that the complainant's subsequent distress was because her affair had become public. She had to cover up her shame by the accusation of rape.

In response, state counsel submitted that the rupture of the hymen should not be over blown. It can occur without having sexual intercourse. The lack of injuries is attributable to the obvious and observable differences in sizes between the accused and the victim.

She invited court to take note of the size of the accused visa vis the victim. How else would the chairman and the rest of the public come to rescue the victim if she had not raised an alarm? Counsel submitted further submitted that on the basis of his own admission, as well as the positive identification of the accused, his participation was proved beyond reasonable doubt. She submitted that Court should find the accused guilty as charged as all the 3 ingredients having been proved beyond reasonable doubt.

The girlfriend suggestion by the accused is an afterthought that court should reject in total, counsel submitted.

I have paid careful attention to the submissions by both counsel. I have also carefully analyzed the evidence on record. I am convinced that the victim did raise an alarm that drew in the large crowd around the accused's house. That in turn is how the chairman got alerted and hurried to the scene of crime. The contradictions about the accused opened the door voluntarily or was forced to open the door is in my view minor and not fatal to the prosecution's case. Secondly, there was no problem of identification, the crime having been committed in broad day light in the mid day morning.

I am in agreement with my assessor that the sexual intercourse between the accused and the victim was without her consent. Participation by the accused is proved by direct evidence of the victim and corroborated by the medical evidence. The accused is accordingly found guilty as charged and accordingly convict him.

**SIGNED**

**JUSTICE RALPH W. OCHAN**

**10<sup>TH</sup> SEPTEMBER 2013**

**ALLOCUTUS**

**State:** We do not have any past criminal record of the convict before you. The victim was an orphan refugee trying to make a living for herself and a guardian. The convict tricked her into taking mangoes into his house which she obliged to. The convict abused her goodwill and trust by forcefully engaging her into sexual intercourse. The experience of rape left the victim very traumatized. She will live to remember that she is a victim of rape. We pray for a deserving sentence that will make the convict never to repeat such acts.

**Defence:** The convict Tibagwa Bala is a first offender. He has been on remand since 15<sup>th</sup> July 2010, for 3 years and 1 month now. At the time of arrest he was 25 years. At 28 years now, is still a youth. He deserves a chance to be afforded reformatory considerations. He can still be of use to his community. He regrets his actions. He undertakes to be a law abiding citizen. He prays for clemency. We pray for a lenient sentence.

**Court:** Sentence will be at 4:00 Pm today.

**SIGNED**  
**JUSTICE RALPH W. OCHAN**  
**10<sup>TH</sup> SEPTEMBER 2013**  
**SENTENCE**

Refugees, especially female refugees are particularly vulnerable to sexual exploits of various types and degrees. They have no voice in the camps in which they live. I take this opportunities to call for special protection for this extremely vulnerable group. The convict is a typical example of sexual predators that prey upon refugee women in the camps. I sentence him to 5 years imprisonment.

**SIGNED**  
**JUSTICE RALPH W. OCHAN**  
**10<sup>TH</sup> SEPTEMBER 2013**