

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT IGANGA**

CRIMINAL SESSION CASE NO. 24 OF 2011

5

**UGANDA.....PROSECUT
OR**

VERSUS

10

BALUNYWA

BUDALA.....

.....ACCUSED

BEFORE: THE HON. LADY JUSTICE FLAVIA SENOGA ANGLIN

15

JUDGMENT

20 BALUNYWA BUDALA the accused person in this case was indicted for Rape
c/s 123 & 124 of the Penal Code Act.

The case for the prosecution is that the accused person on 15.02.10 at
Butondolo village in Iganga District had unlawful carnal knowledge of
25 Nangobi Edinansi Byamwilya without her consent.

The accused denied the indictment. He stated that during the night in
question, he was at his home preparing himself for school. The next day
he was arrested on his way from school and told he had stolen a shirt from
30 one Henry. He denied ever having stolen the shirt.

The prosecution called 8 witnesses in a bid to prove its case.

The issues for the court to determine that also constitute the ingredients of the offence are the following:

- (1) Whether there was carnal knowledge of the complainant.
- (2) If so, whether the act was committed without her consent or
5 with consent obtained by threats, deception or violence
- (3) Whether it is the accused who had carnal knowledge of the complainant – See **Charles Katende Vs. Uganda [1971]2 ULR 16.**

10 In determining this case, I bear in mind the duty of the prosecution to prove all the ingredients of the offence beyond all reasonable doubt. This burden never shifts save in a few exceptional cases provided for by law.

The accused person has no legal burden to prove his innocence. Even
15 where he raises a defence, the duty still remains on the prosecution to prove beyond all reasonable doubt that nonetheless the offence was committed and that it was committed by the accused.

The prosecution case against the accused person should be so strong as to
20 leave only a remote possibility in his favour. Refer to **Section 101 of the Evidence Act, Woolmington Vs. DPP (1935) AC 462; Miller Vs. Minister of Pensions.**

To prove the act of sexual intercourse, the prosecution relied upon the
25 evidence of PW2 the complainant Edinansi Nangobi Byamwilya and PW1 Doctor Bamudaziza who examined both the complainant and the accused person.

PW2's evidence was that during the night in question, at about 1am while
30 she was sleeping, someone opened her door and ordered her to get up

and take him to one Badeebye's home. She was then dragged from her bed, pushed down and the assailant sat on her and held her by the neck. In her struggle to extricate herself her right arm was dislocated. The assailant then had sex with her against her will.

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She had pain in her neck and arm, the stomach and private parts. She bled for 4 days through the nose.

10 Immediately after the rape, PW2 went and informed her son Waiswa Benedicto PW3 and his wife. They spent the rest of the night with her and took her for treatment the next day.

15 The medical examination of PW2 was done by Dr. Bamudaziza PW1 on 17.02.10. The findings were that PW2 had bruises with soft tissue injuries on her waist, chest and abdomen. The injuries were about 3 days old.

20 She also had lower abdominal pain and a vaginal discharge. And it was found that there had been successful forceful penetrative sexual intercourse.

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The medical evidence was admitted as Exhibit P1 under section 66 T.I.A.

That this ingredient was proved to the required standard is not disputed by the defence.

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30 It is also evident from all the circumstances surrounding the sexual act that there was use of force against the complainant and that the act was without her consent. She was rudely awakened from her sleep and violently assaulted after being dragged from her bed. The evidence of the doctor confirms the injuries sustained as a result.

I am therefore satisfied and find as a fact that there was sexual intercourse with the complainant against her will.

- 5 The last issue to determine is whether it was the accused person who had sexual intercourse with the complainant during the night in question.

The determination of this ingredient raises a number of issues that include identification, corroboration, circumstantial evidence, and the defence
10 raised by the accused person.

The accused raised the defence of alibi and vehemently denied committing the offence. He said that during the night in question he was at home preparing for school and was arrested the next day on the
15 allegation that he had stolen a shirt.

At this point, I wish to remind myself of the position of the law regarding the defence of alibi ***“It is not the duty of accused person to prove his alibi. It is up to the prosecution to destroy it by putting the
20 accused person squarely at the scene of crime and thereby proving that he is the one who committed the crime” - Sekitoleko Vs. Uganda [1968] EA 531.***

The prosecution contends that the accused was identified by the
25 complainant; since the description she gave of her assailant matches the looks of the accused person. She described her assailant as a short medium sized boy who was wearing a sleeveless shirt.

But as pointed out by counsel for the accused, the incident occurred at
30 night under circumstances that made identification difficult. The

complainant was rudely awakened from her sleep, dragged from her bed and thrown down, her arm pulled and dislocated. She clearly stated that she did not recognize her assailant but said that she noticed he was wearing shorts and a sleeveless shirt. This is confirmed by the fact that
5 when she reported the rape to her son PW3 she did not name her assailant. Infant PW3 clearly stated that the accused was arrested because he was found with a shirt stolen from a clothes line in his courtyard.

10 PW6 D/CPL. Bakibisemu also confirmed that PW2 told him she never recognized her assailant.

The evidence against the accused person is therefore circumstantial. And Case Law has established that ***“To justify a conviction in such cases, the inculpatory facts must be incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to make possible moral certainty to the exclusion of every reasonable doubt”***. - Refer to **Musinguzi Jonas Vs. Uganda Criminal appeal 149/2004**.
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The evidence of PW5 Tondo Sarah who said she heard a bang on her door and got up and saw accused ran in the direction of complainant’s house, is not so reliable either. She too was woken up from her sleep, and admits
25 that she was scared. While she says she had a torch and that is how she recognized the accused, there is nothing further in her evidence to connect accused to the crime. She never reported to any authority that accused had banged her door. Neither was she ever told by the complainant that it was accused who committed the rape.

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The evidence left for the prosecution to rely on was that of the shirt stolen from PW4 Isabirye Henry, the grandson of the complainant. This witness testified that the night of the rape after her grandmother reported to them, he also noticed that his white short sleeved shirt that had been
5 hanging on the line was missing.

That on 15.02.10 he found the accused at Busalamu Trading Centre about 2pm putting on a white shirt and blue T-shirt underneath. The accused was arrested with help of the LC.1 chairman Mugolo John and taken to
10 police. He recognized the shirt as his because it was newly made with the button holes made horizontally (across).

Before his arrest, the accused told PW4 that the shirt was his and he had bought it from Nabirye Madina PW8.
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PW8 confirmed in her evidence that she sold a new white short sleeved shirt to the accused on 12.02.10 for Shs.6,500/- though she insisted that the shirt was not locally made.

20 PW6 also described the shirt said to have been recovered from the accused as one with button holes made horizontally.

PW7 D/SGT. Kasiko Stephen is the one who received the accused at the police station from the LC.1 Secretary for Defence of Butondero village,
25 one Mugolo John and charged him with rape. He also received a report from PW4 that the shirt accused had been found wearing went missing the night complainant was raped. He took the shirt from the accused and exhibited it on 15.02.10 on an Exhibit slip and handed it over to CPL. Waloki Edward who received it also signed for it - with his force number
30 CPL. 10135 and signature under SD. Ref ERB11/2010.

The shirt was never exhibited by the prosecution and court was told that it could not be found in the police exhibit store and that the person who received it had long since been discharged from the force.

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The court therefore never got a chance to see if the descriptions of the shirt given by the prosecution witnesses matched with what they said they recovered from accused. I am not persuaded by the argument of counsel for the State that its immaterial that the shirt was never brought to court.

10 The prosecution's explanation that the Officer who received the shirt from PW6 has since been discharged from the Police Force is not tenable. It could not be expected that he left with the shirt or that he never handed over the exhibit store before he left. The explanation given is not plausible and I therefore find that the case of **Yowana Serunkuma Vs. Uganda SC. Criminal Appeal 08/89** relied upon by the prosecution is
15 not applicable to the circumstances of the present case.

I agree with the submission of counsel for the accused that, it unbelievable that a person could commit a serious crime like rape during the night,
20 steals a shirt from the relatives of the victim and puts on the same shirt the very next day.

Would he have done so if indeed he had committed the rape? Is such conduct the conduct of a guilty person? It is highly doubtful.

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It's the prosecution evidence that the accused insisted from outset that the shirt was his and he maintained the same claim in his defence. The person he is said to have bought the shirt from appeared for the prosecution (PW8) and confirmed that indeed she sold a white shirt to the
30 accused on 12.02.10. The doubt created in the prosecution case,

especially after failure to exhibit the shirt has to be resolved in favour of the accused person.

5 Granted, the accused said he was not wearing the shirt when he was arrested, but that alone is not sufficient ground to disbelieve his evidence. The conviction of an accused depends on the strength of the prosecution case and not on the weakness of the defence.

10 That the accused had a previous criminal record of burglary and theft vide Criminal case 398/2010 before Iganga court by itself alone without any other evidence to show that the stole the shirt and raped the complainant is not sufficient to sustain the charge against him.

15 The purported conviction was also never availed to court.

All in all, I find that the prosecution evidence did not satisfy the standard of proof required in cases that depend entirely on circumstantial evidence. The evidence adduced did not irresistibly point to the accused as the one who committed the offence.

20 The prosecution failed to prove the 3rd ingredient of the offence against the accused person. He is accordingly found not guilty of the offence of Rape as indicted and he is acquitted of the same.

25 He should be set free forthwith unless otherwise held on other legal charges.

Flavia Senoga Anglin

30 **JUDGE**

01.10.13

01.10.13:

5 Accused present

Katami Lydia for State present

Ngobi Balidawa for accused present

Assessors present

Counsel for State: The matter is for Judgment.

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Court:

Judgment delivered in open court. Accused acquitted and set free
forthwith unless otherwise held on other legal charges.

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Flavia Senoga Anglin

JUDGE

01.10.13

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