

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

**CRIMINAL CASE NO. 092OF 2011**

**UGANDA.....PROSECUTOR**

**VERSUS**

**TUMWESIGYE ZIRABA alias SIGWA.....ACCUSED**

**BEFORE: THE HON. JUSTICE GODFREY NAMUNDI**

**JUDGMENT**

The Accused was indicted with Rape contrary to Sections 123 and 124 of the Penal Code Act.

The prosecution contends that on 15/10/2010 at about midnight, Nalumansi Mary was sleeping in her house when she was awakened by some noise. She got her torch which she switched on and it flashed directly on to the Accused. The Accused hit the torch which fell down, then he forcefully had sexual intercourse with her, without her consent. She reported the matter to the authorities and the Accused was arrested and charged with the offence of Rape.

The Accused denied the charges and set up an alibi that on the material day, he was at home sleeping with his wife.

The prosecution must prove the following ingredients beyond reasonable doubt in a case of rape:

1. That there was unlawful sexual intercourse involving the victim/complainant.

2. That the sexual intercourse was without her consent or against her will.
  3. That the Accused was responsible.
- 5 The prosecution called a total of 7 witnesses to prove the said ingredients.

**Ingredient No.1-Sexual intercourse and lack of consent:**

- 10 Nalumansi Mary the complainant testified that on the material day/night at around midnight, she was in her house sleeping when she was awakened by noise made by the children she was staying with.
- 15 She picked her torch and on flashing it she saw the Accused whom she knew. He hit the torch which fell to the ground but did not go off. The assailant then struggled with her and overpowered her by twisting one of her arms which was affected by an accident. He then forcefully had sexual
- 20 intercourse with her. During the scuffle, some items including a mirror, a pot and the bed got broken. In the morning she went to report to the area LC. But he was not there. She proceeded to the police post.
- 25 PW7 Detective Sergeant Arakit received the complainant at the police at Kidera as she was on duty. She was troubled and distressed.

The complainant reported that Sigwa, the son of the area

30 LC.1 chairperson had raped her.

PW2 Dr. Isabirye Robert testified that he examined the complainant on 18/10/2010.

She had a healed hymen and tenderness on the shoulder, showing signs of resistance. He filed PF.3 which was tendered as P.Ex.1.

- 5 On cross examination he stated that there were no injuries in the private parts, but being a mature woman, establishing sexual intercourse could only be established by retrieving semen since her hymen was long healed.
- 10 The defence has submitted that forceful sexual intercourse has not been proved because
- The complainant did not take steps to report the case to the chairperson.
  - She could not estimate the time the rapist took in  
15 committing the offence.
  - That the doctor's evidence was not corroborated and that the doctor could not say for sure whether there was sexual intercourse since samples were not taken.
  - That the evidence of the broken mirror, pot and bed  
20 were introduced as an afterthought.

I have considered the evidence and the submissions by both counsel. Much as it is submitted that there was no corroborating evidence, the Court has to look at and consider  
25 the evidence in its totality.

There is evidence of forceful entry into the house, the signs of a scuffle. In **Kayondo Robert Vrs. Uganda SCCA 18/96** (cited by the prosecution, signs of struggle corroborate  
30 evidence of lack of consent).

The evidence of PW7 Arakit is to the effect that when the complainant reported at the police, she was disturbed and distressed. In **Kibazo Vrs. Uganda (1965) EA 510**, it was

held that in sexual offences, the distressed condition of the complainant is corroboration of the offence.

5 Considering all the above evidence and circumstances, I find that the two ingredients of sexual intercourse and lack of consent have been proved beyond reasonable doubt.

### **Ingredient No.3 - Participation of Accused:**

10 The prosecution has relied on various pieces of evidence and Principles of Law in an effort to place the Accused at the scene of crime.

These include:

- Identification.
- 15 - Identification parade.
- Circumstantial evidence.

### **Identification:**

20 PW1 Nalumansi was the single identifying witness. Her evidence is that when she heard noise, she picked her torch, flashed it and it shone directly on to the assailant. She states that the assailant hit the torch and it fell down but the flash enabled her to identify the accused, who she knew as Sigwa - son of the LC.I chairperson. She had known the  
25 Accused for about 3 months. Where there is a single identifying witness, the court has to caution itself to alloy the possibility of mistaken identity. Ref: **Nabulele Vrs. Uganda.**

30 The court must be satisfied that the circumstances were favourable for identification.

- What was the lighting?
- The distance between the witness and the assailant.
- Familiarity with the assailant by the witness.

In the instant case, apart from the lighting, the other factors were available.

5 As regards the lighting, the witness stated that she used a torch which she flashed directly on to the Accused. She saw somebody she knew. When the torch fell, it remained alight. And when she made a report to the police, she reported somebody she knew as Sigwa.

10

PW7 Arakit corroborated this when she states that the complainant reported that it is Sigwa who had raped her.

15 The issue of the light has been attacked by the defence that there was insufficient light to enable proper identification. Further, the defence questions why the said torch was never produced as an exhibit.

20 I have considered the evidence of PW1 and PW7. The report to PW7 was made as soon as was practically possible and pinpointed the Accused. Coupled with the fact that the witness knew the Accused. I am satisfied that the witness PW1 had ample opportunity to observe the assailant.

25 **Identification Parade:**

An Identification Parade was conducted by PW5 and this was witnessed by PW4.

30 This was done to rule out any possibility of mistaken identity. 7 youths with the Accused as the 8<sup>th</sup> were placed in a line and in various positions. The complainant was able to pick out the accused as the person who raped her.

The way the Identification Parade was conducted has been attacked by the defence. The Accused in his sworn statement claims the Police Officer (PW5) saw a wart on the Accused's back, touched it and it seems told the complainant  
5 to pick out the person with the wart. That all the 3 times, the 8 people were facing the wall.

This claim is not supported by any evidence and is in sharp contrast with the evidence of PW5 which was corroborated by  
10 PW4. The case of **Sentale Vrs. Uganda** where the rules of identification applicable in Kenya were adopted in that case was cited.

I have looked at the said Rules which are to be found in  
15 **Kenya Police Order 15/26.**

I have also considered the evidence of PW5 and PW4 as to how the Identification Parade was conducted.

20 I am satisfied that the conduct of the parade was largely in accordance with the said Rules/Guidelines.

25 **Circumstantial evidence:**

The prosecution has relied on the evidence of PW7, PW6 who visited the scene, the signs of scuffle at the scene as shown by the broken pieces e.g. the pot, the mirror and the bed.

30 These tend to corroborate the allegation of forceful sex and together with the identification Place the accused at the scene of crime.

The Accused raised an alibi that he was lying peacefully in bed with his wife/girlfriend on the material night and was nowhere near the scene of crime.

- 5 The law is that the Accused does not have to prove his alibi once he raises it. See **Uganda Vrs. Dusman Sabuni (1981) HCB 1.**

10 It has been submitted by the State that if the accused is to rely on **alibi** then he should mention it early to enable to police to cross check or investigate it.

That in my view would be ideal. However, the prosecution should prove its case to the extent that the alibi raised cannot stand, rather than look at the weaknesses in the defence case.

15 I have considered the evidence raised by the prosecution in its totality. I am satisfied that the Accused has been placed at the scene of crime and that the alibi raised by the Accused cannot stand. It lacks credibility.

20 The Assessors gave a joint opinion. They advised that all the ingredients of the offence have been proved beyond reasonable doubt and that the accused should be found guilty.

I do agree with the position of the Assessors.

30 I accordingly find that the indictment against the Accused has been proved beyond reasonable doubt. I find the Accused guilty of the offence of Rape contrary to Sections 123 and 124 of the penal Code Act, and convict him accordingly.

**Godfrey Namundi**  
**Judge**

5 **03/12/2013**



03/12/2013:  
Accused in court  
Kitimbo for State  
Wagira for Accused on brief for Aguma

5

Court: Judgment delivered.

10 **Godfrey Namundi**  
**Judge**  
**03/12/2013**

15 Kitimbo: The convict is a first offender and has no  
criminal record. The convict has been on  
remand for 3 years. The offence was  
committed in the presence of children who  
were traumatized. Rape is a demeaning act  
20 as it leads to psychological torture on the  
victim. The victim was a widow mourning her  
husband and was old enough to be his mother.  
The accused was unremorseful. Sex should  
be consensual. He should be sentenced to the  
25 maximum sentence.

Wagira: the convict has been remorseful. He is a  
young person, capable of reform. Leniency  
should be exercised. There was no infection  
30 transmitted. A sentence of 15 years inclusive  
of the 3 spent on remand be given.

Court: **Sentence**

5 Rape is a demeaning act as against the victim  
who will be traumatized the rest of her life.  
The circumstances the offence was committed  
are also so bad that the children who saw the  
victim being raped will remain traumatized.  
The convict is a young man who can get  
consensual sex without attacking helpless old  
women. He has been on remand for 3 years. I  
take that into consideration. A sentence of 12  
10 years imprisonment is appropriate and it is so  
imposed.

15 **Godfrey Namundi**  
**Judge**  
**03/12/2013**

20 Right of appeal explained.

25 **Godfrey Namundi**  
**Judge**  
**03/12/2013**