

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
HC -06-CR-SC 130 OF 2012

UGANDAPROSECUTION

VERSUS

NGUCHE YOWERI.....ACCUSED

BEFORE HON LADY JUSTICE MARGARET C. OGULI- OUMO.

(JUDGE).

JUDGEMENT

NgucheYoweri alias Mugisu was indicted of Rape contrary to **section 123 and 124 of the penal code Act.**

The particulars of the offence are that NgucheYoweri alias Mugisu on the night of 13th May,2012 at Bugala in Kalangala district performed a sexual Act with NamagandaAgnes without her consent.

The brief facts of the case are that on the 13th May,2013,at around 2:00am ,the victim was at her home sleeping ,the accused came, called her. He forced her door to open and after gaining entrance he went straight to her bed ,after flashing his torch on her. She had herTadoba on which he sniffed off after one minute

That she tried to make an alarm ,but he grabbed her by the mouth ,started slapping her seriously.

She weakened and he overpowered her, tore the skirt she was wearing and thereafter had forceful sexual intercourse with her for 40 minutes.

He then went away after he had accomplished what he wanted but during the sexual act, she noticed that he was circumcised.

In the morning the victim went and reported the matter to police and the accused was later arrested.

The accused person denied the offence and the matter went to full trial.

The prosecution adduced the evidence of 3 witnesses to prove its case.

The accused in his defense made an unsworn statement and denied liability.

In all criminal cases an accused person is presumed to be innocent until proved guilty or he pleads guilty (**see Article 28(3) a of the constitution of Uganda ,1995**)

In a case of rape such as the present, the prosecution has to prove the following ingredients of the offence;

1. That there was a female victim of above 18 years of age?
2. The proof of sexual intercourse with the victim
3. The sexual intercourse was without her consent
4. The accused participated in the commission of the said offence.

Ingredient 1- whether the victim was above 18 years of age?

Prosecution adduced the evidence of PW1 the victim herself who stated that she was 27 years old.

Prosecution also adduced PF3 admitted as PE2 which indicated that Namaganda Agnes the victim was 26 years old at the time of her examination.

The defense did not contest this ingredient of the offence

Age can be proved by relying on a birth certificate, opinion of experts to wit medical doctors or by relying on the people who knew when the victim was born or through observation by the court (**Uganda Vs Bonyo Abdu Criminal case No. -0017 OF 2009**)

The victim said she was 27 years old . This is corroborated by the medical evidence tendered in court as PE2 . Court also had the opportunity to look at the victim and it was clear that she was an adult woman of above 18 years.

In those circumstances, I have no doubt that the prosecution had proved beyond reasonable doubt that the victim was a person of above 18 years of age.

As regards the second ingredient of sexual intercourse taking place

Prosecution relied on the evidence of PW1 the victim herself who experienced the sexual intercourse

She also stated that the attacker caused her pain and during the sexual intercourse she cried throughout the entire episode.

Counsel for the accused conceded to the proof of this ingredient of the offence.

It is trite law that the evidence of the victim is the best evidence.

(see **Badru Mwindu Vs Uganda CAA no.1/1997.**

I did observe PW1, and from her conduct she was straight forward and truthful .she did not weaver even in her cross examination.

In addition to that the medical evidence in PE3A exhPE2 is good corroboration evidence of the complainants evidence of a sexual Act having taken place. (see **Uganda Vs Aijo Cipriano ,Lira Criminal session case No. 007 of 1996(unreported).**

Further more,the distressed condition in which she reported to PW3 at police the next day with a torn skirt is also valuable (see **Sam Buteera Vs Uganda SCCA Case No. 021 of 1994 (unreported)**

In view of the above, I am satisfied that the prosecution has proved this ingredient of the offence beyond reasonable doubt.

This brings me to the third ingredient of the offence as to whether the sexual intercourse was without the victim's consent.

The prosecution relied on direct evidence of the victim herself who testified that the intruder attacked her and forcefully entered her house after having broken

the door ,got hold of her,tore her skirt which she was putting on which was identified in court and tendered as exhibit "PE3".

In her testimony she testified that she never at any time consented

The medical evidence supports this and was marked 'PE1' where the medical evidence indicated the tenderness on the arms and back were injuries consistent with resistance being put up by the victim.

The defense had issues with the 3rd ingredient and contended that when the victim said the sexual incident took more than two hours, it in fact presupposes that she was actually in her good moods to make a recollection because she could recall the duration.

That if there was no consent, she would have not been able to recall the duration.

In view of the above, the fact that she could recall the duration of the sexual Act is immaterial where there is the evidence of the victim that she was resisting all the time and it is confirmed by the medical evidence in PF3A Exhibit PE1.

In addition to this, the distressed condition of the victim the following day when she went to report the matter to the police together with the torn skirt is valuable evidence.

In fact if she was in the mood, why did he have to tear her skirt in order to get entry to her.

The tearing of the panty which she said she was ashamed to show to the police and the torn skirt is enough to show that she was resisting all the time and there can be no doubt that all the above show that there was no consent.

Further more, the nature of the injuries she sustained in the as reflected in PF3 only go to show that she put resistance.

The defense also indirectly tried to raise the fact of consent from the victim gave the evidence that the victim was HIV positive.

Counsel for the state submitted that this was reflected in cross examination of PW2, the medical officer who clarified that HIV would cause ulcers and sores in the genitals of an HIV positive person and they would not want to involve in sex which was not the case here as the medical officer didn't see any sores or ulcers in the case of PW1 and he ruled out that painful sex would not cause tenderness on the arms and back.

In view of the above, I am of a considered opinion that prosecution proved that the sexual intercourse was without consent to the required standard.

This brings me to the last ingredient of participation by the accused person.

On whether the accused was identified by PW1 the victim and this being that she was the only identifying witness.

I did warn myself as I did to the assessors of the danger of convicting on the evidence of a single identifying witness. I did take into account the conditions for correct identification.

The accused came in with a torch which he flashed and the victim had her 'tadoba' on which the accused sniffed off after she had seen him as someone she had seen in the neighborhood and had greeted him.

By the nature of a sexual act, the distance between the accused and the victim is was zero. He held her hands and she felt his penis as he inserted into her as he was circumcised and this was not challenged at all.

In addition, she said he had sex with her for close to 40 minutes which was enough time for her to identify him.

All the above show that there is no question of mistaken identity.

I therefore find that this ingredient had been proved beyond reasonable doubt.

The gentlemen assessors advised court to convict the accused and I accordingly convict him as charged.

ANTECEDENTS

STATE: I have no known criminal record in respect of the convict before court however he committed a serious offence in which he violated the bodily integrity and privacy in this case.

Such conduct ought to be punished as it leaves long lasting psychological impact on the part of the victim and there are also social scars as the victim will be branded as victims of rape.

In such circumstances in which the convict never showed any signs of remorse,during the trial would call for a deterrent sentence .

We so pray.

DEFENSE COUNSEL

The convict has been found guilty. We pray that you consider these mitigating factors;

That he is 28 years old and such a young man capable of reform and can be useful because he can tell his peers about about the dangers such offences.

Secondly, the convict has been on remand for a period of 2 years and 3 days which we pray that you consider.

He also confided in me that he is an orphan who had come to look for survival to take care of his siblings.

In the circumstances we pray for alenientsentence .

We so pray.

Accused : I am asking for forgiveness . my father died. I pray for a lenient sentence.

That is all.

SENTENCE AND REASONS FOR IT.

NgucheYoweri alias Mugisu was indicted for Rape C/S 123 and 124 of the Penal Code Act.

The particulars of the offence are that NgucheYoweri alias Mugisu on the night of 13th May, 2012 at Bugalain the Kalangala district performed a sexual act with Namaganda Agnes without her consent.

The accused denied the offence and matter went to full trial.

The prosecution called 3 witnesses to prove its case and the accused was found guilty.

No evidence was brought to show that the accused had a criminal record.

The accused is a first offender and has been on remand for 2 years and 3 days.

He is an orphan and looks after his siblings.

Whereas the offence the accused is convicted with carries a maximum of death on conviction.

The convict invaded the privacy of the victim and violated her bodily integrity and also exposed her to society stigmatization as a raped woman which stigma she has to live with for the rest of her life.

Consequently court sentences him to 28 years imprisonment and he has a right to appeal against the conviction and sentence.

Hon. Lady Justice Margaret C. Oguli -Oumo

(Judge)

16 /05/2014

Present

1. David Baxter Bakibinga for the State
2. Zikusooka Herbert for the accused on state Brief
3. Accused in court
4. Sentongo Joseph Court clerk/interpreter
5. Eva Amongin -Research Assistant
6. Assessors .