**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**HCT – 01 – CR – CS – 020 – 2013**

**UGANDA.....PROSECUTOR**

**VERSUS**

**KAHOOZA JULIUS.....ACCUSED**

**BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.**

**Judgment**

The accused was indicted with the offence of Rape Contrary to **Sections 123** and **124** of the Penal Code Act. That on the 18th of February 2013 between Kyarubingo Trading Centre and Bujumiro Trading Centre in Kamwenge District, the accused had unlawful Sexual Intercourse with Nuwamanya Eunice without her consent. The accused on arraignment, pleaded not guilty. He gave sworn evidence and did not bring any witnesses. He also raised a defence of alibi. The prosecution brought 3 witnesses in a bid to prove its case.

Brenda Najuuko – State Attorney appeared for the prosecution and Counsel Acellam Collins represented the accused on State Brief.

**Burden of proof**

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

**Standard of proof**

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

The law on Rape was well stated by the court of Appeal for East Africa in the case of **Kibazo versus Uganda (1965), E.A 507,** that in a charge of Rape the onus is on the prosecution to prove that sexual intercourse took place without the consent of the complainant. The court should address its mind to the question of reasonable doubt on the issue of consent. The fact that non-consent must be proved to the satisfaction of the court and where the court is not satisfied beyond reasonable doubt in the issue of non-consent there cannot be a conviction.

The essential elements requiring proof beyond reasonable doubt in the offence of Rape are:

1. That there was unlawful Sexual Intercourse with the complainant.
2. That the complainant did not consent to that Sexual Intercourse.
3. That it was the accused who had the unlawful Sexual Intercourse with the complainant.

**Section 123** of the Penal Code act defines rape as;

*"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."*

His Lordship, Chief Justice Lord Campbell (as he then was) in the case of **FLETCHER (1959) 8 cox cc 131** had this to say on definition of rape;

*"....The definition of rape may now be considered Res judicata... It is carnal knowledge of a woman against her will or without her consent."*

Also, in that case of **DPP versus Morgan & 3 Others (1976) AC 182, Lord Hailsham** (as he then was) said;

*"Rape consists in having unlawful sexual intercourse with a woman without her consent and by force... It does not mean there has to be a fight or blows have to be inflicted. It means there has to be some violence used against the women to overbear her will or that there has to be a threat of violence as a result of which her will is over borne."*

**Whether there was Unlawful Sexual Intercourse with the complainant?**

The law with regard to proof of sexual Intercourse has long been settled. In the case of **Bassita Hussein versus Uganda, Criminal Appeal No. 35 of 1995**, the Supreme Court of Uganda held as follows:

*"The Act of sexual Intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by Medial evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's 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 it is sufficient to prove the case beyond reasonable doubt".*

PW1 in the instant case told Court that she was Raped by the two accused. However, one of them (A2) pleaded guilty and is already serving his sentence. The victim told Court that as she was coming from Kyarubingo Trading Centre and gone passed St. Joseph Technical School. There was a bush and it is where the accused (A1) came from and started fighting her and later on was joined by another man(A2 now convict) and started fighting her. That the assailants put her down and held her neck and had sexual intercourse with her in turns until one Mugume came and found them.

**Medical evidence**

PW2, the medical personnel who examined the victim told Court that the victim only had bruises on the neck and face. The victim did not have any evidence of injuries or bruises on any other parts of her body.

State in her submissions stated that there is no need for there to be any injuries occasioned to the victim's genitalia for Court to find that there was sexual intercourse. Whereas, I agree that for the offence of Rape there does not necessarily have to be injuries on the victim's genitalia, I also vehemently disagree that this is not consistent with the allegation of Sexual

penetration as was adduced by the victim in Court. Not to mention the fact that she told Court that she had had unlawful sexual intercourse with two men.

The medical Report that was presented to Court to corroborate the evidence of the victim did not help at all even though PW2 told Court that the strangulation was consistent with sexual assault it was not enough to prove that there was unlawful sexual intercourse. Ordinarily even in consensual sexual intercourse, I would in least expect inflammation or redness to be observed during medical examination. I will not speculate in regard to the victim having possibly had internal injuries that could not be seen by the naked Medical Officer's eyes.

In the case of **Katumba James versus Uganda Criminal Appeal 58 of 1997 (Court of Appeal),** the victim had been medically examined but the medical doctor did not testify on issue of penetration. The court of Appeal held, inter alia that;

"*There can be no doubt that there was penetration, notwithstanding that no medical evidence was led on the point. The complainant was an old woman of 40 years. She had 9 children... she must have known what she was talking about."*

The State submitted that PW1 was a witness of substantial truth, therefore should be believed, and even if I applied the above authority I still am not satisfied that the victim had unlawful sexual intercourse with the accused. What I only see is evidence of strangulation but nothing more than that.

The victim also told Court that she was 3 months pregnant at the time of the incident; however, the medical report and PW2's testimony are to the contrary. That the victim was instead said to have been 24 weeks along which is roughly 6 months as opposed to the 3 months she mentioned. I therefore wonder if this is a credible and reliable witness whose testimony should be relied upon.

**Circumstantial evidence:**

The prosecution relied on the evidence of PW3 who visited the scene, the signs of scuffle at the scene as shown on the Sketch were marks indicating that the ground had been tampered with, the grass was withering and the struggle was too huge. The scene of crime had elephant grass, spear grass, and thorny trees, with some reeds and some of these were over 6feet high as per the evidence of PW3.

This evidence was to corroborate the allegation of forceful sex. I have however, failed to wrap my mind around the fact that the victim could have allegedly been raped in such surroundings but only obtain bruises on her face and not any injuries on other body parts. Such as slight cuts on the arms or legs, just in case she was standing and fighting back, and if she was laying down, I would have expected the medical report to have shown some injuries or bruises also on the back, buttocks and thighs consistent with unlawful Sexual Intercourse. The scene of crime was said to have been heavily tampered with but the victim got off with only a few bruises on her face. How is that so? I therefore, find that the prosecution failed to prove this ingredient beyond reasonable doubt.

**Whether the complainant did not consent to that Sexual Intercourse?**

PW1 told Court that she had been raped by the accused meaning that they had sexual intercourse with her without her consent. However, the prosecution failed to prove that fact the victim was involved in a sexual act if any. I therefore, find that the prosecution also failed to prove this ingredient beyond reasonable doubt.

**Whether it was the accused who had the unlawful Sexual Intercourse with the complainant?**

The court must be satisfied that the circumstances were favourable for identification considering;

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

In the instant case, PW1 told Court that she was able to identify the accused because there was bright moonlight. However, the place was very bushy. When PW3 was asked on cross-examination if it was possible to identify any one in such surroundings he stated that it would depend on the time and if it was dark, one would not but if there was moonlight they would be able to identify the assailant. PW1 testified that the accused did rape her in turns so she was able to see them and that the accused (A1) was also known to her for a period of one year.

In my opinion even though the victim told Court that she was able to identify the accused by way of moonlight, the prosecution did not prove any evidence whatsoever regarding the issue of moon light apart from just mentioning it. I find that the prosecution did not prove this ground beyond reasonable doubt even though A2 pleaded guilty and was not even known to victim prior to the incident.

The accused raised a defence of alibi, that at the night of the alleged incident he was home sleeping therefore he did not commit the offence.

The position of the law regarding the defence of alibi is that;

*"It is not the duty of accused person to prove his alibi. It is up to the prosecution to destroy it by putting the accused person squarely at the scene of crime and thereby proving that he is the one who committed the crime"* – **Sekitoleko versus Uganda [1968] EA 531.**

In the instant case, in my opinion the accused was not sufficiently placed at the scene of crime by the prosecution.

In a nutshell, I find that the prosecution failed to prove beyond reasonable doubt the offence of rape against the accused. I am inclined to believe that the victim was strangled in a struggle to have sexual intercourse with her but the intention of the accused was never materialised since there was no proof of any sexual intercourse to have been encountered by the victim.

The victim and the accused both maintained that neither had a grudge with the other. I therefore, acquit the accused and set him free.

Right of appeal explained.

**.....**

**OYUKO ANTHONY OJOK**

**JUDGE**

**10/11/16**

**Judgment delivered in open Court in the presence of;**

1. Najuuko Brenda – State Attorney
2. Counsel Acellam Collins for the accused on State Brief.
3. Assessors
4. Court Clerk – James

**.....**

**OYUKO ANTHONY OJOK**

**JUDGE**

**10/11/16**