

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KABALE**  
**CRIMINAL SESSION CASE NO.0086 OF 2014**

**UGANDA**

**PROSECUTOR**

**VERSUS**

**1. AYEBARE AUGUSTINE alias GASO**

**2. MUSINGUZI SAMUEL**

**ACCUSED**

**BEFORE HON.JUSTIOCE MOSES KAZIBWE KAWUMI**

**JUDGMENT**

Ayebare Augustine(A1) and Musinguzi Samuel(A2) were indicted for Rape contrary to sections 123 and 124 of the Penal Code Act. Particulars of the offence in the Indictment are that the two accused with another still at large had unlawful carnal knowledge of Natukunda Lillian on the 14<sup>th</sup> April 2014 at Nyakabungo village within Kabale Municipality.

Nine witnesses were presented by the Prosecution and the accused opted to remain silent. The witnesses were Swaibu Mikidadi(PW1)Dr.Ariharizira Moses (PW2)Rukundo Beatrice(PW3)Natukunda Lillian(PW4)Ahimbisibwe Hellen(PW5) Akankwasa Nicholas(PW6)D/Seargent Gumisiriza Joseph(PW7) and D/C Katushabe Grace(PW8) D/Seargent Byaruhanga James(PW9)

PW1 was the defence secretary of the village at the time the offence was allegedly committed. His evidence was that he got a brief of the rape from an uncle to the victim who also gave him a phone with pictures of five suspects to be arrested.PW1 arrested A1 and did not know how A2 was arrested. Court heard that he also got a brief regarding the complaint from Police and had a CRB number at the time the arrest of A1 was made.

In the Police statement recorded on the 28<sup>th</sup> June 2014 and admitted as an exhibit for the accused,PW1 stated that A1 denied raping the victim but conceded it was done by someone known as “boy” but A1 was around watching them.

Dr.Ariharizira Moses examined the victim on the 14<sup>th</sup> April 2014 and found her to be 15 years old. She had a swelling on the head, abrasions on the neck, upper limbs, back and thighs. The victim also had lacerations on the vaginal walls and buttocks.The injuries were attributed to use of sharp objects and possible dragging.

PW3 narrated that she knows the accused as residents in the neighborhood and that the victim had gone out to bathe at about 6.00am on the 14<sup>th</sup> April 2014 when Hellena (PW5) came and told her that she had seen the victim on the ground screaming and pleading with “boy” not to kill her.PW3 ran out of the house making an alarm calling on Akankwasa(PW6) tohelp her as she ran to the farm where the victim had been seen by PW5.She told Court that she saw

A1,A2 and “boy” running away and the victim narrated to them how she had been carried from the bathroom by A1,A2 and “boy” to the farm where “boy” had sexual intercourse with her.

The victim’s body was dirty with mud and she had injuries on the neck, arms and the head .She was putting on a dirty skirt and covering her upper body with a towel.PW3 reported to the village chairman who referred them to Police and subsequently the victim was examined by PW2 on the same day.

The victim who testified as PW4 told Court that she knows the accused and a one Michael usually called “boy” but was not their friend. That Michael had tried to befriend her but she had ignored him. She narrated that she was in the bathroom at about 6.40 am when A1,A2 and Michael entered the room. They grabbed and blindfolded her with a piece of cloth before carrying her to a one Katungi’s farm. Michael told A1 and A2 to *“take her to a place he was to show them”* calling A1 and A2 by the names of ‘Gasó’ and ‘Sam.’

As they carried the victim Michael cut her finger with a knife saying *“I will kill you or i die”* and when they reached the scene where they put her down he said *“I am going to rape you, kill you and throw you in the valley”* after which the piece of cloth was removed from her face. The victim further narrated that when they put her down, Michael ordered A1 and A2 to go away so that *“he shows her how powerful he is”* and when they declined to leave he told them *“I have given you what you want, now you can go”* before they left. Michael pierced her left shoulder with a knife and then raped her and when she screamed loudly PW5 heard and ran to PW3 who came to her rescue with Akankwasa but Michael ran away before they arrived at the scene.

PW4 confirmed to Court that she was examined by PW2 and her towel and skirt were taken by Police as exhibits. She told Court that she identified A1 and A2 in the bathroom, heard Michael mention their names as they carried her to the scene and further identified them when the cloth was removed from her face .Court heard from the victim and it was not disputed that Michael is a close friend of A1 and A2.

PW5 narrated how she heard the victim screaming and pleading with “boy” to leave her and she ran to PW3’s home to report the incident.PW3 followed by Akankwasa (PW6) ran back to assist the victim who then narrated what had taken place naming A1,A2 and Michael as the assailants.PW5 told Court that she knew Michael and saw him running away from where the victim was found.PW7,PW8 and PW9 visited the scene of crime, drew sketch maps, escorted the victim to hospital for examination by PW2 and stored the exhibits presented to court respectively.

The accused opted not to say anything in defense and Court was treated to various legal arguments relating to the framing of the Indictment. The victim exonerated the accused from raping her but outlined their role as that of carrying her to where she was sexually abused from. Prosecution argued that the accused were treated as Principal offenders under Sections 19 and 20 of the Penal Code Act and hence had to be indicted with rape. Counsel for the

accused on the other hand argued that sections 19 and 20 of the Penal Code Act could not be invoked given the facts of the case.

Counsel argued that the offence of Rape requires to proof of penetration which is personal in nature hence Sections 19 and 20 of the Act could not be applied. It was further argued by Counsel for the accused that the Indictment did not follow the rules that require Prosecution to clearly state the nature of the offence the accused has to answer to by outlining the role each of them played in the commission of the alleged offence.

In an indictment for rape, the Prosecution carries the burden to prove that a sexual act was performed on the victim without her consent by the accused persons.

Proof of a sexual act was from the evidence of the victim herself who implicated Michael and not the accused persons of having done it. This was corroborated by the evidence of PW2, Dr.Ariharizira Moses who examined the victim on the 14<sup>th</sup> April 2014 and issued a report that indicated lacerations on the vaginal walls. This element of the offence was sufficiently proved by the Prosecution.

For a conviction on a an indictment on rape to be secured, it must be proved that there was no consent from the victim or that the consent was 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.

The victim narrated that she was forcefully removed from the bathroom by A1, A2 and Michael who subsequently raped her. Evidence of the skirt and towel corroborate the testimony of PW3 that she had left the house for a shower that morning. The victim was carried to a spot about 600 meters away from her home and in a farm with threats of raping and killing her uttered by the said Michael which was not disputed by the accused. All these threats were uttered in the presence of the accused according to the victim. I observed the victim in Court and how she calmly responded to the questions put to her in cross examination.

She was consistent in her narrative about Michael's earlier attempts to befriend her and how she was forcefully taken to the farm. All these acts and the body injuries are not consistent with an agreement to have sexual intercourse. It is my finding that Michael had sexual intercourse without the consent of the victim.

Did the accused rape the victim? For a conviction of rape to be secured, a sexual act must be proved. Section 129(7) of the Penal Code Act defines a sexual act to mean ;" *penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ.*"The victim clearly exonerated the accused from having a sexual act with her but implicated Michael who was not arrested and charged with the accused.

It was argued that penetration is a personal effort and the accused cannot be held liable for what was done by Michael under sections 19 and 20 of the Penal Code Act but Court could charge them with any other offence on the basis of the facts before it.

Court heard from the victim that she was in the bathroom at about 6.40 am and there was a little light. The accused were identified by the victim before they put a cloth around her face, she heard Michael call them by their names and even saw them when the piece of cloth was removed just before she was ravished by Michael at about 7.20 am. The victim knew all the three very well and they were very close to her throughout the whole ordeal.

Much as the victim was in fear and shock which term was mistakenly used as being “unconscious”, the above factors enabled the accused to clearly identify the accused. It was argued by Counsel for the accused that there was no common intention to commit the crime in the indictment since the accused left the scene before Michael raped the victim. This argument was premised on the presumption that the accused did not know Michael’s intention from the start which Prosecution had failed to rebut. It was further argued that the departure of A1 and A2 from the scene amounted to disassociating themselves from the criminal act by Michael.

I respectfully disagree with the submission by Counsel in regard to the Law of Common intention. Section 20 of the Penal Code Act provides;

*“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the procurement of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence.”*

It was not disputed that the accused attacked and carried the victim which per se is criminal. It was not denied that Michael commanded the accused as to where to take the accused. Michael cut her finger in the presence of the accused and uttered words to the effect that he was going to rape and kill her before they left. Neither of the accused stopped Michael from harming or raping the victim after he dismissed them on giving them “*what they wanted.*”

The conduct of the accused and their presence denote a common intention. There was no indication that they disassociated themselves from the events of that morning.

The above sequence of events points to a pre-arranged assignment to kidnap the victim from her setting to the scene from where she was raped on receiving what they wanted from Michael. It is my finding that the accused are joint offenders in the prosecution of a common purpose with Michael who is still at large.

**See. CA Crim. Appeal No.6/1978 Kisegerwa & Anor V Uganda; R v Tabulayenka (1967) EA 239.**

Even if the common intention was not developed from the start of the transaction, it can develop in the course of events and the accused would still be held as joint offenders with Michael. Nothing however shows that the intention to rape developed mid way the original plan. The accused were close to Michael who had attempted to befriend the victim but rejected hence the mission was clear to them as expressed in the commands he issued and they followed.

**See; Wanjiru Wamiro V R ( 1955) EA 521; R V Okute [1941]8EACA 80**

**In Queen v Harder {1956} SCR 489** the respondent had been convicted for assisting others to rape the complainant by subduing her. His conviction had been quashed in the first appeal on the ground that he had not carried out the actual rape, but reinstated in the second appeal on the ground that he was an accomplice as he had aided and abetted the rapists.

Section 19(1) (b) of the Penal Code Act provides ;

*“When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it;-*

*(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence.*

The accused aided Michael in forcefully subduing and transporting the victim from the bathroom to the farm where the sexual act took place. The carrying of the victim from the bathroom to the time she was raped constituted one transaction in which A1 and A2 were active participants. The accused who knew where the victim stayed did not report what was planned to PW3 like PW4 did and even when they received what they had agreed on with Michael did not make a report to any authorities .The accused are therefore deemed as Principal offenders who aided and abetted Michael in the commission of the offence and were therefore rightly charged with the offence of rape.

It was argued by Counsel for the accused that the Indictment was defective for failure to lay out the detailed actions of each of the accused as required by Article 28 of the Constitution. This was raised after the Prosecution had closed its case and i do not deem it prejudicial to the accused. No failure of justice whatsoever was occasioned to the accused who were ably represented.

**See.Uganda v Dickens Elatu HC Revision Case No.71 of 1972.**

I find A1 Ayebare Augustine and A2 Musinguzi Samuel guilty of Aiding and Abetting Michael in committing the offence of Rape under Section 19(1)(b) of the Penal Code Act and i accordingly convict them.

Moses Kazibwe Kawumi

Judge

28<sup>th</sup> August 2017