

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KABALE
CRIMINAL SESSION CASE NO.361 OF 2013

UGANDA

PROSECUTOR

VERSUS

BYARUGABA ERIKANDO KABIGABWA

ACCUSED

BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

The accused was indicted for Rape contrary to sections 123 and 124 of the Penal Code Act .Particulars of the offence are that on the 21st October 2013 at Kanyabutano Village,the accused had carnal knowledge of Tumusiime Dellah without her consent.

The Prosecution called five witnesses and the accused did not call any witness.

The Complainant testified as PW2 and she told Court that on the 21st October 2013 at about 7.30 pm she went to Bazirakye's shop at Kanyabutano to buy her necessities .She met the accused in the shop and he suggested that he gives her money for sexual intercourse for the night. The accused then started abusing her and she left for another shop owned by a one Mzee Bruce. The accused followed her to Mzee Bruce's shop and together with Mwijukye and Sabiiti she was assaulted after which a piece of cloth was tied around her face. Mzee Bruce did not help her. She was lifted and whisked off to the home of the accused. The accused and the complainant were locked up in the house by the men who lifted her.

Her evidence was that she was weak and helpless. She consented to sex with the accused but escaped through a window at about 11.00pm without her knickers and the piece of cloth they had used to tie her face. Court heard that she went for her clothing on the 22nd October 2013 but the accused refused to hand them over and she reported the rape case to the village chairman who referred her to Nyanga Police Post. Police referred her to Maziba Health Center where she was treated and then sent to Kabale Hospital. Court heard that the accused infected her with HIV and that he and the others who assaulted her disappeared from the village to evade arrest.

Irumba Bernard testified as PW3.His evidence was that he was with the accused, Bruce, Sabiiti, Mwijuka and Bruce's wife when the complainant came to the shop . The accused told the complainant that he was going to take her for sexual intercourse for the night. The complainant was roughed up and carried away by the accused, Mwijuka and Sabiiti. That the complainant tried to make an alarm but was over powered. PW3 saw the complainant with a bruised face when she was going to report to the village chairman at about 10.00am the following day.

PW3 told Court that Bruce and his wife remained in the shop and the whole ordeal lasted about five minutes. Asked why he did not help the complainant, PW3 told Court that the accused and his colleagues were strong boys who could have assaulted him too so he feared to intervene but narrated the events to other village mates.

Christopher Rujirehe, PW4 told Court that sometime in October 2013, he met the accused who told him that he was planning to visit his mother in law to reconcile him with the complainant since she was still his wife. The mother in law referred to is the complainant's mother. PW4 told Court that he later on the 21st October 2013 learnt of what had happened to the Complainant. He referred the complainant to the village chairman on the 22nd October 2013. As the village crime preventer, he told Court that he confronted the accused who insisted that he had committed no offence since the complainant was his wife.

Dr. Ariharizira Moses testified as PW5. He examined the Complainant on the 30th October 2013 and found her with lacerations below the eyes and tenderness in the chest. The genitals were intact and he could not tell if she was raped. Detective Corporal Kansiime Pious who gave evidence as PW6 received the complainant at Maziba Police Post on 25th October 2013. He referred the complainant to Maziba health center where she got treatment. PW6 investigated the case and interviewed Bruce the shop keeper who confirmed that the accused had raped the complainant who was his wife. He later arrested the accused on the 28th November 2013 since he had relocated to Kavu village but had sneaked back to his garden on that day.

The accused narrated in his defence that he married the complainant's sister and later took on the complainant as his second wife with whom they got a child but separated in 2009. The accused further informed Court that PW3 and PW4 had sexual affairs with the complainant and they advised her to force him to surrender land for the child but he declined because the boy was still young. The accused claims that he was at his home with his first wife and children on the day he is alleged to have raped the complainant. On inquiry by the Court, the accused confirmed that he paid 600,000/= as dowry to the father of the complainant but they had since separated.

Counsel for the Prosecution urged Court to find the accused guilty on the basis of the complainant's evidence corroborated by that of PW3. It was submitted that much as evidence relating to the offence of rape was circumstantial, the words uttered by the accused and the subsequent forceful taking of the complainant to his home pointed to guilt. Prosecution further argued that it was not possible to prove penetration by medical evidence since the complainant was a mother and she was examined nine days from the day the offence was committed.

For the accused, it was submitted that penetration as a key ingredient in the offence of rape had not been proved and that the evidence of the complainant lacked corroboration. Counsel pointed to the grudge between the accused and the complainant relating to the refusal to give land to the son as the basis for framing the accused. I find it pertinent to observe that this crucial piece of evidence was not at all raised at the time the complainant or any of the

witnesses were cross examined. It is considered as an afterthought which this Court cannot take seriously.

The inconsistency in the evidence of the Prosecution witnesses was raised by Counsel for the accused. This relates to when the complainant left the home of the accused, where and by whom the complainant's face was covered with a piece of cloth and who allegedly carried her to the home of the accused.

Counsel further noted the disparity in the evidence of the complainant and PW3. While the complainant said she tried to make an alarm but was over powered and carried away, PW3 told Court she made loud noise before she was whisked off. I was invited to disregard the Prosecution evidence on account of its being inconsistent and for failure to prove the ingredients of the offence to the required standard.

In all criminal cases the Prosecution carries the burden to prove the ingredients of the offence charged beyond reasonable doubt. This however does not mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. The accused is under no obligation to prove his innocence which implies that any conviction is based on the strength of the prosecution evidence and not on the weakness of the defense adduced by the accused person.

The offence of rape is committed by a person who has unlawful carnal knowledge of a woman or girl without her consent or with her consent if it is obtained by force or by means of intimidation of any kind or by fear of bodily harm or by means of false representation as to the nature of the act or as in the case of a married woman by personating her husband.

Uganda V Kyambalango [1994—95]HCB 32.

The ingredients of the offence to be proved by the prosecution are; that a sexual act was performed on the complainant; it was done without her consent and by none other than the accused person.

There was no medical evidence to prove penetration in this case. The complainant was medically examined after nine days from the date the offence was allegedly committed. Prosecution argued that the complainant is an old woman and a mother which factors could not allow for evidence of rape to be detected through examining her sexual organs and more so after such a long time.

PW3 saw the accused and others assaulting and carrying away the complainant although he did not know what transpired thereafter. The same PW3 and PW4 saw the complainant with a bruised face the following morning and she made a report to the village chairman about the events of the evening.

PW5 examined the complainant after nine days and he reported lacerations below the eyes and tenderness in the chest. PW6 was not challenged when he testified that Mzee Bruce confirmed to him that the accused had sexual intercourse with the complainant but "*she is his wife*". The complainant and PW3 told Court that the accused said that he wanted to have sex

with her for the night and this evidence was not at all challenged. The complainant is a mature woman who knows what penetration is and she told Court that it happened to her at the home of the accused.

In **Uganda V Bonyo Abdu Criminal Case No.0017 of 2009** it was held that

“Medical evidence is good independent evidence to corroborate a complainant’s evidence as proof of penetration.”

I find the complainant’s evidence sufficient to prove penetration and all the circumstantial evidence alluded to above points to the occurrence of sexual intercourse which was the expressed intention of the accused.

The complainant emerged with a bruised face on the 22nd October 2013. This was confirmed by PW3 and PW4. The Police Officer saw bruises on her face when she went to report the case on the 25th October 2013. PW5 the examining Doctor confirmed the facial lacerations when he examined her on the 30th October 2013. In her own words the complainant told court;

“The accused had sexual intercourse with me. I accepted because I was helpless. I had been assaulted. At 11.00pm i escaped through the window and ran away...I left my knickers and piece of cloth at his home.”

The accused told Court that he could not have taken the complainant to his home when there was his wife and children who were staying with him and attributes all this to a grudge about the land he had refused to give to the child. The accused further attributes his woes to PW3 and PW4 who he claims are sexually connected to the complainant. This was another accusation not at all raised during the cross examination of the two witnesses. It was an afterthought brought out in the defense of the accused yet it was such a crucial aspect of his defence which should have been introduced when the same witnesses appeared to testify as Prosecution witnesses.

Considering both versions of evidence i find it logical for the accused to say that she escaped through the window. It corroborates her testimony to the effect that they were locked into the house by the men who helped the accused to carry her to his home which implies there was nobody else in the house. It also supports the evidence that she had to leave her knickers and the piece of cloth they had used around her face.

I find that the mode of transport used to carry the complainant to the home of the accused and the facial injuries sustained coupled with the mode of exit from the same house are not consistent with consent. The complainant was forced into sexual intercourse by the accused and his cronies.

It was argued for the accused that there was no corroboration of the alleged sexual act and hence the Prosecution had failed to prove penetration. I do not find this to be a valid proposition of the Law. The position of the Law is that corroboration of the victim’s evidence in sexual offences is only a rule of practice but not a mandatory requirement. Corroboration is

mandatory where a witness is a child of tender years and did not take oaths under Section 40 of the Trial on Indictments Act.

Court can therefore base a conviction on cogent evidence of the victim after a careful evaluation of all the evidence submitted in proof of and against the charge. The victim's evidence in this case was however corroborated as shown in this judgment.

Crim. Appeal No.42/2002 Basoga Patrick V Uganda; CA.Crim Appeal 329/2010 Okello Godfrey V Uganda; Mukungu VR (2003)2 EA.

I did not find the disparity in the Prosecution evidence so grave and intended to derail the cause of justice in this case and i ignored them. I find the circumstantial evidence adduced by the Prosecution capable of no other reasonable explanation than the guilt of the accused.

Before I take leave of this case, I wish to observe that what the accused purported to do has roots in one of the old forms of initiating marriage negotiations among some of the communities in Uganda. The practice is known as '*okunegura*' or '*okwetika*'. The girl would be kidnapped and carried to the potential suitor's home. An emissary would then be sent for marriage negotiations with her parents.

This practice is unconstitutional, illegal and abominable. It has no place in the modern world and should be shunned. Women have full rights to their bodies and have the choice as to when and with whom they may want to have sexual intercourse. They should not first be raped before marriage negotiations commence.

I find the accused guilty of the offence of Rape under Sections 123 and 124 of the Penal Code Act. I accordingly convict him.

Moses Kazibwe Kawumi

Judge

15th August 2017.