

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CRIMINAL CASE No. 0146 OF 2014**

**UGANDA** ..... **PROSECUTOR**  
**VERSUS**  
**NYINGALING KIZITO alias NYINGAMBE** ..... **ACCUSED**

**Before Hon. Justice Stephen Mubiru**

**JUDGMENT**

The accused is charged with one count of Rape c/s 123 and 124 of the *Penal Code Act*. It is alleged that the accused on the 21<sup>st</sup> day of June 2013 at Alakala village, Warr sub-county in Zombo District, had unlawful carnal knowledge of Kamela Ogeya, without her consent.

The prosecution case is that the accused used to live together with her 70 year old aunt, the victim. On the morning of 22<sup>nd</sup> June 2013, the victim reported to the brother and cousin of the accused that the accused had attacked her at around 3.00 am the previous night and raped her. Both witnesses saw her clothes were dirty, her whole body was covered with sand, she complained of pain the abdomen and walked with a bent-over gait. When they went to her home, they found the utensils scattered inside the house. The case was reported to the L.C.1 Chairman and subsequently to the police. She was referred to Warr Health Centre III where upon medical examination it was found that she had physical signs of sexual assault committed with violence. She was in pain and appeared angered. She looked mentally stable, but annoyed. She had a painful swelling in the left lateral face with bruises, a cut wound in lower lip a Painful right shoulder extending to the scapular and painful hip joints laterally. On her genitals there were cut wounds in the lateral vaginal orifice bilaterally with lacerations in the left and right regions of the vaginal orifice. The accused was arrested and charged. In his defence he pleaded alibi and a grudge over land with the prosecution witnesses as the reason he had been implicated. At the close of the trial, the learned State Attorney Mr. Emmanuel Pirimba submitted that the accused should be convicted since the prosecution had proved all the ingredients of the offence beyond reasonable doubt. Defence counsel on state brief Mr. Onencan Ronald submitted in response that

whereas he conceded to the first and second ingredients as having been proved to the required standard, it had not been proved beyond reasonable doubt that it is the accused who had raped the victim. There is no direct evidence and what was adduced was hearsay which should be rejected and the accused accordingly acquitted. In their joint opinion, the assessors advised that whereas the first two ingredients had been proved, the prosecution had failed to prove the last ingredient and therefore the accused should be acquitted.

In this case, the prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See *Ssekitoleko v. Uganda [1967] EA 531*). By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which he is charged and the prosecution has the onus to prove the ingredients of the offence beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused are innocent, (see *Miller Vs Minister of Pensions [1947] 2 ALL ER 372*).

For the accused to be convicted of Aggravated Defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. Carnal knowledge of a woman.
2. Absence of consent of the victim.
3. That it is the accused who had carnal knowledge of the victim.

Regarding the first ingredient, carnal knowledge means penetration of the vagina, however slight, of the victim by a sexual organ where sexual organ means a penis. Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence. The victim in this case did not testify because she was reported to have died before commencement of the trial. P.W.4, a Senior Clinical Officer at Warr Health Centre III, Mr. Amiloki Patrick presented a report of an examination carried out by a one Otim Tonny, a Clinical Officer at that health facility who examined the victim on 25<sup>th</sup> June 2013, four days after the day on which the offence is alleged to have been committed. This report was admitted by virtue of section, 30 of The Evidence Act which permits the receipt of statements made by

persons who cannot be found or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable. The attendance of this witness could not be procured without an amount unreasonable delay within the limited time of the current criminal session. It was also found to be admissible under section 30 (a) of the same Act as a statement made in the ordinary course of business, in records kept in the ordinary course of the discharge of his professional duty, as a document dated, written and signed by him.

In this report, exhibit P.Ex.1 (P.F.3A) the Clinical Officer certified that he examined the victim who was of the apparent age of 70 years. His findings were that there were signs of “sexual assault with violence.” This conclusion was based on other medical findings which included the fact that the victim was; “in pain with anger. Looks mentally stable, but annoyed. Painful swelling in the left lateral face with bruises, cut wound in lower lip. Painful right shoulder extending to the scapular. Painful hip joints laterally.” On the genitals he made the following findings; there were “cut wounds in lateral vaginal orifice bilaterally with lacerations in the left and right regions of the vaginal orifice.”To constitute a sexual act, it is not necessary to prove that there was deep penetration. The slightest penetration is sufficient. In agreement with the opinion of the assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that, there was carnal knowledge of Kamela Ogeya on 21<sup>st</sup> June 2013.

Proof of lack of consent is normally established by the victim’s evidence, medical evidence and any other cogent evidence. The victim in this case did not testify because she was reported to have died before commencement of the trial. The prosecution instead relied on the circumstantial evidence of the nature of injuries sustained by the victim and their location. They are indicative of resistance having been put up by the victim. P.W.1 Okech Chwinyu Robert saw her clothes were dirty, her whole body was covered with sand, she complained of pain the abdomen and walked with a bent-over gait. At her home, he found the utensils scattered inside the house. P.W.2 Canpara John Bosco, a brother of the accused, saw wounds on the neck of the victim, her clothes were dirty, she was lying down and complained she felt pain on passing urine. P.W.3 Pyei-ewiya Kenneth the L.C.1 Chairman saw wounds on the neck of the victim. In agreement with the opinion of the assessors, I am satisfied that the prosecution has on the basis of the

circumstantial evidence available, proved beyond reasonable doubt that, Kamela Ogeya did not consent to that sexual intercourse.

Lastly, the prosecution had to prove that it is the accused who committed the unlawful act. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime not as a mere spectator but as the perpetrator of the offence. There is no direct evidence. The accused denied having committed the offence. The prosecution relies on what the victim told P.W.1, P.W.2 and P.W.3 naming the accused as her assailant. Unfortunately this is inadmissible hearsay evidence and will not be relied upon by court since it does not fall under any of the exceptions to the rule against hearsay.

The prosecution then is left only with the circumstantial evidence of P.W.1 Okech Chwinyu who testified that the accused used to spend daytime at the home of the victim and that of P.W.2 Canpara John Bosco a brother of the accused, who said the accused was his caretaker of property he left in the home where the victim lived while on his teaching duties. I find this evidence to be too weak to sustain a conviction. Therefore in agreement with the joint opinion of the assessors, I find that the prosecution has failed to prove beyond reasonable doubt that it is the accused who committed the offence. He is therefore found not guilty and accordingly acquitted of the offence of Rape c/s 123 and 124 of the *Penal Code Act*. He should be set free forthwith unless he is being held for other lawful cause.

Dated at Arua this 6<sup>th</sup> day of February, 2017.

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Stephen Mubiru  
Judge.