

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL SESSIONS CASE No. 0039 OF 2014

UGANDA **PROSECUTOR**
VERSUS
WADRI FAROUK **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 8th day of June 2013 at Elefea village, Arua District, had unlawful carnal knowledge of Andruru Rose, without her consent.

The prosecution case is that on the fateful day, a neighbour's wife was brewing alcohol at the home of the complainant until late in the evening. Some customers who came to buy the alcohol bought some for the complainant as a result of which she became intoxicated. At around 10.00 pm she retired to the veranda of her house from where she soon fell asleep. She awoke much later to find herself in a bush about forty meters away from her home. A man was lying on top of her having sexual intercourse with her. She was too weak to fight of the man until moments later the neighbour and his wife who had been searching for her fearing that she had gone missing caught the accused in the act. The complainant was able to recognise her assailant as the accused once he was remove off her and in anger began boxing him. In his defence, the accused denied having committed the offence and attributed the accusation to grudge.

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 v. 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 P.W.2 Andruru Rose, testified that said when the assailant was pulled off her, she found that her private parts were covered in blood and she was feeling pain everywhere. P.W.1 Dr. Ambayo Richard of Police Health Centre III in Arua who examined the victim on 11th June 2013, three days after the day on which the offence is alleged to have been committed, corroborated he testimony.

In his report, exhibit P.Ex.1 (P.F.3A) which was admitted at the preliminary hearing, he certified that the victim was of the apparent age of 60 years. His findings were that there was "mild bruising of the vaginal opening. This is consistent with sexual intercourse having occurred within the last five days." To constitute a sexual act, it is not necessary to prove that there was deep penetration. It is further corroborated by P.W.3 Bayo Robert who testified that he participated in the search for the victim who was feared missing and found the accused on top of her. His wife, P.W.4 Orodrio Hellen, testified that she responded to the alarm raised by PW3 upon finding the victim and found the accused still on top of the victim with his trousers down and hands held at the back by PW3. When the victim stood up, P.W.4 saw that the victim's private parts and her clothes were soaked in blood. Therefore 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 Andruru Rose on 8th day of June 2013.

Proof of lack of consent is normally established by the victim's evidence, medical evidence and any other cogent evidence. The victim, P.W.2 Andruru Rose testified that she was drunk, and went to sleep on the veranda, only to find herself later about forty metres away from her house in a bush with a man having sexual intercourse with her. When rescued by P.W.3 Bayo Robert, P.W.4 Orodrio Hellen, said that the victim remained lying down totally drunk and did not know what had happened. This element was contested by counsel for the accused in his final submissions but on basis of that evidence and in agreement with the opinion of the assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that, Andruru Rose did not consent to that act 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. In his defence, the accused admitted having been at the home of the victim earlier that evening drinking alcohol but had left immediately and returned to his home when the issue of land over which he has a dispute with PW3 came up. There was a scuffle involving him and PW3 shortly before that in which the accused sustained an injury above the eye and on the neck and PW3 reported the case of rape as a frame up and to avoid being charged with assault.

To rebut that defence, the prosecution relied on the evidence of the victim who testified that she was only able to recognise the accused after he was pulled off her. P.W.3 and P.W.4 testified that they recognised him by torchlight. This being evidence of visual identification which took place at night, the question to be determined is whether the identifying witnesses were able to recognise the accused. In circumstances of this nature, the court is required to first warn itself of likely dangers of acting on such evidence and only do so after being satisfied that correct identification was made which is free of error or mistake (see *Abdalla Bin Wendo v. R* (1953) 20 EACA 106; *Roria v. R* [1967] EA 583 and *Abdalla Nabulere and two others v. Uganda* [1975] HCB 77). In doing so, the court considers; whether the witnesses were familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witnesses to observe and identify the accused and the proximity of the witnesses to the accused at the time of observing the accused.

As regards familiarity, the three identifying witnesses knew the accused prior to the incident. In terms of proximity he was approximately they were very close to him as they physically arrested him. As regards duration, they had ample opportunity to recognise him. Lastly, there was torchlight which provided light sufficient enough for them to recognise the accused. In the result, I have not found any possibility of mistaken identification. In any event he was arrested at the scene. Therefore in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that it is the accused who committed the offence.

In the final result, I find that the prosecution has proved all the essential ingredients of the two offences beyond reasonable doubt. The accused is therefore found guilty and accordingly convicted of the offence of Rape c/s 123 and 124 of the *Penal Code Act*.

Dated at Arua this 4th day of August, 2017.

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Stephen Mubiru
Judge.
4th August, 2017

7th August 2017

11.42 am

Attendance

Ms. Mary Ayaru, Court Clerk.

Ms. Harriet Adubango, Senior Resident State Attorney, for the Prosecution.

Mr. Oyarmoi Okello, Counsel for the accused person on state brief is present in court

The accused is present in court.

SENTENCE AND REASONS FOR SENTENCE

Upon both accused being convicted of the offence of Rape c/s 123 and 124 of the *Penal Code Act*, although she had no previous record of conviction against the convict the learned State Attorney prosecuting the case prayed for a deterrent sentence on grounds that; the offence of rape is serious and punishable by death. The victim is like a mother to the convict. She is the one who brought the accused up. The convict ought to have respected her. He abused her dignity as a woman. She prayed for a deterrent custodial sentence to help the accused reform and restore sanity in society to stop women from being disrespected.

In his submissions in mitigation of sentence, Counsel for the accused prayed for lenience on grounds that; he is a first offender. He has been in remand for four years. He has learnt a lesson while on remand and will therefore not commit the same offence again. In his *allocutus*, the convict stated that he has very many orphans he pays fees for. The work he does is because of those orphans. He also has his biological children. He prayed that those factors are considered.

In sentencing the accused, I am guided by *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*. Regulations 20 and 22 thereof specify circumstances by virtue of which the court may consider imposing a sentence of death in cases of this nature. None of them arose in the instant case. I have not found any other extremely grave circumstances as would justify the imposition of the death penalty. The manner in which the offence was committed was not life-threatening and neither was death a probable result of the accused's conduct. For those reasons, I have discounted the death penalty.

The next option in terms of gravity of sentence is that of life imprisonment. However, none of the relevant aggravating factors prescribed by Regulations 20, 22 and 24 of the Sentencing Guidelines, which would justify the imposition of a sentence of life imprisonment, are applicable to this case. Similarly, that possibility too is discounted.

In imposing a custodial sentence, Item 2 of Part I of the guidelines prescribes a base point of 35 years' imprisonment. This can be raised on account of the aggravating factors or lowered on basis of the mitigating factors. In doing so, the court must take into account current sentencing practices for purposes of comparability and uniformity in sentencing. I have therefore reviewed current sentencing practices for offences of this nature. In this regard, I have considered the case of *Kalibobo Jackson v. Uganda C.A. Cr. Appeal No. 45 of 2001* where the court of appeal in its judgment of 5th December 2001 considered a sentence of 17 years' imprisonment manifestly excessive in respect of a 25 year old convict found guilty of raping a 70 year old widow and reduced the sentence from 17 years to 7 years' imprisonment. In the case of *Mubogi Twairu Siraj v. Uganda C.A. Cr. Appeal No.20 of 2006*, in its judgment of 3rd December 2014, the court of appeal imposed a 17 year term of imprisonment for a 27 year old convict for the offence of rape, who was a first offender and had spent one year on remand. In another case, *Naturinda Tamson*

v. Uganda C.A. Cr. Appeal No. 13 of 2011, in its judgment of 3rd February 2015, the Court of Appeal upheld a sentence of 18 years' imprisonment for a 29 year old appellant who was convicted of the offence rape committed during the course of a robbery. In *Otema v. Uganda, C.A. Cr. Appeal No. 155 of 2008* where the court of appeal in its judgment of 15th June 2015, set aside a sentence of 13 years' imprisonment and imposed one of 7 years' imprisonment for a 36 year old convict of the offence of rape who had spent seven years on remand. Lastly, *Uganda v. Olupot Francis H.C. Cr. S.C. No. 066 of 2008* where in a judgment of 21st April 2011, a sentence of 2 years' imprisonment was imposed in respect of a convict for the offence of rape, who was a first offender and had been on remand for six years.

Considering the gravity of the offence, the circumstances in which it was committed in the instant case and the fact that the complainant was raped in her own home, by a person she raised as her own child, the punishment that would suit the convict as a starting point would be 30 years' imprisonment. The sentence is mitigated by the fact that the accused is a first offender, he is now 54 years old and with considerable family responsibilities. The severity of the sentence he deserves has been tempered by those mitigating factors and is reduced from the period of thirty years, proposed after taking into account the aggravating factors, now to a term of imprisonment of 20 (twenty) years' imprisonment.

It is mandatory under Article 23 (8) of the *Constitution of the Republic of Uganda, 1995* to take into account the period spent on remand while sentencing a accused. Regulation 15 (2) of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, requires the court to "deduct" the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. This requires a mathematical deduction by way of set-off. From the earlier proposed term of 20 (twenty) years' imprisonment arrived at after consideration of the mitigating factors in favour of the convict, he having been charged on 14th June 2013 and has been in custody since then, I hereby take into account and set off the four years and one month as the period the accused has already spent on remand. I therefore sentence the accused to fifteen (15) years and eleven (11) months' imprisonment, to be served starting today.

The convict is advised that he has a right of appeal against both conviction and sentence, within a period of fourteen days.

Dated at Arua this 7th day of August, 2017.

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Stephen Mubiru
Judge.
7th August, 2017.