

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL SESSIONS CASE No. 0034 OF 2016

UGANDA **PROSECUTOR**
VERSUS
OGAMA JOSEPH **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 17th day of September 2015 at Hakhua village, in Arua District, had unlawful carnal knowledge of Amasia, without her consent.

The prosecution case is that the on that day at around 10.00 am, the victim who suffers from a mental disability, went crying at the top of her voice to Aroi Health center III where she met P.W.2 a midwife, and told her she had been raped by the accused. When PW2 examined her, she found seminal fluids flowing from her genitals. She offered her emergency treatment and reported the matter to her relatives who in turn reported to the police. The accused was arrested and in his defence he set up an alibi saying he had spent the morning of that day watching some Chinese construction workers and the later part of the day at a feast which took place at the home of one of the residents within the trading centre.

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 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 did not testify because after conducting a *voire dire*, the court established that she understood the questions put to her and was capable of giving rational answers to them. Section 40 (1) of *The Trial on Indictments Act*, requires every witness in a criminal cause or matter before the High Court has to be examined upon oath, the only exception being a child of tender years who not only is possessed of sufficient intelligence but also understands the duty of telling the truth.

In the instant case, through the *voire dire*, it was established that the victim, although an adult, by reason of her mental disability neither understood the nature of an oath nor the duty of telling the truth and for that reason was incompetent to testify. P.W.2 Bako Bellar Amaria, a midwife at Aroyi Health Centre III, testified that she examined the victim on 17th September 2015, the very day on which the offence is alleged to have been committed, and found that she had semen on her vulva and thighs. Her vulva was swollen and sensitive to the touch. P.W.3 Imalingat Innocent, a Clinical Officer attached to Police Health Centre II in Arua, examined the victim on 21st September 2015, four days following the date on which the offence is alleged to have been committed, and in his report, exhibit P.Ex.2 (P.F.3A) certified that she was of the apparent age of 38 years. His findings were that the genitals were "well developed but the hymen was not palpable (ruptured)." He explained that an examination done after five or more days is unlikely to yield anything as any tears or wounds are likely to have healed by then. He could not determine when the hymen was ruptured.

Corroboration of the testimony of P.W.2 can be found in the circumstantial evidence of the distressed condition of the victim as seen by P.W.2. It can also be found in the testimony of P.W.5 No. 56675 DC Drapari Sunday, who was led to the scene of the crime on 17th September 2015, one week after the day on which the offence is alleged to have been committed, where the witness found some torn pieces of cloth whose pattern and fabric matched that which the victim was wearing. 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 Amasia on 17th September 2015.

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 after conducting a *voire dire*, the court established that she understood the questions put to her and was capable of giving rational answers to them, but she neither understood the nature of an oath nor the duty of telling the truth and for that reason was incompetent to testify. The prosecution is relying only on the circumstantial evidence of what was seen by P.W.2. She knew the victim before but on that day she turned up at the clinic in a distressed condition. She was crying at the top of her voice and there was semen on her vulva and thighs. 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, Amasia did not consent to that act of 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 essentially relies on the testimony of P.W.2 and that of P.W.4. Nyai Mark the L.C.1 Chairman. The victim reported to each of them that it is the accused who had raped her.

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. As a result the prosecution has failed to adduce evidence placing the accused at the scene of crime. His defence of alibi remains un-assailed. Therefore in disagreement 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 2nd day of August, 2017.

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Stephen Mubiru
Judge.
2nd August, 2017