THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT TORORO

HCT – 04 – CR – SC – 0032/2014

UGANDA …… PROSECUTOR

VERSUS

KALANI MARTIN ……. ACCUSED

JUDGMENT

BEFORE HIS LORDSHIP HON. JUSTICE HENRY I. KAWESA

Accused was charged of rape C/S 123 and 124 of the Penal Code Act.

The allegation is that Accused on 27/5/2012 at Maga zone in Tororo District had unlawful Carnal knowledge of Agola Esther Lucy without her consent.

The ingredients of rape are:-

1. Unlawful sexual act
2. Lack of consent
3. Participation of the accused.

The burden is upon the prosecution to prove the above ingredients beyond all doubt.

Accused denied the charge and prosecution to prove the charge relied on the following evidence:
PEXI which is PF3A, DE2 PF24, **PWI Esther Lucy, PW2 Okiru Chuma, PW3 Aketch Immaculate**.
Accused gave sworn evidence and also relied on DE1 (Police statement of **Chuma**).

Both counsel conceded on the fact that there was sexual intercourse, and this intercourse was not with the consent of the victim. The only ingredient that was contested by the defence was that of the participation of the accused.

This court agrees that from available evidence through PW1, PW2, PW3 and PE1, and PE2 the prosecution proved that;

1. There was a sexual assault on the victim by a male sexual organ.
2. The victim did not consent to this sexual assault.

The next question therefore is who was the assailant?

The prosecution through PW1, PW2 and PW3, proposes that it was the accused.

The defence through DI (accused and DE1) proposed that it was not accused.

In counsel's submissions to beef up her defence, she argued that identification of the assailant by PWI was not possible given the fact that it was still dark.

She further found PW2's evidence inconsistent, by reason of which she exhibited his police statement as DEI. She claims his evidence is a lie. PW3's evidence was in her view unbelievable; being a sister of PWI in that it is impossible to believe that she could stand and watch and make no alarm or call for help.

The prosecution on the other hand insisted that PWI was able to identify the assailant, by virtue of his appearance. He struggled with her for about 40 minutes. He boxed her, tore her knicker, and lay on top of her about five minutes while playing sexual intercourse with her. She also testified that there was moonlight; she was able to remember his face. Next morning she asked **PW2 –Chuma**- whom she knew very well who the boy who chased them was, and he revealed his name as **Kalani** – the accused. **PW3 (Chuma**) corroborated that testimony.

Regarding discrepancies in PW2's testimony prosecution relied on the case of ***Mubangizi Alex VS Uganda CACA 0012/2012*** to argue that identification parades are only a means of corroboration of the identification claim made by a witness. Where there was overwhelming evidence that the appellant was properly identified at the scene, it would be a affront to just acquit them. He also referred to the case of ***Alfred Tajar (1969) EA 1977*** to argue that minor inconsistencies which do not go to the root of the matter can be ignored if they do not affect the substance of the prosecution's case.

Regarding the defence, the prosecution argued that it was a mere denial and the alibi was sufficiently destroyed , by accused's statement at police placing himself at the scene of crime.

I have examined all points raised on the evidence and find as follows:

1. **IDENTIFICATION**

The identification rules as set up in the case of ***Abdalla Nabulere & others VS Uganda Criminal Appeal No.9 (1978-9) HCB 77*** as follows:-

> *"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the Judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications.*
>
> *The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The Judge should then examine closely the circumstances in which the identification came to be made particularly the* length of time, the distance, the light, the familiarity of the witness with the accused. *All these factors go to the quality. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger.*
>
> *When the quality is good as for example when the identification is made after a long period of observation or in satisfactory conditions* by a person who knew the accused before, a court can safely convict even though there is no other evidence to support the identification evidence p*rovided the court adequately warns itself of the special need for caution*". (Emphasis added mine).

I did specifically caution the assessors and do again caution myself on the need for proper identification in this type of case.

I note from evidence that PWI in evidence in Chief and in cross examination told court on oath that she did not know her assailant before but was able to identify him as the boy whom she met with **PW2 (Chuma**). She described him as PW2 (**Chuma**'s friend) whose name she did not know, but his face was familiar because it remained in her memory after the incident

– (see PWI's evidence in chief). PWI further told court that she observed Accused's appearance and face as they struggled for over 40 minutes, and during the act when he slept on top of her and began having Sexual intercourse with her forcefully.

It has also to be remembered that PWI, said accused was with PW2 (**Chuma**) when he began chasing them. PW2 (**Chuma**) testified that he was with accused ad another when PWI and PW3 came, passed them and accused began chasing them.

Evidence of PWI in collaborated by PW2 who knew accused before. PW3 however, also mentions in evidence that as they moved with PWI, they met PW2 (**Chuma**) with his friend and another. The accused chased them, and first caught her. They struggled; she freed herself and ran away. PWI fell down, and accused caught up with her. They struggled as PW3 watched. She made an alarm which attracted people and seeing people the accused took off.

The sum total of all that evidence in my view satisfies the conditions for proper identification in that:

1. the victim saw the accused who chased her.
2. they spent a long time struggling
3. there was moonlight
4. the accused was a known friend of PW2.
5. PW2 and PW3 all saw accused chase the victim.

There was no break in this chain of events to give room for any intervening circumstances to propose that the rape was by another male person. The evidence of PW1, PW2 and PW3 shows that this identification was proper.

2. INCONSISTENCIES IN EVIDENCE

Save the minor discrepancies in the evidence of PW2 regarding whether the knickers were recovered and whether he followed the girls to the scene or not, I do not find any major inconsistencies on record. I therefore agree that as per the case of ***ALFRED TAJAR EA*** (supra), these are minor details especially as what counsel dwelt on were information contained in DE1, (police statement) which is a statement not on oath. The statements were denied by the alleged author, who said he never told police so. A police statement is inferior in evidential value to the witness's own testimony because in court he is on oath whereas the police statement it is just a plain statement not on oath. I will therefore disregard the police

statement and take the evidence of PW2 on oath as truthful. His evidence therefore corroborates PW1 and PW3's evidence.

3. ALIBI

The defence of Alibi once set out raises a different standard of legal burdens on both the accused and the prosecution.

The case ***R V Chemulon Wero Okugo (1993) 4 EACA*** stated:

> *"The burden on the person setting up the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible as to have committed the imputed act."*

Further more in ***R V Sukha Singh Son of Wazir Singh and others (1939) EACA 145*** quoted in ***Festo Abdroo Asenua V Uganda Criminal Appeal 1 of 1998*** (SC Mengo) it was held that;

> *"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can…."*

However the court further pointed out in ***Festo Androa*** (supra) that:

> ***"****Its trite law that by setting an alibi an accused person does not thereby assume the burden of proving its truth so as to raise doubt in the prosecution case"*.

With the law above in mind an accused must account properly for the time of the transaction to show that there is no possibility that he committed the crime.

The prosecution then assumes the burden to show and prove that the accused indeed committed the crime by placing him at the scene of crime.

I have gone through the evidence, the defence alleged that the accused was not at the scene but the evidence of PW1, PW2 and PW3 is of people who saw. PW2 is a friend of his and confirmed he was with accused when the accused ran after the victim. There is therefore no merit in the defence of alibi. It has been sufficiently destroyed by the prosecution.

In the final analysis therefore there is enough evidence on record to prove that accused participated and was the culprit in this crime.

The assessors in their opinion advised this court to convict the accused.

I do agree with this opinion. I therefore find that the prosecution has proved this case beyond all reasonable doubt. The accused is found guilty of the charge. He is convicted accordingly. I so order.

Henry I.Kawesa
Judge
26/2/2016

26/2/2016

Accused present

Evelyn Akello for accused

RSA Khaukha

Court: Judgment delivered in open court

Signed: Justice Henry I.Kawesa
Judge
26/2/2016

RSA: The offence was committed with much violence as PF3A. There was sufficient premeditation by accused who had a cow horn who threatened the sister. Offender was doing it in front of the sister. It has had great impact. We pray for life imprisonment.

Signed: Justice Henry I.Kawesa
Judge
26/2/2016

Akello: We pray for leniency. His young 21 years. Need time to reform. If given a favourable sentence. Has no previous record. Has been on remand since May 2012 todate a period of about 4 years. We pray for mercy. We propose 10 years.

Signed: Justice Henry I.Kawesa
Judge
26/2/2016

Alloctus: I have spent long on remand.

SENTENCE AND REASONS

Accused convicted of rape.

The maximum is death. Mid range is 35 years.

Mitigating factors are that

- first offender
- Has spent time on remand since 2012.

- No previous conviction

Aggravating factors

- Accused premeditated offence
- Accused committed offence against a vulnerable young girl (first sexual encounter)
- Committed in presence of her sister.
- Had a horn to intimidate and threatened violence (Boxed) the victim
- The impact on the community/the family.

From the above aggravating factors court cannot move below the starting point. The period on remand subtracted, accused is sentenced to a custodial period of 26 years.

I so order.

Signed: Justice Henry I.Kawesa
Judge
26/2/2016

Court: Right of Appeal explained.

Signed: Justice Henry I.Kawesa
Judge
26/2/2016