

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT LUWERO

CRIMINAL SESSIONS CASE No. 0092 OF 2016

UGANDA

PROSECUTOR

VERSUS

KIZITO ROGERS

ACCUSED

Before Hon. Justice Stephen Mubiru

RULING

The accused in this case is indicted 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 April 2014 at Bweyeyo village in Luwero District, had unlawful carnal knowledge of Nassozi Sofia without her consent. The accused pleaded not guilty to the indictment. In a bid to prove the indictment against the accused, evidence of one witness was admitted during the preliminary hearing and the prosecution called two additional witness then closed its case.

At the close of the prosecution case, section 73 of *The Trial on Indictments Act*, requires this court to determine whether or not the evidence adduced has established a *prima facie* case against the accused. It is only if a *prima facie* case has been made out against the accused that he should be put to his defence (see section 73 (2) of *The Trial on Indictments Act*). Where at the close of the prosecution case a *prima facie* case has not been made out, the accused would be entitled to an acquittal (See *Wabiro alias Musa v. R [1960] E.A. 184 and Kadiri Kyanju and Others v. Uganda [1974] HCB 215*).

A *prima facie* case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, would convict the accused person if no evidence or explanation was set up by the defence (See *Rananlal T. Bhatt v R. [1957] EA 332*).

The evidence adduced at this stage, should be sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. It is the reason why in that case it was decided by the Eastern Africa Court of Appeal that a *prima facie* case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution though at this stage is not required to have proved the case beyond reasonable doubt since such a determination can only be made after hearing both the prosecution and the defence.

There are mainly two considerations justifying a finding that there is no *prima facie* case made out as stated in the Practice Note of Lord Parker which was published and reported in [1962] *ALL E.R 448* and also applied in *Uganda v Alfred Ateu* [1974] *HCB 179*, as follows:-

- a) When there has been no evidence to prove an essential ingredient in the alleged offence,
or
- b) When the evidence adduced by prosecution has been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it.

Both counsel opted not to make any submissions. At this stage, I have to determine whether the prosecution has led sufficient evidence capable of proving each of the ingredients of the offence of Rape, if the accused chose not to say anything in his defence, and whether such evidence has not been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it. For the accused to be required to defend himself, the prosecution must have led evidence of such a quality or standard on each of the following essential ingredients;

1. Carnal knowledge of a woman.
2. The act was performed without the consent of the victim.
3. That it is the accused who performed the unlawful sexual act on the victim.

Regarding the ingredient requiring proof of carnal knowledge of a woman, there has to be evidence of sexual intercourse between a male and female in which there is at least some slight

penetration of the woman's vagina by the man's penis. In the instant case, there is the direct evidence of the victim P.W.2. Sophia Nassozi to the effect that she was overpowered by her assailant who threw her onto the ground, held her mouth, knelt on her legs and proceeded to have sexual intercourse with her. Her testimony is not corroborated by the medical evidence of P.W.1. admitted during the preliminary hearing since exhibit P. Ex. 1 (P. F. 3A) dated 15th May, 2014 (almost a month after the incident) does not disclose any significant findings relating to the attack. Despite this, I find that the prosecution has led sufficient evidence capable of supporting a finding that, Sophia Nassozi was subjected to an act of sexual intercourse, if the accused chose not to say anything in his defence.

Regarding the ingredient requiring proof of carnal knowledge having been obtained without the consent of the victim, there is the direct evidence of the victim P.W.2. Sophia Nassozi to the effect that she was overpowered by her assailant who threw her onto the ground, held her mouth, knelt on her legs and proceeded to have sexual intercourse with her. This aspect of her testimony was not discredited as a result of cross examination nor is manifestly unreliable. I find that the prosecution has led sufficient evidence capable of supporting a finding that, Sophia Nassozi was subjected to an act of sexual intercourse, if the accused chose not to say anything in his defence.

The last ingredient requires proof that it is the accused who committed the unlawful act of sexual intercourse on the victim. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime. In this case we have the direct evidence of a single identifying witness, P.W.2. Sophia Nassozi the victim who explained the circumstances in which she was able to identify the accused as the perpetrator of the act. Where prosecution is based on the evidence of a single indentifying witness, the Court must exercise great care so as to satisfy itself that there is no danger of mistaken identity (see *Abdalla Bin Wendo and another v. R (1953) E.A.C.A 166*; *Roria v. Republic [1967] E.A 583*; and *Bogere Moses and another v. Uganda, S.C. Cr. Appeal No. 1 of 1997*).

In the instant case, although the witness testified that there was very bright moonlight on the night of her attack and that there was close proximity between her and her assailant because of the sexual intimacy, I note that the assailant was wearing a cape throughout the attack, she did

not know the assailant before, the incident took only a few minutes and she was all the time being strangled, threatened with death and was thus under considerable distress. Despite the leads provided by the victim in her statement to the police, the investigating officer P.W.3 No. 30409 D. Cpl. Kabajasi Judith, apart from recording statements from the victim, did not go out to visit the scene of crime or interview any other persons. As a result there is no physical or other independent evidence to corroborate the evidence of the single identifying witness under difficult conditions. She more or less conducted her own investigations when weeks later she saw the accused at a last funeral rites wearing a stropped T-shirt just like the one her assailant was wearing. He inquiries revealed the name of the accused and that he was a son of one of the residents on the village. It also revealed that the accused is a notorious bhang smoker and that he has committed similar offences before. This appears to have fortified her recognition of the accused whose accuracy cannot be independently verified.

I have consequently formed the opinion that although this evidence is not manifestly unreliable, it was discredited as a result of cross examination to the extent that it has been shown that this evidence is not free from error or mistake and if the accused chose to remain silent, this court would not have evidence sufficient to hold him responsible for the unlawful act of sexual intercourse with the victim.

I therefore find that no prima facie case has been made out requiring the accused to be put on his defence. I accordingly, find the accused not guilty and hereby acquit him of the offence of Rape c/s 123 and 124 of the *Penal Code Act*. He should be set free forthwith unless he is lawfully held on other charges.

Dated at Luwero this 17th day of January, 2018.

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Stephen Mubiru

Judge.

17th January, 2018.