

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
HCCT-00 – CR- SC-NO- 1332 OF 2016

UGANDA ----- PROSECUTOR

5

VERSUS

TURIGYE ANDREW ----- ACCUSED

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

10 The Accused person Turigye Andrew was indicated for rape contrary to section 123 and 124 of the Penal Code Act.

15 It is alleged by the Prosecution that, on the 11th day of April, 2013, at Basement Parking Yard, Nakumatt Supermarket, Nakawa Division, in Kampala District, the Accused Turigye Andrew had unlawful carnal knowledge of Akaserengait Joan without her consent.

20 The Accused denied the charges and the Prosecution called six witnesses in a bid to prove its case.

The issues for this court to determine that also constitute the ingredients of the offence are:-

- 1) Whether there was carnal knowledge of the complainant.
- 2) If so, whether the act was committed without her consent or with consent obtained by threats, deception or violence.
- 3) Whether it was the Accused person who had carnal knowledge of the complainant.

35 In determining the issues, I bear in mind the duty of the Prosecution to prove all the ingredients of the offence beyond all reasonable doubt. And that, the duty never shifts except in a few exceptional cases provided for by law.

Even when the Accused raises some defence, it is still upon the Prosecution to prove that nevertheless, the offence was committed. This is because the Accused bears no legal burden to prove his innocence.

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The Prosecution evidence against the Accused should be so strong as to leave only a remote possibility in the Accused's favour.

10 What now remains is to evaluate the evidence of both the prosecution and the defence to determine whether the prosecution discharged its burden on each of the ingredients of the offence to the required standard.

Whether there was carnal knowledge: To prove this ingredient, the Prosecution relied upon the evidence of Pw2 the complainant and Pw1 the Doctor who examined her on 12.04.13 and also examined the accused person on 18.05.13.

20 Pw2 testified that she knows the Accused person Turigye Andrew aka Romeo. They became friends on Facebook; where the Accused at first disguised himself as Penina. With time Penina told Pw2 about a brother Romeo and insisted that the two became friends.

25 Pw1 then began chatting with Romeo who told her that he liked her, but she told him she has a boy friend.

30 On the day of the alleged offence, Pw2 agreed to escort Penina to the airport as she was travelling back to London. She agreed to meet with Penina's brother at Tuskeys, Opposite Makerere University. But because she delayed to go to Tuskeys, the two agreed to meet at Nakumatt Parking Lot, where he had parked his vehicle and the two met for the first time. The Accused was seated in the car and Pw2 entered the vehicle and got in front thinking they were going to the Airport.

35 The accused moved to the back seat of the car and asked Pw2 to move there. When Pw2 refused, the accused who had by then locked the vehicle shouted at her insisting that she moves to the back seat.

40 The accused adjusted the car seat and forced Pw2 to sit down on the carpet. He became very aggressive and she tried to calm him down, asking him to let her go and they would talk later.

She also told him that she had lectures at 5pm and she needed to prepare but Accused would not listen. He became brutal and told Pw2 that if she did not let him do what he wanted to do, he would kill her. By then he was strangling her and she was crying. She pretended to have fainted but and told her she was pretending and that if she woke up he would still do the same.

She tried to get up, and knocked on the window but the Accused had put on loud music and threatened to harm her if she did not calm down. That the car had tainted windows.

Accused then tried to remove her knickers but she resisted and held it, but that the next thing she recalls is the car driving off and believes that she must have blacked out. She was out of the car; her knicker was in her bag together with a cloth used for cleaning the car. Her phone had been taken but the sim card had been removed and left behind.

Pw2 then got a bodaboda and went back to the Hostel where she was staying with her roommate. She found her roommate in a discussion with a couple of friends.

She went to the bathroom without telling them anything as she felt embarrassed. When she checked herself, she was wet. She dumped her knicker into the trash and went to her bed and began crying.

When her room mate asked her, she informed her she had been raped. Since some of her roommate's friends know a Police Officer, they advised her to report to Police. She went with them and reported to Jinja Road Police Station, and made a statement.

The Police advised her to get emergency treatment (PEP) and took her to a Teenage Center for the same.

After about 4 days, she was taken by a Police lady for medical examination and she was examined by Pw1.

The Accused person was eventually arrested by Police who were in the company of Pw1's boyfriend. Pw2 remained in the car.

It was the further testimony of Pw2 that, the father of the Accused and his uncle called her and proposed to give her and her mother money to

drop the case. The met at Mamerito Hotel but that she refused to drop the case.

5 Pw2 was subjected to medical examination by Pw1 Dr. Ojara Santo on 12.04.13. He found her to be 19 years of age and of normal mental status. He found her with soft tissue injury with tenderness around the neck. She also had a small scratch on the right thigh middle inner part. She has no injuries to the genitals. The Hymen was ruptured but not recently, meaning she was sexually active.

10 The injury to the neck was caused by a blunt object possibly due to strangulation.

She tested negative for HIV and a vaginal swab was taken to be sent to the Government Laboratory for DNA comparison.

15 By the time of the examination, Pw2 was already on ARVS (Post exposal treatment) and Pw1 recommended that she gets emergency contraceptives.

20 Pw2 had told the doctor that she had been raped on 11.04.13, in a car.

The doctor concluded that Pw2 was sexually active and had been injured in an attack. In his assessment, some one tried to strangle her. The Police form 3A was admitted in evidence as Exhibit P₁.

25 The same doctor also examined the Accused person on 18.05.13. He was 21 years of age then and tested negative for HIV. He was in a good general condition and of normal mental status. He had no physical injuries to the body.

30 The doctor took a blood sample from the Accused to be taken to the Government Analytical Laboratory for DNA. Police form 24 on which the Accused was examined was tendered in evidence as Exhibit P₂.

35 Pw3 Onen Geoffrey is the Principal Government Analyst at the Government Analytical Laboratory. He received eight (8) exhibits that included test tubes with the vaginal swab of Pw2 – A, cotton wool vaginal swab of Pw2 – B, and the blood sample of the Accused - C.

40 Upon examination of the samples, he found that Exhibit A had a mixed DNA profile which he used to compare with the DNA of Exhibit C the blood sample of Accused.

From the mixed profile, Pw2's profile matched five (5) positive while the suspects file matched four (4) positives.

5 He concluded that there was moderately strong generic evidence that the victim (Pw2) was the potential contributor to the mixed DNA profile recovered from the vaginal swab.

10 And there was also moderate generic evidence that the Accused person was the potential donor to the mixed DNA profile recovered from the vaginal swab. The report was admitted as Exhibit P₃. Both Pw2 and the Accused contributed to the mixed DNA profile.

15 Pw4 No. 27896 D CRL Achuku Rose a Police Officer was allocated the case file on 12.04.13. She confirmed taking Pw2 for medical examination on 12.04.13 and that vaginal swab were extracted from her.

20 Further that when Accused was arrested, she also accompanied him to the doctor (Pw1) together with DCPL Laker and Accused was examined and a blood sample extracted from him on 16.05.13.

25 And that the blood samples and vaginal swab were submitted to the Government Chemist for analysis, together with clothes brought to Police by Pw2 – See Exhibit P₅ and P₆.

30 Pw5 Nabilah Nankya stated that she first interacted with the Accused on face book and saw his face there. When the Accused posted her photograph on face book, his former girl friends warned Pw5 to block him on the ground that he was a fake guy a rapist and a thief.

The girls created a chat group where they exchanged information Pw5 asked Accused if he had ever raped anyone and he was bitter with her for choosing his ex girl friends over him.

35 Later she met Pw2 who told her how she had been raped at the Nakumatt Parking. Later she and one Linda connected Pw2 to Gilbert Arinaitwe; the three of them met him and narrated their stories. Later Accused was arrested and the girls recorded their statements. The first
40 time Pw5 saw Accused physically was at Police. She met Pw2 around late March, after she had been raped and they got Arinatwe to help.

Apart from Pw2, Barbra, Linda and Vanessa claimed Accused had slept with them but had not raped them.

5 Pw6: No. 31579 DSgt Wassajja Karoli is the Divisional Exhibit Store man who received Exhibits P₈- P₁₄ from the investigating Officer. He identified the exhibits and they were admitted in evidence.

10 In his defence, the Accused stated that he was dating Pw2. On the fateful day they agreed to meet at Nakumatt. Accused parked in the basement and when Pw2 arrived and he suggested that they go for lunch in a nearby Restaurant, she insisted that she wanted to talk in the car. They talked for a while, became intimate and had sex until they were interrupted by a Police guard who was moving around the area.

15 The defence conceded that the Accused had sexual intercourse with the victim (Pw2) although they insist the act was consented.

20 The court is accordingly satisfied and finds as a fact that there was carnal knowledge of the Pw2 by the Accused person.

The first and third ingredients of the offence were therefore proved beyond reasonable doubt.

25 What remains for the court to determine is **whether the sexual intercourse was committed without the consent of Pw2 or with consent obtained by threats, deception or violence.**

30 As already indicated in this judgment, the victim met the Accused at Nakumatt Parking Lot as agreed. She found him seated in the car. Though she was meeting the Accused for the first time, Pw2 entered the vehicle and sat in front.

35 The Accused moved to the back seat of the vehicle and asked Pw2 to move there. That when she refused to move, the Accused who had by then locked the vehicle shouted at her, insisting that she moves to the back seat. He then adjusted the car seat and forced her to sit on the carpet, became very aggressive and would not listen when she tried to calm him down. That he became brutal and threatened to kill her if she did not do what he wanted. By then he was strangling her and she
40 pretended to have fainted but he saw through her pretense. That the Accused had put on loud music and her efforts of knocking on the

window yielded no help. And he threatened to harm her if she did not calm down.

When the Accused tried to remove her knickers, she resisted and held it.
5 The victim believes that she must have blacked out as the next thing she recalls is the car driving off. She was out of the car, her knicker was in her bag together with a cloth used for cleaning the car, and her sim card had been left behind and the phone taken. She got a bodaboda and returned to her hostel.

10 Pw1 the doctor who examined the victim confirmed that she had a soft tissue injury with tenderness around her neck, and a small scratch on the middle of the right thigh, inner part. Although she had no injury to her genitals and doctor concluded that she was sexually active, he
15 concluded that she had been injured in an attack. That is that someone tried to strangle her.

The Accused while admitting that they were dating and agreed to meet at Nakumat, contends that it is Pw2 who insisted on remaining in the
20 vehicle to talk. They talked for a while, became intimate and had sex until they were interrupted by a Police guard who was moving around the area.

That after the sexual act, she picked out her towel, cleaned the Accused
25 and herself and kept the towel.

That as he drove her back to the hostel, Pw2 requested him for money and Accused told her he did not have any. As they approached the Makerere gate, Pw2 asked him to stop so that she gets out if he was not
30 going to help her with money. He stopped and she moved out yelling at him saying he would pay for his mistakes.

Later that night, the Accused says he received a call from a gentleman claiming to be a relative of Joan. The man asked the Accused to pay
35 Pw2 her money and make life easier for everyone. The Accused hang up.

A few days later, the Accused kept on getting calls from Joan (Pw2) and other people claiming to be Policemen, all insisting that he pays Pw2.
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On May, 2013, the Accused reported to Mutungo Police Post that he was receiving threats. After trying to talk to Pw2 in vain, the O.C. Mutungo advised the Accused to report back in case the threats continued.

5 A day later, the Accused was arrested from his home by Police men who included Arinatwe, in company of Pw2 and her friends. He was put in a cell.

10 The next day, he made a statement. The following day, Arinaitwe picked him from the cell and took him to an Officer not in uniform to make another statement. When Accused refused to make the statement, he was returned to the cell.

15 Next day, he was again picked up by Arinaitwe and taken to an Office where there were two other gentlemen. They tried to convince him to make another statement, but Accused refused.

A few days later, he was released on bond.

20 In November, 2013, the Accused was remanded for two weeks at Luzira. While in prison, he got a skin infection which resulted into bleached skin. He was granted bail and was admitted at Nsambya Hospital.

25 While in hospital, Arinaitwe went to visit him in company of another person. Accused was discharged after a week. It took him a few months to recover although the skin still troubles him. He has remained on bail since then.

30 Dw2 the father of the Accused person recalls that Accused was arrested around 14.05.13 and taken to Jinja Road Police Station. The next he talked to the Accused person who informed him that Pw2 was his girlfriend, how they met at Nakumatt in April and had some amusement in the vehicle. But that, later on Pw2 began demanding for money. But since the Accused was unable to provide the money, Pw2 made the
35 allegation of rape.

40 Dw2 visited the scene where the alleged rape took place. That is the lower parking of Nakumatt at the entrance of the supermarket. There were watchmen moving around and guarding the parked vehicles. He asked one of them if there had been any rape case in the parking lot in the recent past. But he had not heard of anything of that sort.

This witness highly doubts that a rape could take place at that place at about 4:00pm without anyone noticing. Further that, there are CCTV cameras at the place and such an incident would have been recorded by the cameras.

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Later when Dw2 went back to the Police Station, he talked with the mother of Pw2 briefly. She told him that the matter could be sorted out. They exchanged telephone numbers and agreed to meet again.

10 After about a week, they met at Tourist Hotel, near Nakasero Market. She told Dw2 that if he was able to raise facilitation incurred during the arrest, the matter could be settled outside court. She promised to make consultations and tell him when they met again.

15 They met again a week later at the same hotel and she asked for Shs. 30,000,000/-. When he asked her to revise the figure, she told him she would consult again and relay the final figure when they met again.

20 When the two met again at NSSF Building opposite Former ESSO Corner at a salon, Pw2's mother told Dw2 that the figure had not changed.

25 Dw2 requested to meet Joan (Pw2) and they met at Sports View Hotel, Kireka. Pw2 demanded for Shs. 50,000,000/- and also told him that he would have to meet the expenses of other people who were involved in the arrest. That is the Policemen and the media.

Dw2 asked to meet the Policemen and met Arinaitwe and another person at a Hotel on Rubaga Road, near Kabakanjagala roundabout.

30 Arinaitwe told him that they were in three groups and each group would require Shs. 5,000,000/-. The witness promised to think about the request and communicate later. He never gave the final communication as he was not able to raise the money and he also detected extortion.

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The Accused was on Police bond during this time. In November, 2013, they were informed that the results from the samples taken from the Accused and Pw2 had been finalized and that the Accused was to be charged at Nakawa Court and taken to Luzira.

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When Dw2 was leaving Nakawa Court, he found Pw2's mother who then told him that she had had a discussion with OC CID Jinja Road and the Prosecutor Nakawa Court, and they had decided to extend the Accused's bond if Dw2 could raise Shs. 2,000,000/-.

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Dw2 failed to raise the money and Accused was remanded and fell ill. He was released on bail after the doctors at Luzira informed court that they could not handle his illness. He was taken to Nsambya Hospital. The illness affected his skin and he developed a pigmentation which has refused to go away to date.

15

Looking at the evidence as a whole, that is both of the prosecution and of the defence and bearing in mind that an accused person does not have a duty to prove his innocence and considering the injuries stated to have been sustained by the complainant on her neck, it would appear at first that the sexual act was committed without the consent of the complainant.

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However, upon considering the evidence of the Accused person in his defence and that of his witness - Dw2, doubts are raised in the evidence of the prosecution which I find go to the root of the prosecution case.

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- The complainant had no injuries to her private part. The doctor found that she was sexually active. If the Accused was violent as alleged, wouldn't there have been injuries to the complainant's private parts?

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The actions of the complainant and her family and friends after the matter was reported to Police also raise a lot of questions.

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Why did they have to engage the services of a notorious Police Officer Arinaitwe who was not the Investigating Officer, in trying to obtain money from the Accused person, if they had all the evidence pointing to the offence having been committed?

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Why did it take seven months to charge the Accused person when all investigations had been concluded and doctor's evidence was available?

And why even at the point of his being charged, the family of the complainant was insisting the matter would be settled if money was paid?

5 Why would the family of the complainant demand sums of money ranging from Shs. 30,000,000/-, Shs. 50,000,000/- and Shs. 15,000,000/- claiming there were other people like Police and Media involved in the matter and that all had to be paid, if they had a strong case against the Accused person?

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The evidence of the defence was not controverted by the Prosecution. The place where offence is alleged to have taken place, appears not to have been isolated as the Prosecution wanted court to believe, as there are security guards manning the area.

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The evidence of Pw5- seems to suggest that she talked to the complainant in March, 2013, after she had been raped, when the offence is said to have occurred in April! This contradiction was also not explained by the prosecution. And left as it is, seems to suggest a well planned plot to implicate Accused in the offence.

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When all these surrounding circumstances are put together, I am constrained to believe the evidence of the defence that there was consent to the act but for purposes of trying to extort money from the Accused, the complainant changed her mind and alleged that she had been raped.

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It is trite law that any doubt in the prosecution case has to be resolved in favour of the Accused person. For all those reasons I find that the prosecution failed to prove the second ingredient of the offence to the required standard. I, for all those reasons disagree with the Assessors' opinion and find the Accused not guilty as charged. I am constrained to believe that the sexual act was consensual.

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The Accused is accordingly acquitted of the offence and should be set free forthwith unless otherwise held on other legal charges.

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FLAVIA SENOGA ANGLIN
JUDGE
25.06.18

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