THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT LUWERO

CRIMINAL SESSIONS CASE No. 0165 OF 2015

UGANDA …… PROSECUTOR

VERSUS

KALEMA DAVID …… 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 11th day of July 2014 at Magoma village, Nakaseke District, had unlawful carnal knowledge of Namakula Josephine, without her consent.

The prosecution case is that on 11th July, 2014 at around 2.00 am, P.W.2, Mukouilo Stephen was sleeping in his house when she heard her sickly 80 year old mother screaming "leave me alone," from the house next-door, about eight metres away from his. He lighted a wick-lamp and proceeded to her mother's house to find out what the problem was since he was in the habit of checking on her at least three times during the night to change her over because of her weak state. When he got to his mother's house, he pushed the door but felt some resistance while holding a wick lamp. He forced himself in and found the accused inside the house. He recognized him by the light he was holding. He asked him what the matter was. The accused attempted to leave the house and he held him by the hand. The accused managed to pull himself away and got out and escaped. P.W.2 too dashed out while raising an alarm and asking him why he was running and where he was going. People responded to the alarm and the accused was arrested later. The victim was taken to hospital the following morning where it was confirmed that she had been raped. In his defence, the accused denied having committed the offence and set up an alibi. He stayed out that night guarding his cow against possible theft since cattle thefts were rampant in the area during that time. He was surprised when a mob later came, began

assaulting him and beat him to unconsciousness. When he regained his consciousness, he was in detention at the police station from where he was charged with rape.

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 Rape, 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. P.W.1 Dr. Orol James of Luwero Health Centre IV who examined her the following day, 12th July 2014, found moderate tenderness around the upper humeral region of both arms, noted lacerations on the labia formed the opinion that the victim had been raped. He also commented that the victim was too old to fight an energetic young man. These findings are contained in exhibit P. Ex. 1 which was admitted as part of the uncontested evidence during the preliminary hearing. On basis of this evidence and in agreement with the joint opinion of the assessor, I find that this element has been proved beyond reasonable doubt.

Proof of lack of consent is normally established by the victim's evidence, medical evidence and any other cogent evidence. The victim did not testify, however on basis of the admitted evidence of evidence of P.W.1 Dr. Orol James and exhibit P. Ex. 1, coupled with the fact that P.W.2 heard the victim scream "leave me alone" and the fact that the injuries on the victim as seen by the doctor are consistent with the use of force, I do find in agreement with the opinion of the assessor, that the prosecution has proved beyond reasonable doubt that, Namakula Josephine 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. In his defence, the accused denied the indictment and 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 witness was familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witness to observe and identify the accused and the proximity of the witness to the accused at the time of observing the accused.

As regards familiarity, the single identifying witnesses knew the accused prior to the incident. In terms of proximity he was very close to him as he held his hand and attempted to prevent him from escaping. As regards duration, the scuffle did not take that long but during the short period of time he spoke to the accused, asking him what he was doing inside the house. Lastly, there was tight from the lamp which provided light sufficient enough for him to recognize the accused.

In the result, I have not found any possibility of mistaken identification. 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 Luwero this 7th day of February, 2018.

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Stephen Mubiru
Judge.
7th February, 2018

8th February, 2018
9.48 am
Attendance

Mr. Senabulya Robert, Court Clerk.
Mr. Ntaro Nasur, Resident State Attorney, for the Prosecution.
Mr. Asaph Tumubwine, 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 he had no previous record of conviction against the convict the learned State Attorney prosecuting the case Mr. Ntaro Nasur, prayed for a deterrent sentence of fifteen years' imprisonment.

In his *allocutus*, the convict prayed for lenience on grounds that he left his seven children with his wife who was then pregnant but has since given birth. He was beaten by the mob. He has

learnt a lot and he apologises for what he did. He proposed a sentence of five years' imprisonment. He would like to educate his daughter to work in the court. His eldest child is now 13 years old while the youngest 3.5 years old.

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 15*th* 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, she was frail to the extent of not being able to turn in bed on her own volition, the act was intercepted by her own son to her's and the son's embarrassment, the punishment that would suit the convict as a starting point would be 15 years' imprisonment. The sentence is mitigated by the fact that the accused is a first offender, he is now 50 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 twenty years, proposed after taking into account the aggravating factors, now to a term of imprisonment of 9 (nine) 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 9 (nine) years' imprisonment arrived at after consideration of the mitigating factors in favour of the convict, he having been charged on 15th July 2014 and has been in custody since then, I hereby take into account and set off the three years and six months as the period the accused has already spent on remand. I therefore sentence the accused to five (5) years and six (6) 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 Luwero this 8th day of February, 2018.

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Stephen Mubiru
Judge.
8th February, 2018.