

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA SITTING AT LUWERO**

**CRIMINAL SESSIONS CASE No. 0112 OF 2016**

**UGANDA** .....

**PROSECUTOR**

**VERSUS**

- 1. **KIBERU JOSEPH** }
- 2. **MUSISI SULEIMAN** } ..... **ACCUSED**
- 3. **MUSISI FRED** }
- 4. **SENABULYA RICHARD** }

**Before Hon. Justice Stephen Mubiru**

**JUDGMENT**

The accused are jointly indicted with two counts. In the first count, they are indicted with the offence of Rape c/s 123 and 124 of the *Penal Code Act*. It is alleged that the two accused and others on the 31<sup>st</sup> day of May 2014 at Lutuula village, Kyawangabi Parish, Butuntumula sub-county in Luwero District, had unlawful carnal knowledge of Namusoke Jane, without her consent.

In the second count, they are indicted with the offence of Aggravated Robbery c/s 285 and 286 (2) of the Penal Code Act. It is alleged that the two accused and others on 31<sup>st</sup> May 2014 at Lutuula village, Kyawangabi Parish, Butuntumula sub-county in Luwero District robbed Namusoke Jane of her money, shs. 70,000/= and at, immediately before or immediately after the said robbery, used personal violence on the said Namusoke Jane.

The prosecution case is that on 31<sup>st</sup> May, 2014 the victim, P.W.3 Namusoke Jane, by then ordinarily resident at Lutuula village, went to attend a funeral at Namatogonya village, one of the neighboring villages. It so happened that the two accused attended that burial as well. After the burial, the two accused returned to Lutuula Trading Centre and passed time playing a game of

Ludo with the other two co-accused (A1 and A3 who pleaded guilty and were sentenced during the previous High Court Criminal Session), outside one of the shops. The victim passed them by at around 8.00 pm, on her way from the funeral back to her home.

A short distance after she had passed them by, A1 came running from behind her, by-passed her, turned round and slapped her hard in the face. She was temporarily blinded by the slap and she was immediately dragged forcefully into the one-roomed house of A1 nearby where there was light from a lamp. She recognized the four accused as her assailants by the aid of that light after she recovered her sight and by their voices as they urged one another to hurry so that they could all have their turn with her, and as they asked her whether she had recognized any of them. After they were done, she was let go but they followed her outside and raped her all over again before P.W.2 Godfrey Katosi, who too was returning from the funeral at Namatogonya village, heard her screams and came to her rescue. The following day she was taken to Luwero Health Centre IV for medical examination and to the police where she named the four accused.

When the case came up for trial during the previous High Court Criminal Session on 12<sup>th</sup> July 2017, A1 Kiberu Joseph and A3 Musisi Fred pleaded guilty, were convicted on their own plea on both counts and were sentenced to 12 years' imprisonment on each count, to be served concurrently. The case of the two accused now before court was deferred to this session. In his defense, A2 Musisi Suleiman stated that on that day, he carried a passenger on his boda-boda to Namatogonya village to attend a burial at around 4.00 pm. On the way back, he branched to a shop at Lutuula trading centre at around 4.30 - 5.00 pm and bought fuel, refuelled the motorcycle, got another passenger whom he drove to Kasana and later returned to his home where he spent the night. On his part, A2 Senabulya Richard testified that he left his home at Kasana in the morning and went to Buziranduulu village to collect one sack of charcoal and foodstuffs for his family but did not return home because at 3.00 pm he rode his bicycle and attended a funeral of his deceased friend at Namatogonya village and thereafter, at around 4.45 pm he by-passed Kiberu Fred, Musisi Fred and Musisi Sulaiman as they played Ludo at Lutuula town, and he spent the night at his father's home at Lutuula village. He denied knowledge of the victim except by name.

The prosecution has the burden of proving the case against each of the accused beyond reasonable doubt. The burden does not shift to the accused persons and the accused can only be convicted on the strength of the prosecution case and not because of weaknesses in their respective defences, (See *Ssekitoleko v. Uganda [1967] EA 531*). By their respective pleas of not guilty, the accused put in issue each and every essential ingredient of the two offences with which they are jointly charged and the prosecution has the onus to prove the ingredients of the offences 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 any of the two 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. In this case, the prosecution relies on the testimony of P.W.3 Namusoke Jane, the victim in this case who testified that four youths had forceful sexual intercourse with her in turns, first from inside the house of one of them and shortly thereafter, out in the open after they had let her out of the house.

Her evidence is corroborated by P.W.2 Godfrey Katosi who responded to her screams, found her absolutely naked, lying face up on the ground with two men on top of her while two others stood around. He saw her the following day and her neck was swollen. It is further corroborated by the evidence of P.W.1 Dr. Sarah Ogobi of Luwero Health Centre IV, who examined her on 3<sup>rd</sup> June, 2014, three days after the day on which the offence is alleged to have been committed. In her report, exhibit P. Ex.1 (P.F.3A), she certified that she examined the victim who was of the

apparent age of 45 years. Her findings were that there were “bruises and scratch marks [on the] anterior aspect. Chest pain with scratch marks on the left breast superior aspect. Bruises on posterior aspect of left elbow joint. Vagina and vulva normal, no lacerations seen. No bleeding or history of bleeding.” She further explained that the hymen had an old scar and was thus already ruptured. A scar is classified as old after a period of seven days. Further, that it is possible for a victim of rape not to sustain bruises and lacerations in the genital area if the victim is an adult and has had sexual intercourse before. She did not do a high vaginal swab because the victim had already bathed and there was nothing in that regard she could examine after so many days. I have carefully considered the evidence before court. I have not found any reason why the victim would concoct an allegation of having been the victim of acts of sexual intercourse. Neither do I have an reason to believe that she is mistaken. On basis of this evidence taken as a whole 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 P.W.3 Namusoke Jane, testified that she did not consent to any of the acts of sexual intercourse. She did not put up a resistance because she feared for her life. Her evidence is corroborated by P.W.2 Godfrey Katosi who testified that he heard her screaming for help before he went to her rescue. He saw her the following day before she was taken to hospital by one of her neighbours and her neck was swollen. It is further corroborated by P.W.1 Dr. Sarah Ogobi of Luwero Health Centre IV, who examined her on 3<sup>rd</sup> June, 2014 (three days after the day on which the offence is alleged to have been committed) and found there were bruises and scratch marks on the anterior aspect. She had chest pain with scratch marks on the left breast superior aspect. Bruises on posterior aspect of left elbow joint. I find these injuries to be consistent with forceful rather than consensual sexual intercourse. I do find in agreement with the opinion of the assessor, that the prosecution has proved beyond reasonable doubt that, Namusoke Jane did not consent to that act of sexual intercourse.

Lastly, the prosecution had to prove that each of the accused participated in committing the unlawful act. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing each of the accused at the scene of crime not as a mere spectator but as the perpetrator of the

offence. Both accused denied having participated in the commission of the offence. In his defence, A2 Musisi Suleiman stated that on that day, he carried a passenger on his boda-boda to Namatogonya village to attend a burial at around 4.00 pm. On the way back, he branched to a shop at Lutuula trading centre at around 4.30 - 5.00 pm and bought fuel, refueled the motorcycle, got another passenger whom he drove to Kasana and later returned to his home where he spent the night.

On his part, A2 (Senabulya Richard) testified that he left his home at Kasana in the morning and went to Buziranduulu village to collect one sack of charcoal and foodstuffs for his family but did not return home because at 3.00 pm he rode his bicycle and attended a funeral of his deceased friend at Namatogonya village and thereafter, at around 4.45 pm he by-passed Kiberu Fred, Musisi Fred and Musisi Sulaiman as they played Ludo at Lutuula town, and he spent the night at his father's home at Lutuula village. He denied knowledge of the victim except by name.

To rebut their defences, the prosecution relies on evidence of the victim P.W.3 Namusoke Jane as a single identifying witness who testified that at around 8.00 pm, she passed by the four accused as they were seated at Lutuula Trading Centre. She was able to recognise them by voice and by aid of light from a hurricane lamp that was about ten meters from where they were seated. A short distance thereafter, A1 Kiberu Joseph by passed her, turned round and slapped her hard in the face thereby temporarily blinding her. She was dragged to Kiberu's house where there was light from a lamp. She recognised the four accused as her assailants by the aid of that light after she recovered her sight and by their voices as they urged one another to hurry so that they could all have their turn with her, and as they asked her whether she had recognised any of them. After they were done, she was let go but they followed her outside and raped her all over again before P.W.2 came to her rescue. She was still able to recognise them because of their proximity and since they talked to her still.

This being evidence of visual identification which took place at night, the question to be determined is whether the identifying witness was able to recognise the accused. In circumstances of this nature, the court is required to first warn itself of the 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 witness knew the two accused prior to the incident. In terms of proximity, this being a sexual offence of a nature that required physical intimacy, the two accused were very close to her both inside the house of A1 and outside it during the second episode. As regards duration, she saw them on three occasions; at the trading center, inside the house of A1 and then outside during the second episode. There were four of them, each one of whom took a turn at her as the rest waited. That was long enough a period to aid correct identification. She also recognized them by voice as on three occasions she heard them speak. Lastly, although during the last episode that occurred outdoors took place in a situation of darkness, there was light from lanterns both at the trading centre and inside the house of A1 which provided sufficient light to aid her recognition of each of the accused.

On the other hand, her evidence is corroborated by aspects of the defences put up by the two accused. A1 admitted having been at Lutuula Trading center during the early part of the evening, from where he picked a passenger. On his part, A2 admitted having sat at the same trading centre for sometime before retiring to the home of his father on the same village where he spent the night. He also incriminated A2 when he said in his defence that he was one of the other three he saw playing a game of Ludo at the trading centre, again during the early part of that evening. In his charge and caution statement, exhibit P. Ex. 5, states that he met the three, including A1 at Munene's bar and joined them in drinking alcohol. Consequently, I have not found any possibility of error or mistaken identification in the testimony of P.W.3. The defences put up by both accused fail in light of the evidence considered as a whole.

On this account I believe the more probable occurrence is that the four accused attended the same funeral with the victim. After the funeral, the four accused went to a bar in Lutuula trading center where they passed time playing Ludo. When they saw the victim passing by, they

conspired to rape her and thus put their decision into action. I have in mind the provisions of section 20 of *The Penal Code Act* to the effect that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence. Where an offence is alleged to have been committed by two or more people, there is no need to prove that each of them participated in each of the ingredients. It is enough if they are proved to have shared a common intention. Therefore in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that each of the accused participated in committing the offence.

Accordingly, I find that the prosecution has proved all the essential ingredients of count I of the indictment beyond reasonable doubt. Each of the two accused is therefore found guilty and is convicted of the offence of Rape c/s 123 and 124 of the *Penal Code Act*. As regards the second count, for each of the accused to be convicted of the offence of Aggravated Robbery, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

1. Theft of property belonging to another.
2. Use or use threat of use of violence against the victim.
3. Possession of a deadly weapon during the commission of the theft.
4. The accused participated in commission of the theft.

Under section 286 (3) of *The Penal Code Act*, a deadly weapon is one which is made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death. In the testimony of all three prosecution witnesses, there was no reference to any of the accused having been in possession of any weapon, let alone one that fits that description. Furthermore, in her testimony, P.W.3 Namusoke Jane stated that she did not know which one of the accused took her money which was tied in a handkerchief, on a string around her waist. Her testimony does not prove asportation and does not rule out the possibility that the money dropped during the scuffle related to forceful intercourse. This count has not been proved beyond reasonable doubt. Each of the two accused is found not guilty and accordingly is acquitted of the offence of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act*.

Dated at Luwero this 8<sup>th</sup> day of February, 2018.

.....

Stephen Mubiru

Judge.

8<sup>th</sup> February, 2018

8<sup>th</sup> February, 2018

12.00 noon.

Attendance

Mr. Senabulya Robert, Court Clerk.

Ms. Beatrice Odongo, Resident State Attorney, for the Prosecution.

Mr. Katamba Sowali, Counsel for the accused persons on state brief is present in court

The two accused are 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 any of the convicts and have been on remand for over three years, the learned State Attorney prayed for a deterrent sentence on grounds that; this was gang rape which seriously humiliated the victim. She will live with the trauma forever. The other two convicts pleaded guilty and were sentenced. The Sentencing Guidelines provide for death as the maximum punishment and the starting point is 30 years to death. Given the circumstances, she proposed 25 years' imprisonment.

In mitigation, counsel for the two convicts prayed for lenience on the following grounds; the convicts are first offenders. They are still very young at 25 and 28 respectively. A4 has a family and so does A2. They have been on remand for three years. A2 since 12<sup>th</sup> June, 2014 while A4 since 3<sup>rd</sup> March, 2015.

In their respective *allocutus*, A2 prayed for lenience. He had a wife and two children, one was 2.5 years at the time of my arrest and the other was one month old. He was still renting. His wife was involved in an accident and her legs were fractured. He prayed for a sentence whose duration will enable him to leave prison when he is still strong. On his part, A4 prayed for



lenience because he has two children. One was three years and the other one year old. His wife had a problem with her liver. There is no one else to look after them. He was paying school fees for his younger sibling who has since dropped out of school. He is still youthful with the possibility of reform.

The maximum punishment for this offence is death. In sentencing the accused, I am guided by *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*. Regulations 20 and 22 thereof which specify circumstances by virtue of which the court may consider imposing a sentence of death in cases of this nature, and they include; (a) where the victim was raped repeatedly whether by the offender or by a co-accused, co-perpetrator or an accomplice; (b) by more than one offender, where such persons acted in the execution or furtherance of a common purpose or conspiracy; (f) where the victim was gang raped or gang defiled. The three scenarios apply to this case. However, because there is no evidence that the victim sustained serious injuries arising from the infliction of grievous bodily harm or that the manner in which the offence was committed was life-threatening or that death was a probable result of the convicts' conduct, I have discounted the death penalty.

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 5<sup>th</sup> 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 3<sup>rd</sup> 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 3<sup>rd</sup> 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<sup>th</sup> 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 21<sup>st</sup> 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 victim was raped by four youths twice over, the punishment that would suit the convicts as a starting point would be 35 years' imprisonment. The sentence is mitigated by the fact that each of the convicts is a first offender, A2 is now 25 years old while A4 is 28 years old and both have considerable family responsibilities. The severity of the sentence each deserves has been tempered by those mitigating factors and is reduced from the period of thirty five years, proposed after taking into account the aggravating factors, now to a term of imprisonment of thirty one (31) 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 thirty one (31) years' imprisonment arrived at after consideration of the mitigating factors in favour of the convict, A2 having been charged on 12<sup>th</sup> June, 2014 and has been in custody since then, I hereby take into account and set off the three years and seven months as the period the A2 has already spent on remand. I therefore sentence A2 Musisi Suleiman to twenty seven (27) years and five (5) months' imprisonment, to be served starting today. From the earlier proposed term of thirty one (31) years' imprisonment arrived at after consideration of the mitigating factors in favour of the convict, A4 having been charged on 3<sup>rd</sup> March, 2014 and has been in custody since then, I hereby take into account and set off the three years and eleven months as the period the A4 has already

spent on remand. I therefore sentence A4 Senabulya Richard to twenty seven (27) years and one (1) months' imprisonment, to be served starting today.

Each of the convicts is advised that he has a right of appeal against both conviction and sentence, within a period of fourteen days.

Dated at Luwero this 8<sup>th</sup> day of February, 2018.

.....

Stephen Mubiru

Judge.

8<sup>th</sup> February, 2018.