

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI
CRIMINAL SESSIONS CASE No. 0001 OF 2016

UGANDA **PROSECUTOR**

5 **VERSUS**

KORANI ALFRED alias LADRO **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
10 alleged that the accused on the 24th day of December, 2015 at Kololo village, Ofua sub-county in
Adjumani District, had unlawful carnal knowledge of Masudio Hellen, without her consent.

The prosecution case is that on 23rd December, 2015 the victim P.W.2 Masudio Hellen went to
plait her hair at Ofua Trading Centre, situate at Kololo village at around 3.00 pm. She found too
15 many customers waiting and was told she should return the following day. Her brothers in law,
Geriga, Ladro (the accused) and Nduruga, found her at that place and she passed time with them
drinking some alcohol in sachets. The accused was paying for the alcohol. She felt tired at
around 5.00 am of 24th December, 2015 and told them she was returning home to sleep. The
three of them escorted her to her home which is not very far from the trading centre. As they
20 walked home, the accused held her by the right hand. She tried to disengage from his grasp
unsuccessfully and they continued to walk in that manner. The other two boys were following
from behind, at a distance of about 80 metres. At home before she could say anything, the
accused pushed her inside the kitchen. He held her hand and took her to the kitchen, pushed her
onto the ground. He held her tight, she had no opportunity to resist. The door to the kitchen was
25 open. When she attempted to make an alarm, the accused straight away clasped her mouth and
prevented her from screaming. He tore all her clothes off and proceeded to have forceful sexual
intercourse with her. The other two boys found the accused on top of her and he escaped shortly
thereafter. The two boys began beating her furiously with sticks as she screamed for help.

Her uncle and neighbour, P.W.3. Opiku Samuel Okumu was alerted by the L.C1 General Secretary, another neighbor that his niece, the victim was being raped by a group of boys. When he arrived at the scene he flashed his torch inside the kitchen, and recognised one of the assailants as the accused, a person he had known for the last ten years, who immediately fled
5 from the scene. He recognized the rest of the boys as Chandiga, Idro William and Nduruga and when they saw him, they too ran away. The victim was lying in a pool of blood, naked on a papyrus mat crying out hysterically the name Chandiga and Nduruga. He told the Secretary they should close the door and go for help. On their return, they found Chandiga, Idro William and Nduruga had resumed assaulting the victim and they again ran away. He went back home to
10 change clothes and when he returned to the scene, the three boys threatened to beat him. He retreated and followed them as they dragged the victim towards Ofua Police Post where they abandoned her in a coffee plantation behind the police post. P.W.3 notified the O/c of the police post who found her covered in grass and arranged for her to be taken to Ofua Health Centre III from where she was referred to Mungula Health Centre and thereafter to Adjumani Hospital. The
15 four youths were arrested but the three released after a few days on police bond.

In his defence, the accused denied having committed the offence. He testified that he spent part of the day of 23rd December, 2015 at the Catechist's where he had gone to pay baptism Church dues. He returned home, had lunch and at around 7.00 pm returned to the trading centre where he
20 spent time watching a show and later attended a disco. He returned home at around 2.00 am on the morning of 24th December, 2015, slept until around 6.30 am and was returning from his uncle's home where he had bought chicken to be slaughtered for his Godfather-to-be at his baptism slated for 9.00 pm that night when he was arrested at 8.00 am on allegations he learnt later at the police that he had raped the victim. He denied the allegation and was surprised to be
25 detained when two others he found already under arrest at the police were released yet he had not met the victim anywhere on the fateful day. He denied relating or fraternizing with Chandiga, Idro William and Nduruga because they are about ten years older than him. He had no idea why he was being falsely accused although he knew the victim as an in-law.

30 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*).

10 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.

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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 P.W.2 Masudio Hellen, testified that sometime during the early morning hours of 24th day of December, 2015 at around 5.00 am following a drinking spree, she was escorted home by her assailant who pushed her into the kitchen, threw her down, tore her clothes off, lay on top of her and proceeded to have sexual intercourse with her. It is trite law that corroboration of the testimony of the victim of a sexual offence is not mandatory. Where the victim gives cogent evidence, a conviction based thereon is valid provided the court takes all the necessary caution before relying on the uncorroborated evidence of the victim (see *Mugoya v. Uganda [1999]1 EA 202 (SC)*; *Kibale v. Uganda [1999] 1 EA 148 (SC)*; and *Mohammed Kasoma v. Uganda SCCA NO. 1/94 (SC)*). I have accordingly undertaken a credibility, common sense and ordinary experience evaluation of the evidence of this witnesses.

30 A credibility assessment depends on the perceived accuracy and truthfulness of the testimony. It involves an evaluation of a witness' demeanour, perception, memory, narration and sincerity or veracity as well as pieces of evidence that implicitly corroborate or undermine the other witness'

accuracy or veracity. Credibility assessment involves the consideration of several different aspects of the testimony of a witness.

In assessing the level of honesty and trustworthiness of the victim, the court had to make a
5 determination as to whether she was making a good faith effort to fully and accurately give
evidence, or conversely, whether she was deliberately lying or at least not disclosing certain
information. In this regard the witness came across as forthright. The key observations made by
court in this regard were that; she readily admitted aspects she could not recall without any
attempt to cover up lapses in memory. Her display of emotion was instantaneous and natural
10 without a hint of putting up a show. She did not appear to be holding back information as her
answers were not marked by any significant pauses, and there was no indication of a tendency to
embellish her evidence with unnecessary details intended to convince court.

Considering that she had been drinking alcohol for a considerable period of time, yet the quantity
15 she consumed was undisclosed and her capacity to withstand its effects was unknown, the court
had to be cautious in assessing the reliability and accuracy of her memory of the events of the
evening up to the morning of the incident. In the determination of how accurate and complete her
the memory was, the court was mindful of the fact that memory is influenced by the setting in
which it occurs, by the events that occur to witness after experiencing an event, and by the
20 cognitive processes that the witness uses in helping her remember. In this regard, it was clear to
court that her memory was based on her personal experience of the events and not imagination.
There was no indication of being confused about real as opposed to imagined aspects of the
events. Researchers argue that painful memories such as sexual abuse are usually very well
remembered, that few memories are actually repressed (see McNally, Bryant, & Ehlers, 2003;
25 Pope, Poliakoff, Parker, Boynes, & Hudson, 2007). This type of memory, which is experienced
along with a great deal of emotion, is known as a "flashbulb memory", a vivid and emotional
memory of an unusual event that people believe they remember very well. (Brown & Kulik,
1977).

30 Memories are often influenced by the things that occur to a witness after experiencing an event.
The court was therefore cautious in assessing the witness for suggestibility. It was necessary to

determine whether her memory had not been distorted as a result of conversations or questions with others after the event. In this regard, she did not appear to be giving rehearsed answers. Her ability to understand the questions to communicate about the matters at issue was impeccable.

On the other hand, the court has analysed the (in)compatibility of her testimony with other
5 evidence in the case and found it is corroborated by aspects of the testimony of P.W.3 in such matters as having been found naked in the kitchen with four boys assaulting her and that she was carried to the bush and covered with grass. Her demeanour while giving her testimony, including such matters as the manner of speech, pauses, physical demeanour and apparent confidence were impressive. She narrated the events consistently without self-contradiction. Her narration “makes
10 sense” in that it is consistent with the court's understanding about what happens in the world and how people act in different situations. Finally, she was not shown to be dishonest despite the relatively vigorous cross-examination.

That notwithstanding, her testimony about having been the victim of an act of sexual intercourse
15 that morning is corroborated by P.W.3 Opiku Samuel Okumu, her paternal uncle and neighbour, who testified that when he arrived at the scene in an attempt to rescue her, he found her naked, bleeding and lying on a papyrus mat. The four boys who had attacked her immediately fled from the scene. I find the fact that P.W.3. found her naked, with her panties lying beside her, is more consistent with a sexual assault than the beating to which she was subsequently subjected. It is
20 consistent with her narration that the sexual assault preceded the battery. Furthermore, a few hours later while at Mungula Health Centre, she told him that she had been raped. According to section 156 of *The Evidence Act*, in order to corroborate the testimony of a witness, any former statement made by such a witness relating to the same fact, at or about the time when the fact took place, may be proved (see *Livingstone Sewanyana v. Uganda, S. C. Criminal Appeal No. 19*
25 *of 2006* and *Katende Mohammed v. Uganda, S.C. Criminal Appeal No. 32 of 2001*). This report to P.W.3 made about the time when the offence took place, is corroborative of her testimony.

The evidence is further corroborated by aspects of the admitted evidence of P.W.1 Dr. Joseph Idoru, a Medical Officer at Adjumani Hospital, who examined the victim on 26th December,
30 2015, two days following that on which the offence is alleged to have been committed. In his report, exhibit P.Ex.1 (P.F.3A) he certified that he examined the victim who was of the apparent

age of 18 years. His findings were that the victim had abrasions on the lower lip, scratch marks on the neck, blunt trauma on the chest, multiple lacerations on the abdomen and the back, a bruise on the left shoulder but no bruises or abrasions on the genital area. The hymen had been ruptured a long time ago. In his view, the injuries he saw were caused by blunt, hard and firm
5 objects. Although his examination of the genitals of the victim did not yield any tell-tale signs of sexual assault, this should be considered within the context of the fact that the medical examination occurred two days after the act and in absence of evidence that she had during the act put up a resistance such as would have occasioned injuries to that part of her body. Furthermore, although the majority of the injuries appear to have been inflicted by beating with
10 sticks, I find the scratch marks on the neck to be more consistent with a sexual assault and with the statement of the victim that her mouth was clasped by her assailant as she was prevented from screaming, than with beating with sticks that occurred after the rape.

Therefore having considered all the available evidence, in disagreement with the joint opinion of
15 the assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that Masudio Hellen was the victim of an act of carnal knowledge which occurred in the early morning hours of 24th December, 2015, just before day-break.

Proof of lack of consent is normally established by the victim's evidence, medical evidence and
20 any other cogent evidence. The victim. P.W.2 Masudio Hellen testified that although she had been drinking alcohol was not too drunk so as not to remember, and stated that although she had intended and indicated that she was retiring to her home to rest, he assailant forced her into the kitchen instead, threw her down, tore her clothes off, lay on top of her and proceeded to have sexual intercourse with her. She attempted to raise an alarm but the assailant gripped her mouth.
25 The assailant was later joined by two other youths who subjected her to severe beating.

P. W.1 Dr. Joseph Idoru, a Medical Officer at Adjumani Hospital, examined the victim on 26th December, 2015, two days following that on which the offence is alleged to have been committed. In his report, exhibit P.Ex.1 (P.F.3A) he certified that he examined the victim who
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and the back, a bruise on the left shoulder but no bruises or abrasions on the genital area. The hymen had been ruptured a long time ago. In his view, the injuries he saw were caused by blunt, hard and firm objects. P.W.3 Opiku Samuel Okumu, a paternal uncle and neighbour of the victim, testified that when he went to her rescue, he intercepted four boys he found assaulting her from inside the kitchen. She was crying out the names of two of her assailants hysterically. Although this element was contested by counsel for the accused in his final submissions, on basis of that evidence and in disagreement with the joint opinion of the assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that, Masudio Hellen did not consent to that act sexual intercourse.

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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 having committed the offence. He spent part of the day of 23rd December, 2015 at the Catechist's where he had gone to pay baptism Church dues. He returned home, had lunch and at around 7.00 pm returned to the trading centre where he spent time watching a show and later attended a disco. He returned home at sound 2.00 am on the morning of 24th December, 2015, slept until around 6.30 am and was returning from his uncle's home where he had bought chicken to be slaughtered for his Godfather-to-be at his baptism slated for 9.00 pm that night when he was arrested at 8.00 am on allegations he learnt later at the police that he had raped the victim. He denied the allegation and was surprised to be detained when two others he found already under arrest at the police were released yet he had not met the victim anywhere on the fateful day. He had no idea why he was being falsely accused although he knew the victim as an in-law.

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To rebut that defence, the prosecution relied on the evidence of the victim who testified that she was only able to recognise the accused because she was in his company and never left it at any single moment, right from the evening hours of 23rd December, 2015 until the early morning hours of 24th December, 2015. Her evidence is corroborated by the testimony of P.W.4 who stated that he recognised the accused by torchlight. This being evidence of visual identification which took place at night, the question to be determined is whether the identifying witnesses

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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* 5 [1975] HCB 77). In doing so, the court considers; whether the witnesses were familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witnesses to observe and identify the accused and the proximity of the witnesses to the accused at the time of observing the accused.

10 The victim, P.W.2, testified that on 23rd December, 2015 she went to plait her hair at Ofua Trading Centre, on Kololo village at around 3.00 pm. She found too many customers waiting and was told she should return the following day. Her brothers in law, Geriga, Ladro the accused and Nduruga, found her at that place and she passed time with them drinking some alcohol in sachets. The accused was paying for the alcohol. She got tired at around 5.00 am and told them 15 she was returning home to sleep. The three of them escorted her to her home which is not very far from the trading centre. As they walked home, the accused held her by the right hand. She tried to disengage from his grasp unsuccessfully and they continued to walk in that way. The other two boys were following from behind, at a distance of about 80 metres. At home before she could say anything, the accused pushed her inside the kitchen. He held her hand and took her to 20 the kitchen, pushed her onto the ground. He held her tight, she had no opportunity to resist. The door to the kitchen was open. When she attempted to make an alarm, the accused straight away closed her mouth. The other two boys found the accused on top of her and he escaped. The two other boys then began beating her. Consider her mental state at the time. She had been drinking alcohol for some time but the quantity is unknown. She admitted having been drunk. She was 25 also half unconscious on occasion after the beating.

On his part, P.W.3 Opiku Samuel Okumu, her paternal uncle and neighbour, testified that when he went to her rescue, he intercepted four boys he found assaulting her from inside the kitchen. He flashed his torch and recognised one of them as the accused, a person he had known for the 30 last ten years, who immediately fled from the scene.

As regards familiarity, the two identifying witnesses knew the accused prior to the incident. In terms of proximity they were very close to him. As regards duration, they had ample opportunity to recognise him, especially the victim who was in his company for hours. Lastly, there was torchlight which provided light sufficient for P.W.3 to recognise the accused. In his defence, the accused admitted knowing the victim with whom he met frequently and at whose home he occasionally had meals. In the result, I have not found any possibility of mistaken identification or error. Therefore in disagreement 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.

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In the final result, I find that the prosecution has proved all the essential ingredients of the offence 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*.

15 Dated at Adjumani this 20th day of February, 2018.

.....
Stephen Mubiru
Judge.
20th February, 2018.

21st February, 2018

20 9.00 am

Attendance

Ms. Baako Frances, Court Clerk.

Ms. Bako Jacqueline, Resident State Attorney, for the Prosecution.

Mr. Jurugo Isaac holding brief for Mr. Barigo Gabriel, Counsel for the accused person on state brief is present in court

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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 she had no previous record of conviction against the convict the learned Resident State Attorney prosecuting the case prayed for a deterrent sentence on grounds that; although the convict is a first offender, the offence is rampant. He committed the offence against his sister in law whom he should have respected. She prayed for a deterrent custodial sentence to restrict his movement since he has outlived his usefulness in society. She proposed that he should be

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sentenced to 28 years to allow psychological and physical healing of the victim. It would deter would be offenders as well.

In his submissions in mitigation of sentence, Counsel for the accused prayed for lenience on
5 grounds that; at the time of commission of the offence he was 18 years old and is still a young man. If given a midterm custodial sentence he can still return as a useful Ugandan. He is a first offender. He has been on remand for almost two years and that should be considered. Eight years' imprisonment would be sufficient. The physical and psychological wound that the victim experienced would be healed. He can still be useful to society. In his *allocutus*, the convict stated
10 that he exactly does not know why he has been convicted. Among the four arrested he was not part of them. The victim could have mistaken his name. He prayed court to forgive him for he was still in school. He is the elder son of his father and he has many siblings to care for. His father is now elderly. He requested court from the right years suggested by his advocate to reduce it to four years. In her victim impact statement, the victim of the offence stated that
15 because the convict is her brother in law, she would propose five years' imprisonment.

The offence of Rape is punishable by the maximum penalty of death as provided for under section 124 of the *Penal Code Act*. However, this represents the maximum sentence which is usually reserved for the worst of the worst cases of Murder. In sentencing the accused, I am
20 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-
25 threatening and neither was death a probable result of the accused's conduct. For those reasons, I have discounted the death penalty.

Where the death penalty is not imposed, the starting point in the determination of a custodial sentence for offences of murder has been prescribed by Item 2 of Part I (under Sentencing ranges
30 - Sentencing range in capital offences) of the Third Schedule of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* as 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.

5 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 Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, which would justify the imposition of a sentence of life imprisonment, are applicable to this case. Similarly, that possibility too is discounted.

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I have therefore reviewed current sentencing practice 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
15 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
20 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 15th 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
25 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.

30 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, by a brother in law, the punishment that would suit the convict as a starting point would be twenty years'

imprisonment. The sentence is mitigated by the fact that the accused is a first offender, he is now 20 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
5 of 12 (twelve) 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
10 *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 12 (twelve)years' imprisonment arrived at after consideration of the mitigating factors in favour of the convict, he having been
15 charged on 1st January, 2016 and has been in custody since then, I hereby take into account and set off the two years and one month as the period the accused has already spent on remand. I therefore sentence the accused to ten (10) years and eleven (11) 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
20 period of fourteen days.

Dated at Adjumani this 21st day of February, 2018.

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Stephen Mubiru
Judge.
21st February, 2018.