

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI
CRIMINAL SESSIONS CASE No. 0112 OF 2016

UGANDA **PROSECUTOR**

VERSUS

YIGA MOSES **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 31st day of October, 2015 at Zoka Central village in Itirikwa sub-county, in Adjumani District, had unlawful carnal knowledge of Konjoki Beatrice without her consent. The accused pleaded not guilty to the indictment.

In a bid to prove the indictment against the accused, the prosecution led the evidence of the victim Konjoki Beatrice who testified as P.W.1. She stated that her husband, P.W.2 Irama Sunday returned late that night and instructed her to go buy soap from a shop about a kilometer away, for washing his clothes since he had to attend a workshop in Adjumani Town the following day. On her way back from the shop, she found a tall and muscular man she had never seen before, standing by the road. He told her in English that he loved her and she responded that she did not like him. The man suddenly held her by force, held her by the throat with one hand and the other held her arm. He threw her on the ground, undressed her and had forceful sexual intercourse with her. She made an alarm but nobody responded. As the accused was raping her, a boy named Chandiga from Mungula was returning home from a disco. He found her crying and the accused was standing nearby. He inquired why she was crying and she told him it was because the accused had raped her. Chandiga led her home where she reported the incident to her husband and Chandiga said he had recognized the assailant as the accused. The following morning, based on her description of the assailant and on what Chandiga had told her, she reported to the police. The police led her to place where multiple charcoal burners resided and she was able to point out the accused as her assailant.

P.W.2 Irama Sunday the husband of the victim testified that that fateful night he returned home late at night at around 10.30 pm and sent his wife to Zoka Trading Centre to buy soap only for her to return later and tell him she had been raped on her way back. Chandiga told him he had found his wife on the way crying. She had told him that on her way back from the shop she met a
5 man who held her by force and raped her. Chandiga said that it is his wife who described the man as tall and fat. Chandiga said he did not see the man but he said that he knew some men who had come to cut trees at Gbayi Ado for charcoal, about four kilometres from the place where the incident happened. P.W.2 reported to the police the following day and told the police that his wife had been raped along the way to the shop to buy soap. He told the police that he did not
10 know the name of the person but he could describe the appearance. He described him as tall and fat. Together with the police they went to that place where they found about ten people and his wife picked out the accused. Of the other nine men from whom the accused was picked, one was black, short and fat and the other was brown and slender and short. No one else bore similarity with the accused. The accused was the only one who was tall and fat. His wife was also able to
15 describe the T-shirt the assailant had been wearing which was similar to the the accused was found wearing. That is all that she used to describe him. They were standing in a group but not in a line. The accused was then arrested and brought to the police. His wife was then taken for medical examination.

20 The would have been P.W.3 Chandiga Patrick turned hostile when contradicted his statement to the police by denying having named the accused at the police. Having been declared hostile, his testimony has been disregarded entirely. Having failed to secure the attendance of any additional witnesses, the prosecution closed its case.

25 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
30 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.1. Sophia Nassozi to the effect that On her way back from the shop, she found a tall and muscular man she had never seen before, standing by the road. He told her in English that he loved her and she responded that she did not like him. The man suddenly held her
5 by force, held her by the throat with one hand and the other held her arm. He threw her on the ground, undressed her and had forceful sexual intercourse with her. She made an alarm but nobody responded. I find that the prosecution has led sufficient evidence capable of supporting a finding that, Konjoki Beatrice was subjected to an act of sexual intercourse, if the accused chose not to say anything in his defence.

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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.1. Konjoki Beatrice adverted to above. 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
15 supporting a finding that, she was subjected to an act of sexual intercourse without her consent, 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
20 circumstantial, placing the accused at the scene of crime. In the instant case, the evidence implicating the accused is based on a single identifying witness. "Identification evidence" means evidence that is: (a) an assertion by a person to the effect that a defendant was, or resembles (visually, aurally or otherwise) a person who was, present at or near a place where: (i) the offence for which the defendant is being prosecuted was committed, or (ii) an act connected to
25 that offence was done, at or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the person making the assertion saw, heard or otherwise perceived at that place and time, or (b) a report (whether oral or in writing) of such an assertion.

30 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 had never seen the accused prior to the incident. In terms of proximity, this being a sexual offence of a nature that required physical intimacy, the assailant must have been very close to her during the episode. As regards duration, it was not stated how long it took. Lastly, although the incident occurred outdoors in a situation of darkness, there is no evidence as to the form of light that existed at the scene. Court can only infer that it was sufficient to enable the victim find her way to and from the shop but is incapable of finding it as a fact that it was bright enough to aid her recognition of a stranger. The evidence of this identifying witness standing on its own, is not entirely free from the possibility of error or mistake considering that to her husband, P.W.2 Irama Sunday she was only able to describe her assailant as "tall and fat"

The risk of mistake or error is compounded further by the fact that although she said P.W.3 Chandiga Patrick found the accused at the scene, to her husband Chandiga said he had found her alone, crying. Chandiga said he did not see the man but it is only on basis of her description of the assailant that he said that he knew some men who had come to cut trees at Gbayi Ado for charcoal, about four kilometres from the place where the incident happened. To compound the quality of the evidence further, Chandiga turned hostile when contradicted his statement to the police by denying having named the accused at the police.

At common law, there was a rule of evidence called the "voucher rule." This rule prohibited a party from calling a witness only to impeach the witness's credibility. Under that rule, it was said that a party "vouches" for his own witnesses and thus no party should call a liar as a witness. However, under section 154 (b) of *The evidence Act*, the credit of one's own witness may be

impeached with the consent of the court, by the party who calls him or her, by proof of former statements inconsistent with any part of his or her evidence which is liable to be contradicted. In the circumstances, a party may impeach its own witness concerning prior statements if (a) the trial testimony comes as a surprise, and (b) it does damage to that party's case.

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Evidence concerning a prior contradictory statement introduced pursuant to section 154 (b) of *The evidence Act* may be received only for the purpose of impeaching the credibility of the witness with respect to his testimony upon the subject, and does not constitute evidence in chief. Impeachment therefore acts to "neutralize" the witness' trial testimony with the resultant
10 rejection of the entire evidence on account of the credibility of the witness having been fundamentally undermined. It is on that account that the statement Chandiga made to the police that was exhibited in court, together with his testimony, have been disregarded.

Finally, the circumstances in which the accused was identified were highly prejudicial.
15 According to P.W.2 Irama Sunday, of the other nine men from whom the accused was picked, one was black, short and fat and the other was brown and slender and short. No one else bore similarity with the accused. The accused was the only one who was tall and fat. Visual identification by a witness who did not know the assailant before, and who was not arrested at the scene, is not admissible unless (a) a proper identification parade that included the accused
20 was held before the identification was made, or (b) it would not have been reasonable to have held such a parade, or (c) the accused refused to take part in such a parade, and the identification was made in circumstances in which the identifying witness could not have been intentionally or unintentionally influenced to identify the accused (see *Kasana Moses v. Uganda [1992-93] H.C.B 47* and *Nsubuga Emmanuel v. Uganda [1992-93] H.C.B. 24*). Evidence of an
25 identification parade is irrelevant where the witness knew the accused before (see *Kasana Moses v. Uganda [1988-90] H.C.B 3*).

In essence, an identification parade involves the suspect standing in a line or "parade" with a number of other people of similar appearance and for all people standing, utilised for the
30 purposes of a witness attempting to identify someone involved in a crime. Courts have developed a number of criteria to ensure the fairness of any identification parade including minimum

number of participants (8), the need for persons to have reasonable resemblance in height, age and general appearance, participants not to have visible features that are markedly different from the suspect, no person to be dressed in a way that obviously distinguishes them from other suspects. etc. (See *Ssentale Y.K. v. Uganda*, 1968 MB 26; *Uganda v. John Wasajja* [1975] H.C.B 75; *Otoyo Matayo s/o Yowana Matini v. Uganda* [1975] H.C.B 185; *Sembajwe G.W. and Mustafa Hassan v. Uganda* [1977] H.C.B 118 and *Uganda v. Ntambazi Godfrey and Mulindwa Akim* [1996] H.C.B 29). None of these rules was complied with in this case which renders the entire evidence relating to the identification of the accused in the circumstances explained by P.W.2 Irama Sunday, inadmissible.

Having considered the quality of the available evidence of identification carefully, I have consequently formed the opinion that this evidence is manifestly unreliable having been discredited as a result of cross examination to the extent that it has been shown that it 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 offence with which he is indicted.

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 Adjumani this 1st day of March, 2018

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Stephen Mubiru
Judge,
1st March, 2018.