THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI

CRIMINAL SESSIONS CASE No. 0120 OF 2017

UGANDA …… PROSECUTOR

VERSUS

BARUGO MAXWELL …… 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 25th day of May, 2016 at Ayilo I Refugee Settlement Camp in Adjumani District, had unlawful carnal knowledge of Cunyua Beatrice, without her consent.

The prosecution case is that the victim was a frequent visitor to the home of her sister at Ayilo I Refugee Settlement Camp where the latter is married to the paternal uncle of the accused. The accused and the victim would occasionally meet at that home whenever the accused came to visit his paternal uncle and he would see and hear him talk to her sister and the brother in law, although he never talked to the victim at all. On the fateful day, the victim was asked by her sister to take care of her home and daughter Tinatina. During the day, while on her way back home from fetching water, the victim met the accused who invited her to meet him at the boda-boda stage later in the evening. The victim rebuffed this invitation to his face.

Later at night when the victim had retired to bed, she heard a motorcycle stop outside the house. When she opened the door, the accused came in and left the engine of the motorcycle running and the headlamp flashing light directly into the house. There was bright moonlight outside. The accused sat on a bench inside the house and asked the victim to serve him food. The victim explained to him that there was no food left but if he could find some sauce, there was some bread. The accused went out and switched off the motorcycle engine and light and returned inside the house where he found the victim lying on a papyrus mat. He immediately lay on top of her against her protestations that he should stop. He forcefully undressed her and proceeded to

have forceful sexual intercourse with her. After the act, the victim confiscated the motorcycle ignition key from him in a bid to stop him from escaping. The accused somehow managed to start the motorcycle engine and fled from the scene. The victim realized there was blood oozing from her private parts and towards day break, realizing that she was getting weaker and weaker due to excessive loss of blood, towards daybreak she sent Tinatina to notify her other sister, Marita, who lived in the neighborhood to come to her rescue and take her to hospital. Her sister responded and took her to Adjumani Hospital where she was admitted and placed on drip. The victim's brother was notified and he reported the case to the police whereupon the accused was arrested and charged.

In his defence, the accused denied having committed the offence. He spent the day going about his ordinary business as a boda-boda rider, returned home at around 7.30 - 8.00 pm where he spent the night and was surprised when he was arrested the following day on allegations of having committed the offence of rape the previous night.

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. Lack 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 The victim in this case, Cunyua Beatrice, testified as P.W.2 and stated that while lying on the papyrus mat, the assailant forcefully undressed her and proceeded to have forceful sexual intercourse with her following which she bled profusely from her private parts and had to be hospitalized and put on drip.

Her testimony of corroborated by P.W.1 Dr. Joseph Idro Atia of Adjumani Hospital who examined her on 26th May, 2016, a day that on which the offence is alleged to have been committed. In his report, exhibit P. Ex.1 (P.F.3A) he certified that the victim sustained lacerations at the posterior faucet measuring 1.0 x 0.2 x 0.2 cms. Further corroboration can be found in the testimony of her brother P.W.3 Draciri Sunday, who testified that upon receiving a report of the incident, he went to Adjumani Hospital on the morning of 26th May, 2016 where he found her admitted. P.W.4 No. 23380 D/C Tiko Jane who investigated the case too testified that she went to the scene on 26th May, 2016 and found a blood stained papyrus mat and clotted blood on the floor and blood spots outside. Photographs of the scene were taken by the SOCO in her presence and were tendered in evidence as P. Ex. 3A - C. The accused did not offer any evidence to controvert this and none of the witnesses was broken down in cross-examination. Therefore in agreement with the opinion of the assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that, there was carnal knowledge of Cunyua Beatrice on the night of 25th May, 2016.

Proof of lack of consent is normally established by the victim's evidence, medical evidence and any other cogent evidence. The victim. P.W.2 Cunyua Beatrice testified that while lying on her bed, the assailant forcefully undressed her and proceeded to have forceful sexual intercourse with her following which she bled profusely from her private parts and had to be hospitalized and put on drip the following morning. The act was performed against her will and despite her protestations. She attempted to stop the assailant from escaping by confiscating the ignition key to his motorcycle. The accused did not offer any evidence to controvert this and none of the witnesses was broken down in cross-examination. Therefore in agreement with the opinion of the

assessors, I am satisfied that the prosecution has proved beyond reasonable doubt that, Cunyua Beatrice did not consent to that act 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 having committed the offence. He spent the day going about his ordinary business as a boda-boda rider, returned home at around 7.30 - 8.00 pm where he spent the night and was surprised when he was arrested the following day on allegations of having committed the offence of rape the previous night.

To refute that defence the prosecution relies only on the testimony of the victim P.W.2 Cunyua Beatrice who stated that he knew the accused very well as a brother to her sister's husband, hence an in-law. He was a frequent visitor to her sister's home and he would hear him speak although he never engaged her in conversation. The afternoon of the fateful day he had met the accused as she was returning home from fetching water and the accused had asked her to meet him at the Boda-boda stage, which invitation she rebuffed to his face. Later in the evening after she had gone to bed, the accused came to her sister's home and asked for food. She let him in and told him there was none left. He went out briefly to switch off the motorcycle engine, then came back into the house and raped her. She was able to recognise him by the aid of the motorcycle head lamp which lit the interior of the house and there was moonlight outdoors. They also spent some moments as they talked over the unavailability of food.

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 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 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.

As regards familiarity, the single identifying witness knew the accused prior to the incident. In terms of proximity he was very close as the nature of the sexual act required physical intimacy. As regards duration, the two forst talked to one another. It was not a sudden attack by a starnger and thus she had ample opportunity to recognise him. Lastly, there was light provided initially be the motorcycle head lamp shining into the house and also by bright moonlight outdoors, which was sufficient for her to recognise 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 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*.

Dated at Adjumani this 9th day of March, 2018.

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Stephen Mubiru
Judge.
9th March, 2018.

9th March, 2018
3.07 pm
Attendance

Ms. Baako Frances, Court Clerk.
Mr. Okello Richard, Principal State Attorney, for the Prosecution.
Mr. Barigo Gabriel, Counsel for the accused person on private 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 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; it is of a

serious nature and rampant. He is not remorseful and has no respect for the sexuality of a woman as evidenced by the manner in which he forcibly raped her which left her in a pool of blood. She could have lost her life. He deserves a deterrent custodial sentence to deter the offence in the community and for the victim to recover. She proposed 70 years' imprisonment.

In his submissions in mitigation of sentence, Counsel for the accused prayed for lenience on grounds that; he should be found to be a first offender. He is still a young man. He has a family, wife and three children. He has been on remand for some time, which should be considered. 70 years is excessive. They do not condone such offences but the convict needs a reformative sentence. He is a youthful person who should re-join the community as a responsible parent. He appreciates the conviction. It is s borderline case between him and the victim. In his *allocutus*, the convict stated that he has very many orphans he pays fees for. The work he does is because of those orphans. He also has his biological children. He prayed that those factors are considered. In his victim impact statement, Mr. Lagu Joseph John, a brother to the victim stated that the convict deserves the maximum punishment. He did not consider his family responsibilities at the time he committed the offence. His sister bled and could have died. The convict should be given the maximum, which is death.

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 Rape. In sentencing the accused, I am guided by *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013.* Regulations 22 (g) (iii) and (iv) thereof specify circumstances by virtue of which the court may consider imposing a sentence of death in cases of this nature. It may be imposed where the victim sustained serious injuries arising from the infliction of grievous bodily harm or any other extremely grave circumstances.

In the instant case, the manner in which the offence was committed created a life-threatening situation where death was a probable result, had the victim not been taken to hospital. Exhibits P. Ex. 3A - C taken at the scene by the SOCO are a distressing sight. The scene is not dissimilar to scenes from a village abattoir, in terms of the volume of clotted blood visible. Indeed the victim

lost a large volume of blood and could easily have lost her life, but for the timely medical intervention. No wonder she testified that for about two weeks after that treatment, she was still feeling dizzy. This is indeed a case in which the death penalty would be justifiable. However, because of the youthful age of the convict and being a first offender, I consider a reformative rather than a retributive sentence to be more appropriate. 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 - 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. The sentencing guidelines however have to be applied bearing in mind past precedents of courts in decisions where the facts have a resemblance to the case under trial (see *Ninsiima v. Uganda Crim. C.A Criminal Appeal No. 180 of 2010*).

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 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 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, the punishment that would suit the convict as a starting point would be 40 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 forty years, proposed after taking into account the aggravating factors, now to a term of imprisonment of 35 (thirty five) 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 35 (thirty five) years' imprisonment arrived at after consideration of the mitigating factors in favour of the convict, he having been charged in December, 2016 and has been in custody since then, I hereby take into account and set off the one year and nine months as the period the accused has already spent on remand. I therefore sentence the accused to thirty three (33) years and three (3) 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 Adjumani this 9th day of March, 2018.

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Stephen Mubiru
Judge.
9th March, 2018.