

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MOROTO
CRIMINAL CASE NO. 109 OF 2016**

UGANDA **PROSECUTION**

VERSUS

LOMOE NAKOUPUET **ACCUSED**

BEFORE HON. MR. JUSTICE BATEMA N.D.A, JUDGE.

JUDGMENT

[1] Lomoe Nakoupuet stands charged with one count of Rape contrary to sections 123 and 124 of the Penal code Act. It was alleged that the accused on the 22nd day of December 2015 at Nyakwae ward in Nakapelimoru Sub County in Kotido district had unlawful carnal knowledge of one Loballa Sunday without her consent

Ingredients

- [2] In a case of rape prosecution must prove the following ingredients of the offence:
- a. That there was sexual intercourse with a woman capable of giving consent;
 - b. That the sexual intercourse was done without her consent.
 - c. That the accused participated in the commission of the rape.

Burden of Proof

[3] The prosecution carries the burden of proof. This burden never shifts to the accused to prove his innocence. The accused is presumed innocent until proved guilty or until he pleads guilty.

Standard of Proof

[4] Prosecution must prove its case beyond reasonable doubt.

Admitted Evidence

[5] Both the Resident State Attorney, Mr. Anthony Obonyo Jabwor and the defence counsel Ms. Acom Patricia agreed on the medical evidence.

[6] PF. 3A was tendered in court to prove that the survivor was an adult woman capable of giving consent. The medical report showed that the survivor had an injured back full of bruises as a result of being pulled on ground when she was resisting the rape. The defence did not contest the evidence of the sexual assault but denied participation.

Evidence of Participation

[7] Prosecution relied on oral testimonies of two witnesses. PW1 Loballa Sunday (the survivor) told court that she is married to Nyanga Michael (PW2) who was yet to complete the payment of some cows demanded of him as dowry. On the fateful day, the accused met her at her father's home and expressed interest in her. He bought a lot of potent gin (waragi) for his father and brothers. They entertained him from 5:00 p.m. till 2:00 a.m. The accused then forcefully abducted her to his home. She managed to escape and returned home. She opposed her parents and relatives on this new marriage arrangement. PW2 Nyanga Michael met her quarrelling with her parents and brothers who wanted to receive the dowry from the accused. PW1 told court that although the accused made part payment of the dowry by delivering some crates of beer, she refused to consent to the new marriage arrangement that night.

The next morning her family forced her to go with the accused as a wife. She refused but was dragged by her brothers to the home of the accused. She fought off the accused but was held to the floor by her brothers Loteed Apa Lomaret, Lokong Apa Lokol and Lochang Apa Todeng. The accused had forceful sexual intercourse with her. The survivor told court that he made her his wife without her consent.

PW2 told court that he was in the process of paying all the dowry when his father-in-law one Lokiru Nabep allowed the accused to abduct his wife. PW2 witnessed the abduction in broad day light at around 10:00 a.m. The witness saw and recognized Amuria, Lochade Ngorebok, Sigiria Moi and other in the group escorting the abductors in a crowd full of women making noise. They dragged his wife past the trading Centre to the home of the chairman Mr. Angura. He walked away in anger and later reported the matter to Police. The Police raided the home of the accused the next day and arrested him. In that confusion his wife fled to her aunt called Nakurio.

[8] The next day, this witness followed his wife to the home of her aunt. He met her on the way and took her to the Police. She underwent a medical examination which showed bruises on her back, she explained that she fought with the accused resisting the sexual assault until she was overpowered by her brothers who pinned her on the rough floor and enabled the accused to have forceful sexual intercourse with her in a very shameful manner.

- [9] In his sworn defence the accused made a general denial. He said he does not know the survivor and her parents. He denied being a resident of Nyakwae village. He denied having abducted the complainant and/ or raping her. He claimed that he was at home with his wife throughout and has never met the survivor in all his life. He had no witnesses.
- [10] This court found the accused guilty and convicted him having been convinced beyond reasonable doubt that the accused raped the survivor. I now give reasons for finding the accused guilty.
- a. The survivor knew the accused very well since her childhood. She knew the accused as her village mate, an elder in her community and a friend to her father. She properly identified him.
 - b. On the day of first engagement, the accused went to her father and they had drinks from 5:00 p.m. till 2:00 a.m. She was present at home and she saw all. When her father and brothers offered her to this accused as a wife, she rejected him and they had a long and noisy quarrel. Her father and brothers were drinking waragi and were under the influence of alcohol. She was sober. She had enough time to recognize the accused and became aware of his hedonistic intentions.
 - c. The accused successfully but forcefully abducted her to his home on the first day. Fortunately, she was able to escape from him before he could rape her and ran back home in the dark hours of the night. She knew the way to and from the accused's home very well and did not need a guide.
 - d. The next morning the accused went back to her father's home. She saw and heard him negotiating to pay the dowry and even brought part of it in form of crates of beer. The family then resolved to give her away against her will. She was handed over to the accused and forcefully dragged to the accused's home in broad day light at 10:00 a.m. They went through their trading Centre up to the home of the accused.
 - e. I believe she had enough time and opportunity to identify her assailant because they had a long one-to-one fight. She did not easily give in. She bravely fought off the rapist only to be overpowered by her brothers who pinned her on the ground, held her hands and spread out her legs for the accused to rape her. The close proximity of the accused and the survivor during the fight and this brutal sexual act gave her all the chances of recognising and confirming the identity of her rapist. I have no doubt that the accused was properly identified by his victim and survivor.

- f. PW2, the husband to the survivor, was able to see and recognize the accused the night before. He came to the house of his wife and found her quarrelling with her parents and relatives rejecting their arrangement to force her into a new marriage with the accused. The next morning he was at the trading centre and he saw his wife being taken away to the accused's home. That was in broad day light.
- [11] The general denials by the accused and the attempt to create an alibi did not create any doubt in my mind. The accused is guilty as charged.

g. The Backward Culture

- [12] Like in many other rape cases I have handled in this special Sexual and Gender Based Violence (SGBV) session, most women and girls in Karamoja region are victims of the old culture of abduction and rape. It is accepted and tolerated as long as one pays cows to the parents. It is common to hear the rapist pleading not guilty and saying; "***I only made her my wife***". The women and girls here are never treated as full human beings. They are stereotyped as nothing but mere sex commodities or possessions!
- [13] This court condemns the culture of forcefully chasing, abducting and raping girls and woman to make them wives. It is a brutal and backward culture promoting violence against women. Nobody and no one's daughter, sister or mother deserves being raped in the name of marriage. This vice of cultural rape is a resilient, pervasive and persistent culture promoting gender stereotypes.

Article 5 (a) of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) imposes a duty upon government to modify customs and eliminate such stereotypes that promote discrimination against women. It reads;

"States Parties shall take all appropriate measures

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

- [14] It is therefore the duty of all courts of law, as an arm of government. to fight this stereotyped vice of cultural rape. Culture is dynamic and not static. Culture changes from time to time and from place to place. It is high time the culture of abduction and rape is abandoned by our people of Karamoja. I have found nothing positive and worth promoting

in this cultural rape. This court condemns Rape by whatever name called and will always treat it with the contempt it deserves.

h. Respect for human dignity

[15] This cultural rape is a form of torture, cruelty, inhuman and degrading treatment which is outlawed by our Constitution. Under Article 24 thereof, no person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment. Article 44 further makes it a non-derogable right. Clause (2) of article 32 of our Constitution is more progressive and is directly against this type of SGBV propped by customs and traditions. It provides:-

“Laws, cultures or traditions which are against the dignity, welfare or interest of women or any marginalized group.... or which undermine their status, are prohibited by this Constitution”

We cannot condone the violation of these constitutional rights of our sisters, daughters and mothers which has been going on for centuries with impunity in the name of culture.

[16] Article 274 of our 1995 Constitution provides for judicial activism to fight such backward customs and traditions found in the existing customary law. We are empowered by law to construe the existing law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution. We have the legal mandate to, and so must, question the rape culture. This is the time to break the culture of silence and condemn this negative culture in the strongest terms possible. The conviction and sentence must send a clear message to the accused person and anyone intending to abduct and rape the women of Uganda that it is a serious capital offence.

i. The Woman's Right to Choose a Spouse

[17] My last reason is on the woman's right to choose a spouse. Under article 6 of the Maputo Protocol on the Rights of women in Africa, Uganda, as a state Party to the Protocol, undertook to ensure that women and men enjoy equal rights as equal partners in marriage. Uganda undertook to enact appropriate laws to guarantee that no marriage shall take place without the free will and full consent of both parties.

Uganda is also Party to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). Under Article 16(1) thereof the state parties undertook to

take all appropriate measures to eliminate discrimination in all matters relating to marriage and in particular to ensure on the basis of equality of both men and women:-

“b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent.”

Article 31(1) of Uganda’s Constitution is worded and couched in similar terms. The penal law of rape is intended to protect and enforce these rights. The law recognises that a woman’s right to choose a spouse and enter freely into marriage is central to her life and her dignity and equality as a human being. The accused violated all these women’s rights.

Conclusion

[18] In the instant case Loballa Sunday was raped and forced by her parents and brothers to enter into an arranged marriage without her full and free consent.

Both the national laws and the International Human Rights instruments cited herein above were contravened by the accused. Abduction and rape are very serious criminal acts that deny a woman the right to choose when, if and whom she will marry or fall in love with. Apart from the principal offender, the brothers who aided and enabled the accused to have forceful and shameful sexual intercourse with the victim should have been charged with this offence too.

[19] For those reasons this Court found the accused guilty of Rape c/s 123 and 124 of the Penal Code Act of Uganda.

JUDGE

02/01/2019.

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25/01/2019

SENTENCE

1. Josephine Aryongo for State: Aggravating factors

His past criminal record is not known. However Rape is a capital offence that carries a maximum penalty of death.

The manner in which the rape was carried out was brutal, shameful and traumatizing to the survivor. She is still traumatized to date. She may be affected for the rest of her life.

The offence is rampant within the Jurisdiction as observed by Court especially in Karamoja where cultural rape is acceptable.

2. We pray for a deterrent Sentence to eliminate this violence against women. We suggest imprisonment for life.

3. **Leonard Otte on state brief : In mitigation**

There are no known previous records of the accused. Court must treat him as a first offender.

Accused is remorseful. He indeed attempted cultural reconciliation while at Kotido Police Station. It is unfortunate that it failed.

Note that accused was lead on by the parents and brothers of the survivor. They negotiated and accepted the dowry. The brothers actually dragged her to the home of the accused.

Accused is of advanced age. Given the experience accused has gone through there is no chance that he will do it again. He has been on remand from 11/2/2016. That is two weeks shy of three years.

4. We diligently submit that both accused and the victim Labolla Sunday have suffered a wrong. The Karimojong Cultural rape has existed for centuries. They have grown up in this Culture. I agree with Court that this Culture is backward. But if it did not exist, then accused would not have followed it. Both the Victim and Survivor are Victims of Cultural entrapment. The solution does not only lie in a heavy sentence. It lies in appropriate legislation and sensitisation to change the culture. Let us not target the person now in dock but the culture. Tamper Justice with mercy and hand down an appropriate sentence. We so pray.

Sentence

5. Considering the mitigation, the accused is a first offender with no known criminal record. He was of the age of 39 years at the time of arrest and now 43 years. I will also take into consideration the three (3) years spent on remand.

However, the accused's ignorance of the law is no defence. The law condemning rape has been in place for a long time. People in Karamoja just ignore the law and hide behind their condemned Cultures. We shall target both the accused persons and the Culture its self.

6. I sentence the accused to Fifteen (15) years imprisonment.

When three (3) years served on remand are deducted he remains with a balance of twelve (12) years imprisonment. He is sentenced to serve the balance at Moroto Prison.

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Judge

25/01/2019

7. **Right of Appeal explained.**

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Judge

25/01/2019.