

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA HOLDEN AT IGANGA

CRIMINAL SESSION CASE NO. 443 OF 2015

UGANDA:..... PROSECUTOR.

VERSUS

KADAGO MOSES:..... ACCUSED.

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA.

Brief facts and background

The accused Kadago Moses was on unspecified date indicted with the offence of rape contrary to sections 123 and 124 of the Penal Code Act. Cap. 120 LOU (hereinafter referred to as the Act)

It was stated in the indictment that on 2/2/2015, at Bukiri village, Lwemba sub-county in Bugiri district, the accused had unlawful carnal knowledge with a girl Naigulu Hamula without her consent.

The accused denied the offence and a plea of not guilty was entered on 9¹/1/19. The accused was represented by Julius Naita while Wasajja Robert represented the state.

The prosecution case borne out of the evidence adduced, is that NaiguluHamula the victim was a resident of Bukiri Village, Iwemba Parish in Bugiri District. That 16/11/2014, the victim's mother BitamusiNasenya sent her to the shops to buy silver fish (Mukene) at about1900 hours. On her way from the shop, the accused met the victim and one Racheal aged 5 years. That the accused grabbed the victim by the hand, removed the silver fish from her and gave it to Rachael to take home to the victim's mother. That the accused then pulled the victim to a nearby bush, put her down, pulled of her pair of knickers, inserted his erect penis into her vagina and forcefully had sexual intercourse with her. The victim felt a lot of pain and attempted to sound an alarm but the accused threatened to cut her with aknife. That after the accused was done, he put on his pair of trouser and went away. That the victim went home crying and informed her mother about her ordeal.

That the accused was arrested and upon interrogation at police, he confessed in his charge and caution statement to having had sexual intercourse with the victim.

That the victim was medically examined and the examination revealed signs of penetration and a ruptured hymen. The accused was equally examined and found to be in normal physical condition and of sound mind.

The prosecution presented only one witness to prove their case. Both counsel opted not to make submissions for a no case to answer, leaving it to the Court to decide.

This is therefore is my ruling on whether the accused ought to be put on his defence to this charge as provided for under Section 73(1) of the TIA.

My decision

The burden lays upon the prosecution to adduce evidence to prove the following elements of the offence of rape beyond reasonable doubt which include:-

1. That there was sexual intercourse with complainant.
2. That the complainant did not consent to that sexual intercourse or that sexual intercourse was procured by use of force or threat(s).
3. That it was accused who had sexual intercourse with the complainant.

However, the high standard of proof is required not at the close of the prosecution case, but after the trial is closed. Instead it is expected that by the close of its case, the prosecution has made out a *prima facie* case, one on the face of it, is convincing enough to require that the accused person be put on his defence. See for example **Rananlal T. Bhati Vrs R (1957) EA** followed in **Uganda Vrs Kivumbi &Ors Crim. Case No. 20/2011**. It is also established that it is now a well-established law that a *prima facie* case is made out 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 vs. R [1957] E.A 332.**

It is evident from the record that the accused was indicted for rape under the abovementioned law. Indeed it is the charge that he pleaded to.

A perusal of the summary of evidence indicates that the victim Naigulu Hamaula was stated to be aged 13 years. That fact was confirmed by PW1 Bitamisi Nasenga, her mother. Further confirmation appeared in the child health card and short birth certificate (admitted into evidence as P. Exhibit 1 and 2 respectively) where the victim's birth date was recorded as 2/1/01. That would mean the victim was aged about 13 years on the day of the alleged offence of 16/11/14.

The offence of rape is created by Sections 123 and 124 of the Penal Code Act. The offence can only be committed against a woman or girl above the age of eighteen years. The victim having been below that age would fall under the category of defilement contrary to Section 129 of the Act.

It is clear that the accused was charged under the wrong law. The indictment was defective. This anomaly may have been overlooked by both the Court and counsel but it is on record that prosecuting counsel was at the inception of the trial given a chance to amend the indictment but chose not to do so. Thus the accused should not have been allowed to take plea in the first place and the evidence called against him on the defective charge is null and cannot stand.

According to Section 50 TIA, the High Court has quite wide powers to order for the amendment of defective charges especially where it is shown that any amendments can be made without injustice to the accused person. However there is an exception to that rule given under Section 50(2) TIA. It is stated inter alia that:

".....except that no alteration to an indictment shall be permitted by the Court to charge the accused person with an offence which, in the opinion of the Court, is not disclosed by the evidence set out in the summary of evidence prepared under section 168 of the Magistrate's Courts Act.

The accused's case would fall squarely under the exception above. The indictment was incurably defective and the Court would have no powers to have it amended or for the accused to be recalled to plead to it. In any case, and without going into detail, I am not satisfied that the evidence adduced was sufficient to require the accused to be put on his defence for either the offence of rape or defilement.

In my view, this preliminary point is enough to dispose of this indictment. It would be a miscarriage of justice to continue these proceedings by making a finding on whether there is a case to answer. Indeed, there would be none as the accused was indicted and tried on an incurably defective indictment.

I would accordingly dismiss the indictment and discharge the accused forthwith. I direct for his immediate release save if he is being held for any other lawful charge.

I so order.

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EVA K. LUSWATA
JUDGE
26/3/2019