

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE

CRIMINAL SESSION NO. 0292 OF 2016

(Arising from Criminal Case No. AA. 032/2016; CRB 279/2016 Mbale)

UGANDA :: PROSECUTION

VERSUS

KARENGE ABDU :: ACCUSED

JUDGMENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

- [1]. The accused **Karenge Abdu** and others still at large stand charged of the offence of **Rape** contrary to *Sections 123 & 124 Penal Code Act*. It is alleged that during the night of **16th April, 2018** at Kapchorwa Municipal Boma Grounds in Kapchorwa District, the accused and others still at large had unlawful sexual intercourse with **Chelangat Winnie** without her consent. The accused pleaded not guilty to the offence
- [2]. The Prosecution case as can be gathered from the Prosecution witnesses is that the complainant/victim **Chelangat Winnie (PW₁)**, **Esther Chebet (PW₂)** and a one **Sabila** were on their way from Kapchorwa Hospital where they had gone to check on a patient. It is then that they met the accused on the main road, Kapchorwa Town.
- [3]. The accused diverted them from the main road saying that there was patrol police in front beating up people. The complainant/victim and her colleagues heeded and took the unsafe route to the market. They however saw the accused following them. They became suspicious and they decided to return to the main road and opted to run home for safety.

- [4]. The accused run after them and eventually, he caught up with the complainant/victim whom he started beating up while raising flimsy grounds that she aborted his brother's baby and that she should therefore return to the hospital where they were coming from. When she resisted, the accused drew a knife to silence whoever attempted or intended to alarm.
- [5]. A boda boda motorcycle operator came up at the scene. The victim and her colleagues tried to flee on the boda boda, the accused however grabbed the complainant/victim, threw her down and in the process, her colleagues managed to flee with the boda boda rider and she was left behind at the mercy of the accused.
- [6]. Another boda boda motorcycle operator later also came up at the scene. With his help, the complainant/victim was tricked to sit on the boda boda with the accused and together, they rode her to the lonely Boma grounds where both the boda boda rider and the accused manhandled her and mercilessly raped her one after the other.
- [7]. Upon satisfying his lust, the boda boda operator took off and left the complainant/victim with the accused. The accused dragged her to a certain empty house where he raped her further until morning.
- [8]. The complainant/victim surrendered to fate and had given into whatever the accused demanded. The accused offered her his telephone number for future communication. It is then that he let her go.
- [9]. The complainant/victim was able to join her colleagues **Esther (PW₂)** with whom they went to police and reported a case.
- [10]. A search for the accused ensued by police. It was after a week, while at police that the complainant/victim rang the accused using the phone number she got from him. The accused did not pick the call but later, he

called back. He requested her to join him at **GOOD WILL bar**. She agreed to meet him but in the meantime, she alerted police.

- [11]. At **GOOD WILL bar**, the accused showed up but when police featured up to arrest him, he managed to flee and successfully escaped the police chase.
- [12]. The accused was however, after about 2 months arrested by the help of the community/crime preventers as he had been wanted on other allegations of rape of other victims.
- [13]. In his unsworn statement, the accused denied the Prosecution allegations. He stated that he was a boda boda operator in Kapchorwa Town Council and that in the month of April up to July 2018, he was in Kampala where he was working as a guard at a one Henry Kamugisha's home. That he returned home when his mother summoned him home over an issue where some people had encroached on their land. That upon returning home, he went to police to report the encroachers and, that is when he was arrested on allegations of threatening the people who had trespassed on their land.
- [14]. He further stated that his mother was also arrested and detained though for her, she was later released. For him, he was retained for about 3 days and this is when he was told of the allegations of rape of a certain girl. He was consequently, on 24th July, 2018 taken to court.
- [15]. It is trite law that it is the duty of the Prosecution to prove the guilt of the accused person beyond reasonable doubt and that burden of proof does not shift to the accused person, it remains with the Prosecution throughout except in some exceptional cases where the statute provides otherwise; *WOOLMINGTON VS. D.P.P (1935) AC 462* and *OKETH OKALE VS. R (1965) E.A 555*. It is also the law that a conviction should not be based on the weakness of the case as put up by defence but it must be

based on the strength of Prosecution case; **UGANDA VS. OLOYA S/O YOVAN AWEKA [1977] HCB 6.**

[16]. In case of **Rape** contrary to **Sections 123 & 124 of the Penal Code Act**, the ingredients of the offence to be proved by the Prosecution before securing a conviction are:

a. That there was carnal knowledge (sexual act) with the victim.

b. That the sexual act was without the consent of the victim.

c. That the accused participated in the commission of the offence.

[17]. As regards the 1st ingredient of the offence ie carnal knowledge (sexual act) with the victim, during the preliminary hearing under **Section 66 Trial on Indictment Act** the Prosecution adduced and exhibited **PF3A (P. Exh. I)**, a medical examination report of the complainant/victim dated 17th April, 2018. The report is to the effect that the complainant/victim was repeatedly raped and as a result, she sustained bruises at the left side of the neck with deep tenderness. The genital labia minora was severely bruised and the vaginal orifice was abraded with blood stains. The probable cause of the above injuries were a blunt soft but firm object repeatedly inserted with force and frictional forces. As commonly done to sexual offence victims, she was referred for **post-exposure prophylaxis (PEP)**, a precaution for HIV infection.

[18]. On the other hand, the accused was also subjected to medical examination under **P.F24A (P. Exh. II)** where he was found to be of sound mind, no physical injuries but with HIV positive sero status. This signifies that the victim was subjected to the risk of contracting the deadly HIV. The **PEP** precaution was therefore in the circumstances extremely justified.

[19]. The defence did not challenge the elements of the forceful sexual intercourse subjected to the victim without her consent. It is only the

participation of the accused that was contested. The complainant/victim testified how she was first raped by the accused and another who was a boda boda rider, one after the other in the open Boma grounds and then, how the accused alone had forced sexual intercourse with her in a house the entire night before her release in the morning. The findings of the medical examination indicating the physical injuries on the neck ie the deep tenderness and injuries sustained on the genitals are ample proofs of carnal knowledge without her consent.

- [20]. In case one is to look for corroboration, it is in the evidence of **Esther (PW₂)**. The victim narrated to her what befell her while crying. She was in such a distressed state. She was still in the same state when she appeared before the medical officer who examined her. In **PF3A (P. Exh. I)** paragraph "5" the medical officer described her to had been "*sad in appearance.*" In **KIBAZO VS. UGANDA (1965) E.A 507 at 510** while citing **R VS. ACAM REDPATH (1962)46 CR. APP. R319**, it was held that the distressed condition of the complainant is capable of amounting to corroboration though the weight of such evidence as corroboration will vary according to the circumstances of the case. The court should be satisfied that the distress was real and not simulated; **R VS. JAMES HENRY KNIGHT (1966) 50 CR. APP. R 122**.
- [21]. Among the corroborating circumstances almost generally present in cases of rape, are the signs and marks of struggle upon the complainant/victim which strengthens her evidence of lack of consent.
- [22]. In this case, the **P.F3A (P. Exh. I)** showed bruises at the left side of the neck with deep tenderness. This is evidence of struggle. As clearly observed, the defence did not challenge either the carnal knowledge or the lack of consent on the part of the complainant/victim.
- [23]. In totality of the above, I do find that the Prosecution has proved the 1st and 2nd ingredients of the offence beyond reasonable doubt.

- [24]. The next and most important issue is whether the accused participated in the commission of the offence.
- [25]. The offence admittedly took place during the night. According to the complainant/victim (PW₁), it was around 10:00am when she and her colleagues were confronted by the accused. The issue therefore is whether the accused was properly identified as the attacker who committed the offence.
- [26]. This is a case resting on identity of the offender. It is therefore the duty of this court to satisfy itself that in all circumstances, it is safe to act on such identification, which must be free from mistake or error on the part of the identifying witness or witnesses; *PORIA VS. R [1967] E.A 583*.
- [27]. In this case, the complainant/victim and her colleagues **Esther (PW₂)** and **Sabila** were confronted by the accused around Centenary Bank, Main Street, Kapchorwa Town Council. The accused with the view to divert them to probably a more lonely place, told them that there was a police patrol beating up people in front. The complainant/victim and her colleagues heeded to his advice and opted to take the seemingly unsafe market route. They however saw the accused following them. This made them suspicious and for that reason, they decided to return to the Main Street whereupon they started running for their safety. The accused could not have it that way, he chased them until he caught up with the victim whom he beat up while alleging that she aborted his brother's baby. He directed her to return to Kapchorwa Hospital where they were coming from. She refused. The accused now drew a knife to intimidate her from raising an alarm.
- [28]. This scenario occurred along the Main Street. According to **Esther (PW₂)**, in addition to the moonlight, there was security lights. This offered them

sufficient time under the lighting condition of both the moon and security to properly identify the accused.

- [29]. It did not end at that, a boda boda motorcycle operator drew by. According to **Esther (PW₂)**, this boda boda rider mentioned the accused's names as "**Abdu, what are you after?**" This is how she came to know of the accused's name.
- [30]. This boda boda rider helped **Esther (PW₂)** and **Sabila** to flee the scene but the accused had clung on the complainant/victim and as a result, she was left behind at the mercy of the accused. The complainant/victim had become the focus of the accused probably because she was the younger of her colleagues ie aged 24 years.
- [31]. After **Esther** and **Sabila** had left, another boda boda rider came by and with his help, the accused took the victim to the lonely open Boma grounds where the complainant/victim was viciously raped by both the accused and the boda boda rider one after the other. The accused did not identify the boda boda rider.
- [32]. Upon satisfying his lust, the boda boda left the scene leaving the complainant/victim with the accused who still needed her for the night. He dragged her to a nearby empty house (which appear to had been the accused's accommodation) wherein he lighted a candle and then resumed the forceful sex upon her. Again, this candle light provided a further opportunity for identifying the accused. The forceful sexual encounter proceeded until morning. As the complainant/victim had surrendered to fate, the accused in his sexual ogre stupor, offered his telephone number to the victim for future contact and possible encounter before he let her go.
- [33]. The complainant left for **Esther's** place while in a very distressed condition. She was crying. She told Esther that **she was now dead**. That

she had been raped the entire night. With the help of Esther, she reported the matter to police. With the help of the phone number the accused had offered to the victim, she was able to ascertain the accused's name as Abdu. In cooperation with police, she rang the accused's number but he did not pick. He however later called back and he asked the complainant/victim to join him in the evening at **GOOD WILL bar**. The complainant/victim accepted to meet him but in the meantime, she alerted police. At **GOOD WILL bar**, the accused showed up. The complainant/victim again had another opportunity to identify him further.

- [34]. Besides, the phone contact linked not any other person but the accused to the offence. Police failed to apprehend him, he escaped in time.
- [35]. The evidence of the complainant/victim is amply supported and corroborated by the evidence of Esther (PW₂) who had identified the accused under the security lights and moonlight during the previous evening when the accused interfered with their movements. On his arrest, both the victim and PW₂ had no difficulty in pointing at the accused as the offender. This is therefore not an identification by single identifying witness but of more than one witness.
- [36]. On the other hand, the accused put up a defence of **alibi**. He stated that in the month of April up to July 2018 (when the offence was reported committed), he was in Kampala where he was working as a guard at the home of a one Henry Kamugisha. However, during cross examination, he leaked himself and stated that he left for Kampala on the **25th of April, 2018**. From the Prosecution case, the offence was committed in the night of **16th April, 2018** at around 10:00am. It follows from the above that it is possible that after committing the offence on **16th April, 2018**, the accused left for Kampala on the **25th of April, 2018**. This probably explains why it took police months to apprehend him. The accused's

position was not helped by his witness; **Zelda Chelangat (DW₂)** his mother. According to her, the accused left for Kampala around **January or February, 2019** for job and eventually got a job as a casual laborer. That he returned in **March 2019**.

[37]. As already observed, the events of the offence occurred in 2018 but for Zelda(DW₂), she is referring to 2019. It appeared to me that DW₂ was confused over or by the year when the alleged offence was committed. She was not helpful at all to the accused. It is the law that once the accused puts forward an alibi as his defence, he does not assume the duty to prove it since the burden of proving his guilt beyond reasonable doubt remains throughout on the Prosecution; ***SEKITOLEKO VS. UGANDA [1967] E.A 531***.

[38]. In the instant case, the accused's alibi was destroyed by the contradiction of his evidence and that of his mother (DW₂) regarding his location at the time the offence was committed. Secondly, he himself placed himself at the scene of crime when he stated that he left for Kampala on the **25th of April, 2018** when the offence was committed on the **16th of April, 2018**.

[39]. From the totality of the above, I conclude by stating that the accused was properly identified as the offender right way from the time he encountered the complainant and his colleagues along the Main Street of Kapchorwa around Centenary Bank, up to inside the house where he raped her further where, this time there was candle light. Besides, the accused offered the victim with his phone number which she used to lure him back to her at **Good Will bar** for his apprehension by police. It is still the accused who appeared thus an opportunity for her to further identify him. She further came to know the accused's name as **Abdu** by checking it from the number the accused gave her. The claim by the defence that the rapist cannot give out his phone number does not apply

in all circumstances. In this case, the accused offered out his phone number for future encounter with the victim.

[40]. All in all, I find that the Prosecution has proved its case beyond reasonable doubt. The gentleman and lady assessors had also found so and advised me to find so. I therefore in the circumstances find the accused guilty of the offence of rape and I convict him accordingly.

[41]. Dated at **Mbale** this **04th** day of **December, 2020**.

Byaruhanga Jesse Ruggyema

JUDGE

04/12/2020:

Accused present.

Malinga & Muliro for State.

Luchivya for defence absent, Wamimbi holding brief for her.

Court:

Judgment delivered in the presence of the above.

State:

This is an offence of rape which undermines the dignity of a woman and it carries a maximum sentence of death. The accused is a victim of H.I.V and perhaps he was doing it intentionally to spread and infect young girls with H.I.V. We pray that this accused be given a sentence of 25 years because there is nothing to show that he is remorseful. To release him to the public is to endanger other young girls out there.

Mr. Wamimbi:

The convict is 29 years old and therefore a young man capable of reforming. He is a first offender and before arrest, he had 5 children. The

mother of the convict is also in prison and therefore his children are suffering. While in prison, the accused has reformed and he has been on remandsince25th July, 2018. We pray that all the above be put into consideration for his sentence. This court should find that the accused has surely reformed and consider a lenient sentence of 6 years so that he is able to go back and make peace with the victim.

SENTENCE:

The accused is first offender though in evidence, it appeared that he was a known rapist. He is aged 29 years as he stated in his defence. According to the submission of his Counsel, at this age, before his arrest, he had 5 children. His mother is also in incarceration because of land related issues. All these are mitigating factors warranting leniency from this court in his favour.

However, on the other hand, upon the accused being subjected to medical examination, he was found H.I.V positive and it appears apparent that he knew his sero status. The victim therefore was at the risk of contracting H.I.V. Thanks to the medical team, she was immediately placed on PEP (Post Exposure Prophylaxis) caution to prevent the possibility of the virus taking hold in her body. It is only believed or hoped it worked for since in evidence, nobody alluded to it.

This was not an ordinary rape case. The common rape sessions take a very short time and the assailants after satisfying their lust, flee and take off. For this case, the accused forcefully retained the victim even after the 1st round of the rape session in the open Boma grounds. He dragged her into an empty house probably frequently used by the accused for the purpose of accommodation. Whatever the case may be. He raped her the entire night.

It is therefore in the circumstances correct for one to say that the accused intended to ensure that the victim got infected with the H.I.V he was harboring. The H.I.V leads to the deadly AIDS disease. Infecting the victim would have other implications. She would also infect other members of the community especially the male during her other relationships who would also infect others hence a chain of infections but whose source would be traced from the rape incident.

Rape undermines the dignity of a woman. The victim must have gone through a hell of agony as clearly reflected by what she told Esther (PW₂) upon returning from the merciless hands of the accused. It is a life time agony especially considering the sero status of the accused. This court would not want any of the members of community in Kapchorwa to go through what the victim in this case went through. In short, the accused does not deserve to return to the community soon. To do that amount to endangering the public who deserve protection. I note that the accused has been on remand since 25th July, 2018 ie a period of **2 years and 5 months**.

Considering the totality of the above, I do sentence the accused to **22 years and five months** but taking into account the 2 years and 5 months he has spent on remand, he is therefore to serve a sentence of **20 years imprisonment**. Right of appeal explained.

Byaruhanga Jesse Rugyema

JUDGE

14/12/2020