

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL SESSION CASE NO. 0171 OF 2020

UGANDA ----- PROSECUTOR

VERSUS

KABAREEBE MOSES ----- ACCUSED

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

Kabareebe Moses the Accused person in this case was charged with rape contrary to Section 123 and 124 of the Penal Code Act.

It was alleged by the Prosecution that the Accused person on the 25th day of October, 2019, at Kyebando, Kisalosaloo, in Kampala District, had unlawful sexual intercourse with Akello Juliet, a girl then aged 16 years, without her consent.

The Accused denied the charge and the Prosecution called four witnesses in a bid to prove its case.

At the commencement of hearing, the medical examination report of the Accused person was admitted in evidence as Exhibit P₁, under S.66 Trial on Indictment Act.

The issues to determine in this case, that also constitute the ingredients of the offence are: -

- 1) Whether there was carnal knowledge of the Complainant.**
- 2) If so, whether the act was committed without her consent or with consent obtained by threats, deception or violence.**
- 3) Whether it was the Accused person who had carnal knowledge of the Complainant.**

In determining this case, I bear in mind the duty of the Prosecution to prove all the ingredients of the offence beyond all reasonable doubt.

And that, the duty never shifts except in a few exceptional cases provided for by law.

Even when the Accused raises a Defence, it is still up to the Prosecution to disprove the Defence, by adducing evidence to show that nonetheless, the offence was committed and it was committed by the Accused person.

The is because an accused bears no legal burden to prove his innocence.

The Prosecution evidence against the Accused should be so strong as to leave only a remote possibility in the Accused's favor.

I now proceed to evaluate the evidence of both the Prosecution and the Defence, to determine **whether, the Prosecution discharged its burden on each of the ingredients of the offence to the required standard.**

Whether there was carnal knowledge of the Complainant:

To prove this ingredient, the Prosecution relied upon the evidence of PW1, PW2, PW3 and PW4.

PW4, the victim testified that in 2019, she was working as a house maid for her Auntie (PW1), who was renting the place where they stayed.

On the date in question, she went to the bathroom to bathe and she was followed by the Assailant to the bathroom. The Assailant who found when she had already removed her clothes grabbed her, held her mouth and told her that if she made any alarm, he would shoot her with a gun.

Thereafter, he had sexual intercourse with her. After the act, he warned her not to tell anyone and left her in the bathroom.

When PW1, her Aunt returned from work, she told her what had happened and the matter was reported to Police.

PW1, Acen Daisy, the Aunt of the victim confirmed that on that date when she returned from work, she found the victim lying on a chair and crying.

When she asked the victim what the matter was, the victim told her that she had been raped at about 3pm when she had gone to bathe. And that the Assailant had held her mouth and threatened to shoot her if she said anything.

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The matter was reported to Police – Kyebando Police Post.

The story of the victim was also confirmed by PW3 DC Nyakecho Yuma, the Police Officer who investigated the matter.

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The statement of the victim was recorded on 26.10.19, and she was taken for medical examination.

PW2, Kizito Erick, a Clinical Medical Officer confirmed examining the victim on 26.10.19.

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He found her to be of apparent age of 16 years.

The victim had lower abdominal pain. Examination of the genitals showed that her hymen was recently ruptured. There was a fresh tear wound at the lower and upper part of the clitoris.

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The labia minora and majora were tender and had bruises.

The probable cause of the injuries was stated to be recent sexual intercourse within 12-48 hours.

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While the HIV and Pregnancy tests was negative, it was recommended that the victim be put on an PEP (Emergency Pill for pregnancy) before the lapse of 72 hours.

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The medical examination report was admitted in evidence as Exhibit P₂.

The witness was not cross examined.

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PW3, Nyakecho Yunia, a Police Officer told Court what the victim narrated in her statement.

That the victim was working for PW1 as a house maid. And that on the date in question, when PW1 and her husband went to work, the victim remained at home to take care of the children. At about 3pm when she

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went to bathe, the Assailant attacked her and forcefully had sexual intercourse with her. Thereafter, he warned her not to tell PW1.

5 The victim informed PW1 anyway and the matter was reported to Kyebando Police Post.

The victim's statement was recorded on 26.10.19, and thereafter she was taken for medical examination. She was examined by PW2.

10 As earlier indicted, the victim, Akello Juliet was PW4, confirmed that she used to work for PW1 and that on the date in question when she had gone to bathe, she was forced into sexual intercourse.

15 When PW1 returned home, she narrated to her what had happened and the matter was reported to Police.

20 That she recorded a statement and was taken for medical examination. She was feeling pain around her waist. That the Assailant had had sex with her twice and had threatened to kill her the first time, if she told anyone.

Later she returned to her parents in Lira.

25 This ingredient was not contested by the Defence, in its submissions. And I agree with Counsel for the State that considering the evidence of the Prosecution, the first ingredient was proved to the required standard.

30 The next ingredient to determine is **whether the sexual act was committed without the consent of the victim or with consent obtained by threats, deception or violence.**

35 As already indicated in this judgment, the victim was attacked while she had gone to bathe and the Assailant forcefully had sexual intercourse with her. He warned her not to tell anyone or else he would shoot her.

According to the victim, that was not the first time, but even before that, the Assailant had threatened to shoot her if she ever told anyone.

It is apparent from this evidence that the sexual act was committed without the consent of the victim, coupled with threats to shoot her. The ingredient was proved to the required standard.

- 5 What is left for court to decide is **whether it was the Accused person who had carnal knowledge of the victim.**

10 The determination of this ingredient raises a number of other issues that include identification, corroboration, discrepancies and inconsistencies in the evidence and issues concerning the DNA results.

The Prosecution evidence indicates that the offence occurred in broad daylight about 3pm.

- 15 The Assailant was well known to the victim as he was the landlord of the premises where she was staying with her Aunt.

20 The victim named the Accused person as her Assailant, to PW1 her Aunt. She explained that when she went to bathe in the bathroom outside, behind the Accused's house, he passed through the back door of his house, went to the bathroom where he found her already naked.

25 He then grabbed her, had sexual intercourse with her and threatened to shoot her if she told anyone.

However, the victim informed her Aunt PW1 when she returned from work, naming the Accused as her Assailant.

30 This was confirmed by PW1, the Aunt. And PW3, the Police Officer, also stated that according to the statement of the victim, she named the Accused as her Assailant.

35 The victim further testified that, the Accused had been pestering her, and that was the second time the sexual act occurred. That the Accused was insisting that the victim had to be his wife, but that she had told him that since he was older than her, then she could only be the wife of his son.

40 PW1 also testified that the wife of the Accused called her asking her why her niece was having an affair with her husband. PW1 asked for the

telephone of the father of the Accused person, who at first told her to report to Police.

Later that, the father of the Accused tried to settle the matter.

5

The parents of the victim requested that she goes back to Lira contending that they had forgiven the Accused.

10 The victim returned to Lira and later realized that she was pregnant. According to her, the Accused was the only person she had ever had sex with.

15 In contradiction of her evidence, the victim at first denied having had a child. But she asserted that the Accused upon his arrest had warned her not to abort if she found out she was pregnant. Further that, it was the Accused who told her not to tell court that she had a child.

In his unsworn statement, the Accused denied committing the offence, asserting that the Prosecution witnesses had told lies.

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He requested for an Order of Court directing that DNA test be performed to establish **whether he was the father of the child**.

25 The order was made (15th December, 2020) and the results were not availed until 22.02.2021, after court had warned the Accused that there would be no choice but to close the Defence case, if the results were not availed.

30 DW2, Kirya Musa, the Government Analyst testified that the order for the DNA was received on 21.12.2020.

35 It required the Directorate to examine samples from the Accused as alleged father of Adoi Daniella the child, and Juliet Akello, the mother (PW4).

The three people were escorted to the Laboratory by Police Officers.

40 The samples were taken from them. Upon analysis of their samples, he came to the conclusion that the results of the analysis do not support the proposition that Accused is the biological father of the child Adoi Daniella.

The DNA analysis report was admitted in evidence as Exhibit D₂.

At this juncture, I remind myself of the established position of the law,
5 that, ***"it is not the duty of an accused to prove his Defence. It is up to the Prosecution to disprove the Defence by adducing evidence that shows not only that the offence was committed, but was committed by the Accused person"*** – See the case of **Woolmington vs. Director of Public Prosecutions (1935) AC 462**
10 and **Miller vs. Minister of pensions [1947] 2 ALL ER 373** and **Lubogo vs. Uganda [1967] EA 440**.

It was the submission of Counsel for the Accused that the victim claimed
15 that she became pregnant as a result of the rape and yet she had never had sex with any other man and that the Accused was therefore the father of her child.

Also that he called her telling her not to abort as he would take care of
20 the child. However, that, the DNA analysis did not support the proposition that Accused was the biological father of the child in question.

Counsel asserted that this brings the evidence of the victim in
25 contention, who in cross examination first denied having a child. That this brings her character into question considering that she lied to court disputing the obvious fact of having a child.

Court was then urged to take the evidence with caution considering the
30 lies the victim told in court.

This, Counsel insisted, was coupled with the fact that the evidence of
PW1 and PW2 was hear say.

It was then prayed that court should give due weight to the scientific
35 evidence and find that there was no sexual act between the victim and the Accused and therefore that, the Accused's commission of the act is also in question.

In reply, Counsel for the State prayed to court to ignore the submissions
40 that the victim intentionally lied to court, as at her age, she could easily be manipulated.

That, that also explains why she did not say anything the first time she was sexually assaulted, as she was afraid of the Accused person.

5 Further that, it is the Prosecution evidence that the Accused through his father tried to settle the matter. And his conduct was not that of an innocent person, as he kept in touch with the victim, in an attempt to frustrate the case.

10 Further that, the DNA analysis report although it came to the conclusion that the Accused is not the father of the child of the victim, it has no bearing on the matter. That is, ingredients of the offence.

15 It only proves parentage of a child but does not take away the fact that someone can be raped by different people.

Contending that, the Prosecution had proved all the necessary ingredients of the offence, Counsel prayed court to find the Accused person guilty and convict him accordingly.

20 Looking at the evidence of the Prosecution and the Defence, and bearing in mind that an accused has no duty to prove his innocence, it is apparent that the offence occurred in broad day light 3pm when the victim had gone to the bathroom to bathe.

25 The Assailant whom she identified as the Accused, went through the back door of his house to the bathroom and forced her into the sexual act. He threatened to (shot) kill her, if she told anyone.

30 The circumstances were ideal for correct identification, more so as the victim knew the Accused person as the landlord of the home of PW1 where she lived.

35 The uncontradicted evidence of the victim was that, it was not the first time she had been sexually assaulted by the Accused, although the first time she was too scared to say anything.

40 On the date in question, she named the Accused as the assailant. And it is also the undisputed evidence of PW1 that the wife of the Accused had phoned her asking her why her maid (victim) was having an affair with her husband. This evidence was not challenged in cross examination.

It is also on record that, through the father of the Accused person they tried to settle the matter.

- 5 And the victim also testified that the Accused had been telling her that whether she liked it or not, she would be his wife.

The actions and utterances of the Accused person raise a lot of questions.

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Why would the father of Accused propose any settlement if the Accused had not committed the offence?

- 15 Why would the Accused tell the victim not to abort if she found out, she was pregnant and offer to take care of the child?

Why would he tell her not to tell the court that she had had a child if he had not had any sexual intercourse with her?

- 20 Counsel for the Accused's submission that the victim lied to court and therefore her evidence is unreliable, cannot be sustained as the victim gave explanation, as already indicated in this judgment, that it was the Accused who told her not to reveal to court that she had a child.

- 25 Although the DNA report evidence of DW2 indicates that the Accused is not the father of the child, that alone does not mean that he never had any sexual intercourse with the victim, from the reasons already set out in this judgment.

- 30 I am persuaded by the argument of Counsel for the State, that it is the Accused person had sexual intercourse with victim without her consent

- 35 The DNA report does not belie the act of sexual intercourse, which was proved by the Prosecution. It is only meant to prove paternity of a child.

When all the surrounding circumstances are put together, I find that I am satisfied with all the evidence adduced by the Prosecution.

- 40 The Assessors in their joint opinion were also of the view that the results of the DNA analysis did mean that Accused did not rape the victim.

Taking into account all the other evidence outlined herein, they advised court to find the Accused person guilty.

5 In agreement with their opinion, I am satisfied that with all the evidence and for all the reasons set out in this judgment, the Prosecution proved the guilt of the Accused person beyond reasonable doubt.

10 He is accordingly found guilty of rape contrary to Section 123 and 124 of the Penal Code Act and he is hereby convicted as indicted.

**FLAVIA SENOGA ANGLIN
JUDGE**

15 **30.03.2021**