

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI  
CRIM. SESSION CASE NO. 0096 OF 2018; CRB 118/2016

UGANDA:..... PROSECUTOR  
VERSUS

1. KYALIGONZA MATAYO  
2. AHUMUZA INNOCENT alias HASSAN :..... ACCUSED

*Before: Hon. Justice Byaruhanga Jesse Rugyema*

JUDGMENT

- [1] The 2 accused persons; **Kyalingonza Matayo** (A1) and **Ahumuza Innocent alias Hassan** (A2) were indicted with **2 Counts; Rape C/ss 123 & 124 PCA in Count 1** and **Simple Robbery C/ss 285 & 286 PCA in Count II**.
- [2] In **Count 1**, it was alleged that on the 15/1/2016 at Bwikya Cell, Mparo Division in Hoima District, the 2 accused persons, after committing robbery on a one **Kihumuro Florence** (mother of the victim), had sexual intercourse with **Katusiime Annah** (the victim) one after the other without her consent.
- [3] In **Count II**, it was alleged that on the same day and at the same place as in **Count 1**, the 2 accused persons robbed **Kihumuro Florence** of Ugx 300,000/=, clothes, 5 blue plastic chairs, 2 mattresses and handbags all valued at Ugx 800,000/= and immediately after the said Robbery used actual violence on the said **Kihumuro Florence**.
- [4] **A1** opted for plea bargain, was found guilty on his own plea of guilt and was convicted accordingly while **A2** pleaded not guilty to the offences.
- [5] The prosecution case as against **A2** is as follows;  
During the night of 14<sup>th</sup> & 15<sup>th</sup> January 2016, thieves who had masked themselves to avoid identification broke into the house of **Kihumuro Rogers** and robbed mattresses, chairs, a curtain and other items.

**Kihumuro Rogers**, the head of the house had gone out to work at Bunyoro University where he worked as an askari. In the house were his wife **Kihumuro Florence** and her daughter **Katusiime Annah**, the victim.

- [6] The thieves who were 3 in number found **Katusiime Annah**, the victim, in her bedroom sleeping. They had torches which they flashed around. They bundled up the victim and forcefully took her outside the house. One of the thieves had a knife which he placed under the breasts of the victim as he threatened to kill her. They took the victim to Bwikya primary school pitch where they each raped her. Those who participated in the rape of the victim were 2 of the assailants whom she identified as the 2 accused persons who had removed their masks in the course of dragging her outside the house and during the rape.
- [7] During the rape, **A1** stabbed the victim below the breasts and the right thumb with the knife. Thereafter, he took off and left her bleeding. The victim walked slowly home from the pitch. At home she found when her mother had gone to report the case at Kinubi police post, Hoima. She later followed her to police and this is when investigations and hunt for the culprits commenced.
- [8] In the meantime, by 19/1/2016, Hoima police had **A1** in the cells. He was being held for shop breaking charges and police had formed an opinion to search his place. With the help of the area L.C Chairperson, police broke into **A1's** house and recovered a list of items which included radio speakers, hoofers, basins, cartons of waragi, beers, sodas, mattresses, suit cases, plastic chairs, fridges of different sizes e.t.c all of which were suspected to be stolen items.
- [9] As a consequence of the recovery of these items, the O.C CID Hoima police post put up a public announcement on the radio for people to come and see if they could identify any of the recovered properties as belonging to them.

- [10] On the 24/1/2016, **Kihumuro Florence** came and was able to identify some of the recovered properties to wit; blue plastic chairs and a curtain with a burn mark as some of the items that were robbed from her house during the night of 14<sup>th</sup> & 15<sup>th</sup> Jan.2016 when her daughter **Katusiime Annah**, the victim was raped. **A1** was believed to be operating a “Store/operational house” with **A2** where they store their loot and this is where the suspected stolen properties were recovered. As a result, police sought for **A2** who was eventually found, arrested and detained. A police identification parade was mounted for identification of the assailants and **Katusiime Annah**, the victim was able to identify **A2** as one of the assailants who raped her.
- [11] In his sworn defence, **A2** stated that he was a butcher and a resident of Kinubi cell, Hoima city. That his other name **Hassan**, was of his father. He narrated how police on 23/3/2016 arrested him on allegations of stealing a motor cycle, detained him at police for 5 days and later told him of the present allegations of rape of **Katusiime Annah** of which he was later charged and taken to court. He denied knowledge of **A1** claiming that he found him already in prison over allegations of rape. He also denied ever sharing any accommodation with **A1**.
- [12] 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 weakness of his defence; **Ssekitoleko Vs Uganda [1967] EA 531**.
- [13] It follows therefore that in a case of Rape, the prosecution has the onus to prove the ingredients of the offence beyond reasonable doubt. The essential elements requiring proof beyond reasonable doubt in the offence of Rape are;
1. That there was sexual intercourse with the victim.
  2. That the victim did not consent to the sexual intercourse.
  3. That it was the accused who had the unlawful intercourse with the victim; **See S.123 PCA** on the definition of rape and also **Kibazo Vs Uganda [1965] EA 507**.

**1<sup>st</sup> ingredient of the offence; Whether there was sexual intercourse with the victim.**

[14] The law regarding proof of sexual intercourse was settled in the case of **Bassita Hussein Vs Uganda S.C.Crim. Appeal No.35 of 1995** as follows;

*“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence.”*

[15] In the instant case, the victim **Katusiime Annah** (PW1) testified that 2 of the thieves who had broken into their house dragged her to Bwikya primary school pitch where they forcefully had sexual intercourse with her one after the other. Thereafter, the rapists took off.

[16] The matter was eventually reported to police. The victim (**PW1**) was referred for medical examination and treatment at Hoima police unit Health Centre. According to **P.F3A** upon which **PW1** was medically examined, it was admitted under **S.66 T.I.A** as an agreed fact/document (**P.Exh.1**).

[17] According to the medical report (**P.Exh.1**), the victim **Katusiime** (PW1) was of the apparent age of 14 years when she was raped. The general examination revealed that she was “anxious” with blood stains on her skirt and buttocks. As regards the genitals, her hymen was ruptured and had bruises and redness around the labia minora parts of the vagina and the probable cause of all the above was blunt penetrating objects.

[18] The medical report (**P.Exh.1**) corroborated the evidence of the victim that she had been raped by 2 assailants hence the blunt penis penetrating objects.

[20] Since the defence did not contest this element of the offence, I believed the victim’s evidence regarding the sexual intercourse with the assailants and I therefore find the first ingredient of the offence accordingly proved beyond reasonable doubt.

**2<sup>nd</sup> ingredient; Lack of consent.**

- [21] Proof of lack of consent is normally established by the victim's evidence, medical evidence and any other cogent evidence; **Uganda Vs Otim James H.C.Crim. Session No.09/2015, Lira.**
- [22] In the instant case, **Katusiime Annah** (PW1) testified that the assailants were armed with a knife. One of them (**A1**) stabbed her below the breasts and on the right thumb with a knife as they forced her into sexual intercourse. Her evidence is corroborated by the medical report (**P.Exh.1**) which revealed that the victim had a swollen left hand with a superficial wound around the chest/breast.
- [23] Since this element of the offence was also not contested by the defence, I believed the victim's evidence as regards the forceful sexual intercourse as corroborated by the medical report (**P.Exh.1**) and I find that she did not consent to the sexual act. The injuries sustained were a result of her resistance against the rapists.

**3<sup>rd</sup> ingredient of the offence; Whether it is the accused who had the unlawful sexual intercourse with the victim.**

- [24] 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.
- [25] According to the victim, the offence was committed in the middle of the night. She was found in her bedroom sleeping but to be bundled up and forcefully taken outside the house where she was later taken to Bwikya primary school pitch where she was raped. She however revealed that while the assailants were inside the house, they were putting on and off their masks and because of torch flashes inside the room, she was able to identify them though she never knew their names, and it was her first time to see them.
- [26] 2ndly, that while outside, with the help of the moon light, she was able to identify the accused persons.

- [27] It is however my view that it is extremely difficult for one to be able to identify a strange assailant by the help of torch flashes being held by the assailants and then be able to further identify one by the help of the moon light with such precision that during an identification parade, the victim is able to identify the attacker without any difficulties. The fear, the confusion and pain that is associated by the attacks at night does itself affect the quality of the identification. The situation was further complicated by the fact that the attackers had masked themselves implying that they intended not to be identified.
- [28] In the circumstances of this case, I conclude that the victim could not have identified the accused under the circumstances where the attackers must have been flashing the torches in her face. The torch flashes must have inhibited her ability to identify anyone.
- [29] The recovery of the stolen properties by police which included those identified by the mother of the victim (**PW2**) as being some of the items stolen from their home during the night of the commission of the offence cannot incriminate the accused because the items were recovered from **A1's** place. There was no cogent evidence adduced by the prosecution that **A1** shared a house or accommodation with **A2**.
- [30] In view of the foregoing, I am in disagreement with the lady and gentlemen assessors that the suspected stolen properties were recovered from the premises shared by the accused persons and or that there is evidence that they shared accommodation and as a result, I find that the prosecution has not proved beyond reasonable doubt that the accused (**A2**) was among or participated in the commission of the offence of rape. In the premises, **A2** is not found guilty of **Count 1** and is acquitted accordingly.

**Count II: SIMPLE ROBBERY C/SS 285 & 286 P.C.A.**

- [31] It is trite that on a charge of Simple robbery, the prosecution has the burden to prove the following elements of the offence beyond reasonable doubt.

- (i) Theft of property belonging to the victim.
- (ii) Use of violence or threat of use of violence during the theft.
- (iii) Participation of the accused in the theft; See **S.285 of the P.C.A.**

[32] Theft of the items named in the indictment was not contested. According to **Kihumuro Florence** (PW2), the victim of the robbery, when thieves broke into the house they were demanding for money, but when she told them that she had no money, they picked her bag which was around that contained Ugx 300,000/=. Then one of them moved to the garage and picked a mattress, 5 chairs and a curtain. Thereafter the thieves left.

[33] Later, police recovered certain suspected stolen properties and among them were her blue plastic chairs which she was able to identify by the help of a mark thereon “**KF**” standing as initials of her names “**Kihumuro Florence**”, and the curtain which she was able to identify by the help of a candle burn mark thereon.

[34] With the above evidence, I find that the prosecution has proved the first ingredient of the offence beyond reasonable doubt.

#### **Use of violence or threat of use of violence during the robbery**

[35] It is the evidence of **Kihumuro Florence** (PW2) that when the thieves sighted her bag of money, they picked it and in the process, she grabbed one of them. One of them hit her with a club on the arm and she got paralysed. This was corroborated by her medical report (P.Exh.2) which is to the effect that she had a “mild diffuse tenderness on the posterior aspect of the scapular”.

[36] The above evidence was not contested by the defence and as a result, I believe it and find that the 2<sup>nd</sup> ingredient of the offence of use of violence or threat of use of violence during the robbery has been proved beyond reasonable doubt.

#### **Proof of participation of the accused person**

[37] The victim **Kihumuro Florence** conceded that she was not able to identify any of the assailants because they had masked themselves.

2ndly, none of the items lost or robbed during the robbery were traced from the accused's house. They were recovered from **A1's** house. The accused put up a denial regarding his participation in the commission of the offence. The prosecution has therefore not been able to place the accused at the scene of the crime. In the premises, I find the last and the most important ingredient of the offence not proved by the prosecution.

[38] All in all, the prosecution has not been able to prove the 2 counts of the offence of rape and simple robbery against the accused person. He is therefore found not guilty of the 2 Counts. He is in the premises set free unless he is being lawfully held on other charges.

**Dated at Masindi this 7<sup>th</sup> day of June, 2022.**

**Byaruhanga Jesse Ruggyema**  
**JUDGE.**