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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KABALE
CRIMINAL SESSIONS CASE No. 0078 OF 2017

UGANDA PROSECUTOR

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VERSUS

NIWAGABA OBED..... ACCUSED

Before: Hon. Justice Jane Okuo Kajuga

JUDGMENT

15 The accused in this case was indicted with one count of Rape contrary to Section 123 and 124 of the Penal Code Act. It is alleged that on the 17th of September 2016 at Ahamaramu (Rukore) village, Maziba sub county in Kabale District, **Niwagaba Obed Kakyetero** unlawfully performed a sexual act with Ahurira Ester without her consent.

The accused denied the offence and a plea of not guilty was entered on 14/12/2021. *J. Okuo*

20 The case for the prosecution is that on the fateful day, the victim escorted her mother, **Fausta Katangaza** (PW5) to board a vehicle at around 5.00 am. As she was on her way back home after seeing her off, she met Kakyetero at a place called Ahamaramu. The accused did not say anything to her. He attacked her and a struggle ensued where he overpowered her. When she tried to make an alarm the accused boxed her on the mouth.

25 He also pulled out a knife and threatened to stab her when she said she was going to report to the authorities. He tore her panty and removed his man hood, then started having sex with her. When the accused saw the light from a vehicle, he jumped off the victim, boarded the vehicle which continued in the direction of Rubira. The complainant was able to recognize the assailant as she knew him as a man who traded jackfruits in

30 the area.

The accused pleaded not guilty thus throwing into issue all the elements of the offense. The matter proceeded to trial.

5 **Representation:**

Julie Najjunju (SA) appeared for the State while Ramadhan Akiiki represented the accused on State Brief. Both made oral submissions

Burden and standard of Proof:

10 The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift except in a few statutory cases. This is not one of the exceptions.

It is trite law that a person accused of a crime can only be convicted on the strength of the prosecution case and not because of any weakness in his defense. (See **Sekitoleko Vs Uganda [1967] EA 531** and **Woolmington Vs DPP [1935] AC 462**. This burden must
15 be discharged to the standard of proof beyond reasonable doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent. It does not mean proof beyond the shadow of a doubt (See **Miller Vs Minister of Pensions [1947] 2 ALL ER 372**)

20 **The Law on rape**

For the accused to be convicted of rape, the prosecution must prove each of the following essential ingredients beyond reasonable doubt.

1. Carnal knowledge of a girl or woman
2. Absence of consent of the victim
- 25 3. The accused is the one who had carnal knowledge of the victim

Proof of Carnal Knowledge of a woman:

Carnal knowledge means penetration of the vagina, however slight of the victim by a sexual organ where sexual organ means a penis. Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence.
30 See **Uganda versus Kalema David Criminal Session Case No 165/2015**

The victim in this case PW1 **Ahurira Esteri**, testified that the assailant tore her panty, removed his manhood and starting having sex with her.

PW2 Twinebaaha Apollo, a principal psychiatric officer who examined the victim on 17/9/2016, the same day the offence is alleged to have been committed, corroborated

- 5 her testimony. In his report, **Prosecution Exhibit PEX1** (P.F.3A), he certified that the victim was of the apparent age of 19 years. His findings were that there was a lacerated wound on both vaginal walls. He also found soft tissue around the neck, cut wound on the lower lips and swollen lower lips. There was a lacerated wound on both knees. The injuries were found to be consistent with forceful sexual intercourse / penetration.
- 10 The defense did not submit to the contrary or contest this ground. I am satisfied that the prosecution has proved beyond reasonable doubt, that there was carnal knowledge of Esteri Ahurira on 17/9/2016.

Proof of lack of consent by the victim:

- 15 Proof of lack of consent is also established by the victim's evidence, medical evidence and any other cogent evidence, including evidence of violence or a struggle. The victim PW1 Esteri testified that the accused beat her up and over powered her. She further testified that accused threatened to stab her with a knife and when she made an alarm, the accused boxed her on the lips. The accused also tore her pants.

- 20 This is corroborated by the testimony of Pw2 who examined the victim and established that the injuries were consistent with forceful penetration. He confirms that the victim suffered other injuries apart from vaginal ones.

PW5 Fausta Katanganza the mother to the victim testified that she found Esteri (victim) with a swollen face and she was not in a good condition. Her head and her lips were swollen

- 25 **PW 6 Atwongyeire Florence**, an elder sister to the victim testified that Esteri returned from escorting their mother in a distressed state. She was crying and was carrying part of her panty in her hand. She had soil on her body and her lip was swollen.

- 30 **Pw7 No 26133 D/Sgt Gumisiriza Joseph** testified that when the case was reported the victim herself brought in soiled clothes one of which was a knicker, a grey blouse and a sweater. He too testified that victim had a swollen lip and a cut wound on the lower lip. These soiled clothes that were recovered from the victim were tendered in in court and marked **PEX 4(b)**.

- 35 The testimony of the above witnesses was consistent and not destroyed by cross examination. I am therefore satisfied that the prosecution has proved beyond reasonable doubt that Esteri did not consent to the sexual intercourse. If she had

5 consented she would not have suffered the injuries or damage to her clothes especially the torn panty. Counsel for the defense did not contest this element either.

Proof that it is the accused who committed the offense:

This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime not as a mere spectator but as the perpetrator of the
10 offence. Suffice to note that this is an offence that takes place, most of the times in places of isolation, therefore the victim would be a single identifying witness.

Section 133 of the Evidence Act provides that subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact. In this case therefore I will analyze the evidence of PW1 as one who
15 identified her assailant.

PW1 in her evidence said that she knew the accused person and therefore rightly identified him as a man who usually traded jack fruits although she had forgotten his name. The fight took around 30 minutes. In cross examination she said she saw the accused's face clearly because it was almost morning and not so dark so she would
20 identify him.

The question to be determined is whether the identifying witness was able to recognize the accused. In the circumstances of this nature, the court is required to first warn itself of the likely dangers of acting on such evidence and only to do so after being satisfied that correct identification was made, which is free of error or mistakes. In doing so, the
25 court considers, whether the witnesses were familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witness to observe and identify the accused and the proximity of the witness to the accused at the time of observing the accused. **(See Abdalla Bin Wendo V R (1953) 20 EACA 106; Roria V R [1967] EA 583 and Abdalla Nabulere and two others V Uganda [1975] HCB 77)**

30 In the instant case the victim knew the accused prior to the incident. The fact that he was on top of her shows close proximity and the time the scuffle took was conducive for proper identification. I am therefore satisfied that the victim properly identified her attacker.

There are other pieces of evidence that the prosecution relied upon to place the accused
35 at the scene. Pw7 No 26133 D/Sgt. Gumisiriza Joseph recovered from the accused a black

5 pair of trousers that was soiled and the same was tendered in court and marked as **PEX 5(b)** He took interest in the trousers because they were soiled at the knees. From his observation, the soil on the victim's clothes and on that of the accused's trousers appeared to be the same. The court had the opportunity to carefully observe the clothes. Even with the passage of time it is clear that the soiling was on the knees and not
10 elsewhere. I find this very significant, and corroboratory of the victim's identification of the assailant as the accused.

Further credence is lent to the complainants claim by the testimony of **PW3 No 38393 D/C Turyagumanawe Alfred** who arrested the accused. He testified that he observed unusual things from a person travelling. The clothes the accused had on were soiled at
15 the knees and he had fresh injuries. I find the defense that the clothes of accused were soiled because of dust that got on him on the journey from Kahondo to Kabale as not believable. If that had been so, there would have been soil marks spread all over the trousers in a more random manner. I disregard that explanation.

Lastly, the accused in his defense places himself at the scene in Rubira that very
20 morning. He confirms that he saw the victim, though he denies committing the offense for which he is indicted.

It was suggested by the prosecution witnesses including some police officers and the brother of the victim that the accused ran away after the commission of the crime. In light of the evidence that the accused was a turn boy and was arrested while at work, I
25 am unable to find for a fact that the accused was running away when he was arrested. **PW3** himself stated to court that he was not able to establish if this was true. Guilty conduct cannot be imputed on the accused in the circumstances.

Contradictions and inconsistencies

It was submitted for the accused that there were several contradictions in the
30 prosecution case which clearly demonstrated that the accused did not rape the victim.

Place of the incident:

Counsel for the defense pointed out that whereas **PW1** testified that the rape took place in the middle of the road, the investigating Officer, Gumisiriza drew a sketch plan which was admitted as **PEX3**, showing that the incident happened at the side of the road. I

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- 5 have carefully considered the sketch plan. Item No 5 thereon shows that there was a struggle on the road as there were skid marks running from across the road to the site of the crime marked B thereon. The victim was pulled from the opposite side of the road from a point marked A. The investigating officer was led to the scene by the victim herself.
- 10 After carefully considering the above issues in respect of the sketch plan and the passage of time, it is my finding that the contradiction is minor and does not go to the root. The victim was dragged at various points and it is doubtful that the entire struggle and eventual rape occurred exactly in the middle of the road.

Contradictions on timelines of events/occurrences

- 15 It was submitted that PW1 testified that she left home at 5 am and that the rape took place at 5.30 am. Other witnesses like PW4, 5 and 6 stated that it takes only ten minutes or thereabouts to reach Ahamaramu, thus posing the question of where the victim was before the alleged rape occurred. It is contended that she had twenty minutes which were not accounted for, and that this is the period she used to go and see Smith, the
- 20 salon operator that the accused referred to in his defense. I will analyze the defense later in this judgement.

- Regarding the contradictory time lines, it is improper to expect witnesses to have noted the time when specific events occurred, with the precision of mathematics. It is doubtful that the witnesses were checking their watches to know the exact time when events
- 25 occurred, more so the victim who faced an attack and was struggling with the accused. The element of fear can distort any one's perception of time. I am convinced that the time frames given by witnesses were an estimation rather than an exercise of precision. I decline therefore to find any differences in timeframes as proof that the accused could not have been the one who raped the victim.

30 Points where the injuries were found

- The defense questioned why the victim upon examination, was not found with injuries on her back, or the back of her body if indeed the accused threw her down on her back and forced himself on her sexually. I have considered all the prosecution evidence. I find it probable that her fall could have been cushioned by the fact that she had a sweater
- 35 on. There is no evidence to suggest that the accused removed all the victim's clothes.

5 When all the evidence is analyzed as a whole, the absence of injuries on the back does not wash off the strength of the other evidence that corroborates the victim's assertion that she was raped by the accused.

Counsel for the defense in his final submissions argued that the victim should have sustained injuries on the buttocks had the fight been on a murram road. He also argued
10 that since the injuries were on the knees one wonders if the accused was on top of her. According to defense counsel, the injuries sustained were not a result of the rape. Counsel also invited court to look at the exhibit (5A and B) tendered in court and submitted that the sweater the victim was wearing was not soiled. That the skirt was not soiled.

15 I have examined the exhibits and I find the sweater was soiled at the back. I also noticed the knickers were torn and soiled. I have considered the submissions of the defense and I find that the argument that there would have been injuries behind the victim if the accused was on top of her without merit. The fact that the victim sustained injuries on the face, knees and genitalia is sufficient to prove that there was a struggle.

20 Defense also questioned why the skirt was not soiled. I do not find it strange that the skirt was not soiled. In the circumstances it only lends credence to the fact that there was a struggle. The skirt could have gone up during the scuffle and it is no wonder that it was the sweater and the knickers of the victim which were soiled.

25 In conclusion, I note that prosecution evidence had some inconsistencies. These however are minor and do not go to the root of the case. The law on contradictions and inconsistencies is that if they are minor, they can be ignored but if they are grave and go to the root of the case, such evidence ought to be disregarded. See **Alfred Tajar Vs**
30 **Uganda EACA Criminal Appeal No 167 of 1969.**

Defense case:

The accused who testified as DW1 in defense said that he knew the victim as his girlfriend and that they had been in a relationship for seven months. That on the morning in issue, he was at Rubira when he saw the victim coming out of the house of
35 smith, the salon operator at 5.30 am. When he asked her where she was coming from she didn't reply and they had a fight. That after the fight, the victim told the accused that she would tell her brother who works in Kabale and he would be imprisoned. He

5 states that the injuries the victim suffered on her face were as a result of the fight they had.

During Cross examination, it was established that the accused had told police upon his arrest that he did not associate or relate with the victim. This contradicted his testimony in court that she was his girlfriend. The accused's plain statement recorded at police
10 was tendered in evidence and marked **Exhibit PEX6**. I have carefully studied the statement. He stated therein that ***"I know one Ahurira Esther as the sister to Enock and daughter of Kitoma...she had never been my friend and I do not always associate with her"***

When he was asked why he told police something contrary to what he was telling court,
15 he said he was afraid that they would detain him. The accused is not truthful in his defense. It is not logical that a person who knows himself to be innocent of any crime, especially one as serious as rape, would withhold from the police critical information that would go a long way to establish his innocence. He had nothing to fear at that point except a lesser charge of assault. I am convinced that the accused did not see the victim
20 leave Smith's house that morning as he alleges. If so, he would have immediately informed the police that he had seen her come from there and deflected the rape charge to where it belonged. *True*

I disregard the theory of Smith as an afterthought and find his defense to be a fabrication of convenience. The police statement of the accused together with his
25 evidence on oath are inconsistent.

I find the above inconsistencies of a grave nature and point to deliberate falsehoods and hence shake the credibility of the evidence of the defense. To the contrary, the prosecution witnesses appeared truthful and firm in their testimonies especially the victim whose evidence at the police is the same as what she gave in court.

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I find that the prosecution linked the accused as the perpetrator of the offense.

I disagree with the assessors who advised me to acquit the accused because prosecution evidence was tainted with contradictions and inconsistencies.

5 In the result, I find that the prosecution has proved all the essential ingredients of the
offence of rape beyond reasonable doubt. The accused is therefore found guilty and
accordingly convicted of the offence of Rape C/s 123 and 124 of the Penal Code Act.



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Jane Okuo

Judge

19th January 2022

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SENTENCE AND REASONS FOR SENTENCE

Upon the accused being convicted of Rape C/s 123 and 124 of the Penal Code Act, submitted in aggravation as follows; That this a capital offence carrying a death sentence as the highest. Violence was used hence the victim experienced injuries and psychological trauma. That this trauma continues and the victim had go through this torture again during her testimony. The convict is not remorseful and the offence is rampant in the region. She hence prayed for a deterrent sentence of 30 years' imprisonment.

In his submissions in mitigation of sentence, counsel for the accused prayed for lenience on grounds that; the convict is 28 years. He has 3 children of a very young age. His wife abandoned the children. The children have been left with the convict's mother who is now blind and has cancer. The convict is also very sorry for what he did.

In sentencing, the accused, I am guided by **The constitution (Sentencing Guidelines for courts of Judicature) (Practice) Directions, 2013 Regulation 22** which specify circumstances by virtue of which court may consider a death sentence in rape cases which include inter alia; where the victim was raped repeatedly, where the offender had HIV and knew, where the victim was gang raped, whether serious injuries were caused or any other grave circumstances

I have considered the circumstances under which the instant case was committed and I have discounted the death penalty.

I have also considered **Regulation 24 of the Sentencing guidelines** which stipulates circumstances under which a life imprisonment is applicable. Similarly, the life sentence is discounted too

In imposing a custodial sentence, item 2 part 1 of the guidelines prescribes a base point of 35 years' imprisonment. This can vary depending on the aggravating factors.

I will however take into consideration the current sentencing practice of the offence of rape.

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5 In the case of **Onaba Razaki V Uganda, CACA No 327 of 2009**, court of appeal set aside the sentence of 15 years' imprisonment for the offence of rape and substituted it with 14 years' imprisonment

In **Yebuga Majib Vs Uganda CACA No 3013 of 2009**, the appellant raped the victim while she was asleep and was convicted and sentenced to 15 years' imprisonment. On
10 appeal COA upheld the sentence of 15 years.

Lastly in the case of **Adiya Adinani V Uganda COA Consolidated Appeals No 635 of 2014 and No 757 of 2015** court considered aggravating factors and sentenced the appellant to 18 years' imprisonment.

I have considered the gravity of the offence and the circumstances in which the offence
15 was committed. A lot of force was used, the victim sustained injuries as a result of the rape and assault. I find that the punishment that would suit the convict would be a deterrent severe custodial sentence but the same is mitigated by the fact that the convict is a first offender, relatively young at the age of 28 years, He has a family to take care of and appears remorseful. I therefore sentence the convict to 16 years' imprisonment.

20 It is mandatory under **Article 23(8)** of the Constitution of the Republic of Uganda, 1995 to take into account the period spent on remand while sentencing the convict. I hereby take off the 5 year, 4 months and 1 day spent on remand. He will serve a sentence of 10 years ,7 months and 29 days

25 The convict is advised that he has a right of appeal against both conviction and sentence, within a period of fourteen days.



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Jane Okuo Kajuga

Judge

24th January 2022