THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KITGUM

CRIMINAL SESSION CASE NO. HCT-02-CR-SC- 0282 OF 2022

UGANDA.....PROSECUTOR

VERSUS

KOMAKECH FRANCIS.....ACCUSED

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

JUDGMENT

Introduction

The accused person stands indicted with the offence of rape, contrary to section 123 and 124 of the Penal Code Act Cap 120. It is alleged that on 29th January, 2022, at Ulaya village, Katutuo Parish, Orom Sub-County, Kitgum District, the accused unlawfully had carnal knowledge of Ayugi Miriam without her consent.

Legal representation

The accused was represented by Mr. Silver Oyet Okeny, on State Brief, while Mr. Patrick Ojara, a Senior State Attorney, represented the Prosecution.

Plea of not guilty and preliminary hearing

The accused pleaded not guilty. During the preliminary hearing conducted pursuant to section 66 of the Trial on Indictments Act (hereafter, TIA), it was agreed, inter alia, that, the victim was examined from Orom Helath Centre III on Police Form 3A (PEX1) on 1st February, 2022. However the findings in respect of the victim that she was an elderly lady of over 50 years old and that her genitalia showed signs of trauma, at 6 O' clock in the labia minora, was contested by the Defence. The probable cause of the trauma said to be a blunt object like penis, was equally contested by the defence. For the accused person, it was, however, agreed by the Prosecution and the Defence, that, the accused was examined on PF 24A (PEX2) on 3rd February, 2022 from Kitgum Police Clinic and found to be 34 years old, and of normal mental status.

Two assessors were appointed, namely, Okumu Geoffrey Akera, aged 40 years, a businessman, and, Sema David, a 34 year old, self-employed Software Engineer, all residents within Kitgum Municipality. Neither the accused nor his lawyer, nor the State counsel, objected to the assessors' appointment.

The Prosecution case

The Prosecution called two witnesses, that is, the victim and her son (nephew). The Prosecution case was that, it was at 9:00 PM, in the year 2022, during the date and the month which the victim could not recall, when the victim (Ayugi Miriam) was pushed down by the accused, while at her compound. The accused performed forceful sexual intercourse with the victim. The victim made alarm and the accused took off, having had sexual intercourse with the victim. The accused was arrested by the Chairperson L.C 1 of his area, Lokipowa, and handed to Orom Police Station, and charged.

The Defence case

Court found that a prima facie case was disclosed and pursuant to section 73 (2) of the Trial on Indictment Act (TIA), put the accused to his defence and explained his rights. The accused initially choose to give evidence on oath. The matter was adjourned to enable the accused to open his defence, and call witnesses, if any. Two days later, at the resumed hearing, the accused changed his stance and said he had decided to keep quiet, as is his right.

Submissions

The State orally addressed court first, and the Defence responded orally but also filed written submissions, basically reiterating the oral

submissions but giving elaboration. The State Counsel did not rejoin. I have considered both submission in this Judgment and I am grateful.

Summing up the evidence and the law

After the respective submissions, this court summed up the evidence and the law to the assessors. The assessors returned their joint opinions which court recorded, and is considered in this Judgment.

The burden and standard of proof

Given his plea of not guilty, the accused enjoys a constitutional presumption of innocence under article 28 (3) (a) of Constitution of Uganda, 1995. The accused thus put in issue all the allegations made against him. The prosecution bears the burden of proving the guilt of the accused person beyond reasonable doubt. Apart from insanity and few statutory exceptions which are not applicable here, the burden of proof never shifts to the Defence. See: **Woolmington Vs. Director of Public Prosecutions [1935] A.C 462**; **Chan Kau Vs. R [1955] A.C 206**; **Uganda Vs. Dick Ojok (1992-93) HCB 54**.

The Prosecution must, therefore, prove each and every ingredient of the offence against the accused person beyond reasonable doubt. Proof beyond reasonable doubt, however, does not mean, proof beyond the shadow of doubt. The degree of proof need not reach certainty. This is because court

could end up considering fanciful possibilities with a potential of deflecting the course of justice. What, therefore, is required, is strong evidence against the accused person that leaves only a remote possibility in his/her favour. In my view, if court finds on the evidence that, what a person is accused of, is possible, and not in the least probable, then the standard of proof is said to have been met. Nothing short of that would suffice. See: **Miller Vs. Minister of Pensions [1947] All ER 272, at 373-374, Lord Denning**.

The accused person does not assume any burden of proof, in line with section 101 (2) and section 103 of the Evidence Act Cap 6. Where there is any doubt in the prosecution case, the benefit of the doubt is given to the accused. Any defence not raised by the accused, once there is evidence of it, must be availed to the accused person. See: **Abdu Ngobi Vs. Uganda, SC. Crim. Appeal No. 10 of 1991**; **Obwalatum Francis Vs. Uganda, SC Crim. Appeal No. 030 of 2015**; **Mancini Vs. DPP (1942) AC 1; Didasi Kabengi Vs. Uganda (1978) HCB 216.**

An accused therefore, is only convicted on the strength of the prosecution case, and not because of the weakness in his defence or lack of defence. See: **Israel Epuku S/O Achutu (1934) 11 EACA 166**; **Sekitoleko Vs. Uganda, [1967] EA 531.** Therefore, even if an accused person leads no evidence, or keeps quiet, the court must still, at the end of the case, find

if the legal burden is discharged. That is, whether the Prosecution has proved the guilt of the accused beyond reasonable doubt. All ingredients of the offence must be strictly proved and a court cannot merely rely on concessions made by the accused person. See: **FW Crowie Vs. R [1961] 1 EA 38 (CAN)**.

Ingredients of rape

The following ingredients must be proved by the prosecution;

i) Unlawful sexual intercourse with the victim

ii) Lack of consent to the sexual intercourse

iii) Participation of the accused in the unlawful sexual intercourse.

In **Kibazo Vs. Uganda (1965) EA 507**, it was held that, in a charge of rape, the onus is on the prosecution to prove that sexual intercourse took place without the consent of the complainant. In **DPP Vs. Morgan & 3 others (1976) AC 182**, Lord Hailsham held on the aspect of rape, thus:

"Rape consists in having unlawful sexual intercourse with a woman without her consent and by force...it does not mean there has to be a fight or blows have to been inflicted. It means there has to be some violence used against the woman to overbear her will or that there

has to be a threat of violence as a result of which she will be over borne."

Evaluation of the evidence

Sexual intercourse

In **Bassita Hussein Vs. Uganda, Crim. Appeal No. 35 of 1995**, the Supreme Court held 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. Though desirable, it is not a hard and fast rule that the victim's evidence must always be adduced in every case...whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt."

Carnal knowledge of a woman or a girl, means penetration of the vagina, however slight, by a sexual organ, which is penis. Penetration can be proved either by the victim's evidence, medical evidence, or any other cogent evidence. See: **Remigious Kiwanuka Vs. Uganda, SC Crim. Appeal No. 41 of 1995; Uganda Vs. Sunday Herbert, HCT-01-CR-SC-**

162/2021. It is, however, not a hard and fast rule that, medical evidence be produced to prove a sexual intercourse. See: **Hussein Bassita Vs. Uganda, SC Crim. Appeal No. 35 of 1995** (*supra*). Once medical evidence is adduced by the prosecution, court will consider it. Court may also consider other cogent evidence.

In the instant case, the victim who testified as PW1 stated that, she was pushed down by her assailant, who performed sexual intercourse on her. It lasted for about one minute. She was emphatic that, penis was inserted into her vagina, and she felt pain. PW1 later went to Hospital. The Police Form 3A (PEX1) on which PW1 was examined at Orom Health Centre III, shows that, there were signs of trauma at 6 O' clock in the labia minora. The probable cause of the trauma in the labia minora was stated by the Medical Officer to be a blunt object, like penis. The Defence in its submission, conceded that, sexual intercourse has been proved by the prosecution beyond reasonable doubt. In agreement with the gentlemen assessors, I find that sexual intercourse on the complainant has been proved beyond reasonable doubt.

Lack of consent to the sexual intercourse

Lack of consent to sexual intercourse is normally proved by the victim's evidence, medical evidence and other cogent evidence. See: **Uganda Vs.**

Wadri Farouk, Crim. Session Case No. 0039 of 2014 (Stephen Mubiru, J.)

PW1 testified that, she was pounced on by her assailant, pushed down and the assailant performed sexual intercourse on her. She testified, she made an alarm and the assailant ran away. PW1's testimony is corroborated by Medical evidence (PEX1) which shows that, the labia minora of PW1 suffered trauma caused by a blunt object, which the medical officer stated, was penis. The victim testified that she made alarm, and her assailant took off.

In **Uganda Vs. Otim James, Crim. Session Vase No. HCT-CR-009 of 2015**, Justice Alex Mackay Ajiji held that, the fact that the victim ran to her husband upon waking up and finding the accused performing unlawful sexual intercourse with her, while personating her husband, showed that, the victim did not consent to the sexual act. I agree.

In the instant case, the fact that PW1 made an alarm, meant she had not consented to the sexual act. It is also inconceivable that, consensual sexual intercourse would normally attract alarm by the victim. Alarm during sex is not synonymous with giving consent to the act. Secondly, there is no way the assailant would have run away, if sexual intercourse was consensual, in this circumstances. With the greatest respect, the assailant would have walked away majestically.

The Defence counsel agreed that, sexual intercourse with the complainant was not consensual. The assessors advised me to find lack of consent. I agree with the assessors in this regard. The ingredient of lack of consent is proved beyond reasonable doubt.

Participation of the accused in the unlawful sexual intercourse

The ingredient of participation in the unlawful sexual intercourse is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of the crime, not as a mere spectator but as the perpetrator of the offence. See: **Uganda Vs. Otim James** (*supra*).

PW1 first told court that she knows the accused. She said, she knew him on the night as he was about to kill her. The accused pushed her down and had sexual intercourse with her. It happened in 2022. The victim could not recall the month and the day of the incident. The victim was at her home compound with her granddaughter, Rose. It was 9:Pm. The victim saw the accused. There was moon light. It was bright. The incident lasted for one minute. The accused inserted his penis into the vagina of PW1. PW1's Nephew, Oyet Denis, responded to the alarm. By then the accused had run away. Others also made alarm, such as Rose (granddaughter) and Okech Charles.

In cross examination, PW1 maintained the accused had forceful sexual intercourse with her at her compound, in the presence of Rose, who saw the accused person running away. PW1's Police Statement was put to her, in cross examination and admitted in evidence, as Defence Exhibit. PW1 stated, she never drank alcohol on the material day, which she stated, at Police, as being 29th January, 2022. In response to the question put in cross examination when the Police Statement (DEX1) was being read back to her by Defence counsel, PW1 stated, she did not see the accused person. She also stated that, she was at the home of a one Omony, where she drunk local sweet drink called Kwete. She did not drink bitter alcohol. PW1 stated in cross examination that, she never saw the accused and he never bought for her a drink. PW1 added that, the accused took one minute, having sexual intercourse with PW1 and sexual intercourse happened at the home of Omony, whose compound stretches to that of PW1. PW1 also stated that she heard from people who shouted the name of the accused, saying "he is the one." She said it was Denis Oyet (PW2) and Omony, who shouted "it is Lumun", meaning, the accused, who went by that nickname. PW2 (Denis Oyet) and Omony, were, however, not present when the assailant ran away. PW1 insists there was moon light. She again stated, she could not see the face of the accused, because it was dark, and PW1 also feared. PW1 however said, she confirmed it was the accused, because Denis Oyet and Omony said so, and the accused (Lumur) had been at the home of Omony drinking. However, Denis and Omony, were absent when

PW1 was attacked. PW1 said she did not see the face of the accused at Omony's place, where PW1 was drinking. PW1 said she urinated on herself.

PW2 (Oyet Denis) who said the victim was his aunt (her calls her 'mother'), said the victim's home was about 100 metres from his. PW2 knew the accused, and that he saw the accused when he raped PW1. It was in March, 2022. Of course, Court notes, PW2 got the date wrong, as the alleged incident, going by DEX1 (PW1's Police Statement) was on the night of 29th January, 2022. PW2, however, admitted, he learnt from Omony Alex, who reported to PW2 as the Local Council One Chairperson of Ulaya village. Omony Alex sought PW2's help, saying the accused had raped the victim. However, Omony Alex did not testify. PW1 admitted, neither Omony nor Oyet Denis, were at the scene. PW2 said, the victim told him she had been raped by the accused person. PW2 then called the LC I Chairperson of the accused's area, Jackson Obedo and instructed Obedo to arrest the accused on sight, and take to Police, for the offence the accused had committed. Obedo Jackson arrested the accused. Obedo Jackson then reported to PW2 that he had arrested the accused. PW2 found the accused at Orom Police Station.

From the above pieces of evidence, court notes that the case is based on the evidence of a single identifying witness, that is, the victim only. The

incident happened at night. The circumstances of identification by PW1 has to be examined in totality.

Identification evidence invariably causes a degree of uneasiness because such evidence can give rise to miscarriages of justice. There is always the possibility that a witness though honest may be mistaken. Thus, courts have evolved rules of practice to minimize the danger that innocent people may be wrongly convicted. In **Abdalla Bin Wendo Vs. R (1953) 20 EACA 166**, the principles discernible are:

i) The testimony of a single witness regarding identification must be tested with the greatest care.

ii) The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult.

iii) Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.

iv) Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge adverts to the danger of basing conviction on such evidence alone.

The above principles were cited in **Abdalla Nabulere & 2 others Vs. Uganda [1975] HCB 77**, where the court of appeal noted that, the view

that there is need for corroboration where the only evidence connecting the accused with the offence is the identification of a single witness, is not correct. Court noted that, this is so because, first, plurality of witnesses is not necessary for proof of a fact. See section 133 of the Evidence Act. Secondly, there is no particular magic in having two or more witnesses testifying to the identity of the accused in similar circumstances. What thus is important is the quality of the identification. If the quality of identification is not good, a number of witnesses will not cure the danger of mistaken identity, hence the requirement to look for 'other evidence'.

In the instant case, I proceed to consider all evidence adduced in court, including exhibits tendered in during cross examination. As noted, the Defence counsel applied, and Police Statement of PW1, and PW2 were admitted in evidence, as DEX1 and DEX 2, respectively.

In the victim's Police statement (DEX1), she stated that, on 29th January, 2022, she had gone to the home of Omony (Alex) whose wife (Irene) was selling alcohol. PW1 went with three women. PW1 found Komakech Francis commonly called "Lumur", who started buying drinks for PW1 and others, and PW1 and the women, were drinking together with Komakech Francis/ Lumur (accused), and it was at around 9:00pm. After some time, the women left PW1 and the accused behind, still drinking and he continued to buy more drinks. When it became late, the wife of Omony

(Irene) said she wanted to sleep. She entered the house and locked herself. PW1 also told him (unnamed person) that she wanted to go home since it was late and very dark and was drunk. It was at that point that he (refereeing to the accused) fixed himself on to PW1, and had sexual intercourse with her. He covered PW1's mouth with his hand, that, PW1 was unable to make an alarm but was screaming. He took long raping PW1. PW1 was rescued by owner of the home Omony who came and found 'him' still raping PW1, and when the accused saw Omony, he ran away. PW1 stated, the accused raped her badly and she urinated on herself. Omony ran after the accused but did not get him. PW1 said Omony returned from chasing the assailant, and asked PW1 about what had happened, and she narrated the story to him. PW1 requested Omony to call PW1's son. Omony then called PW1's son, Oyet (PW2) who came and still found PW1 lying down very weak. PW1 told Omony what had happened. Oyet (PW2) took PW1 home and in the morning PW1 was told that Komakech (accused) had been arrested. PW1 recognized the accused because he does casual work in the village for people, such as laying bricks.

In DEX2, PW2 stated that, the victim is his mother. It was on 29th January, 2022 at around 9:00pm when PW2 was in his house. Omony (Alex) knocked on PW2's door and told PW2 that something had happened to PW1. Omony told PW2 that Omony found somebody raping PW1. And

when Omony shouted at them, the man got up and ran away. That, Omony said he pursued the man but did not get him. PW2 went and asked PW1 who mentioned the name of the accused as her assailant. PW2 stated, PW1 had said the accused bought for her waragi and after she got drunk, the accused raped her. PW2 found when PW1 had urinated on herself, at the home of Omony, at the point where the rape occurred. PW2 then mobilized the youth to look for the accused. They could not get him. PW2 then informed the LC I Chairman, Oryema Alfred, who alerted the Chairman of Lokipowa village where the accused was said to have run to. The chairman was requested to arrest the accused on sight. On 30 January, 2022, PW2 was informed by his chairman that, the Chairman had received information about the arrest of the accused, and the accused was detained at Orom Police Station. A case of rape was then registered by PW1 in the presence of PW2. At Police, when the accused was brought out, PW1 recognized the accused, saying, that is the man who raped me. But the accused denied the allegation and said he only bought waragi for the old woman.

In this case, whereas the Police Statements were adduced in evidence at the instance of the Defence counsel to test the truthfulness and credibility of both PW1 and PW2, the statements have yielded relevant information to court. Court cannot ignore it in the case evaluation. Whereas on oath, the complainant (PW1) appear inconsistent on the aspect of identification, she

on the one hand said she identified the accused as being her assailant, as there was moon light, but later alters her position, denying having drunk alcohol with the accused person, and that she did not see his face. PW1, however, was consistent at Police, when she made the first report of what had happened. She said that, the accused bought for her waragi and later raped her. PW1, being a victim of rape which happened in an embarrassing circumstances, she being drunk with waragi, and involving a man fit enough to be her son, PW1 attempted to deny the fact of having drunk alcohol with the accused, but said she drunk kwete, which is sweeter drink (made of millet flour), to avoid embarrassment in open court, being an elderly woman who was expected to have behaved better and respected her age, and not drink herself silly. I think that is why she said she only drunk kwete. However, later she conceded in cross examination, that she drank alcohol. This is consistent with what she told Police. At Police, she said she drank alcohol, and that the accused was buying for her. PW1 was aged 65 at the time of the incident and when she testified, she said she was 66 years old, yet the assailant was said to be 34 at the time of the offence, young enough to be the victim's son, so I think she was embarrassed. She thus tried to conceal certain information from court, but freely narrated her ordeal to Police recorder, in privacy, unlike her examination in open court. I do not think, this is a case where a witness who is victim of rape is merely being dishonest, and trying to accuse an innocent man or made

wrong identification of her assailant. I also do not think she lied at Police. There is no evidence that PW1 lied at Police.

Court has, however, to take with the greatest caution, the evidence of single identifying witness, in difficult circumstances. I warned the assessors, as I warn myself now. In this case, there was moon light, as stated by PW1. She conceded in cross examination, and at Police that she had drunk waragi with the accused before, and drinking went for quite some time, at the home of Omony, implying, PW1 had observed the accused person for some time. The fact that they drunk together, means the distance between the accused and the victim, was close. The victim was familiar with the accused as a man who would help people make bricks in the village, so he was not a stranger to the victim. She mentioned the accused's name, when PW2 came, and also at Police, she recognized the accused as the man who had been drinking with her and who bought her alcohol. At Police, the accused told PW2 (as per DEX2) that he (the accused) bought waragi for the victim (PW1), although the accused denied to PW2, that he sexually assaulted the victim. The fact of buying alcohol for PW1, corroborates the fact that, the accused and the victim were together drinking at Omony's home.

I am satisfied that, the accused was put at the scene of the crime, not merely as a spectator but as the perpetrator. I disagree with the opinion of

the gentlemen assessors that this ingredient is not proved beyond reasonable doubt. The assessors, with respect, did not consider the import of the evidence vide DEX1 and DEX2, and the evidence in totality. I also disagree with the Learned Senior State Attorney who never evaluated all the evidence on record. I think, this court had a duty to consider all evidence adduced in totality and see its weight, without cherry picking. See: **Mumbere Julius Vs. Uganda, Crim. Appeal No. 15 of 2014 (SCU).**

The Defence cannot, with respect, disassociate from DEX 1 and DEX2 which statements at Police, corroborate the victim's statement on oath. Whereas I am alive to the position espoused in **Uganda Vs. Joseph Lote (1978) HCB 269,** where Ntabgoba, Ag. J (as he then was), considered contradictory Police statement and court testimony of a witness and stated:

"It is what a witness states in court that the court will accept as that witness's evidence because it is stated under oath and the defence has had an opportunity to cross examine the witness on it. What a witness states to Police is neither stated on oath nor is the witness cross examined on it by the defence and therefore, cannot be treated as that witness evidence by court."

With respect, the circumstances in the case before the Learned Judge, and the instant case, differ. Here, Defence counsel has used part of Police

Statements in his cross examination, and submission, comparing with the evidence made on oath. Counsel picked favourable parts of these cross examination exhibits, but, with respect, did not completely advert to the whole Defence exhibits. With respect, I do not agree with the approach of cherry picking evidence. The evidence on record must be examined in totality and court has to establish where the truth lies. A witness may be inconsistent in some respect, but that does not mean, as in this case, that the witness was lying.

In conclusion, I find that the accused was positively identified by the victim (PW1). The quality of identification was good. There is no possibility of error. In any case, I have already warned myself and the assessors of the need to take with caution the evidence of single identifying witness. Here the circumstances, as found by this court, favoured positive identification of the accused. The victim was not mistaken about the identification of the accused person. The denial that she was unable to see the face of the accused, was because of the weight of cross examination, but that concession, has to be tested in light of the whole evidence on record.

Having evaluated the whole evidence on record, I find that the Prosecution has proved beyond reasonable doubt that the accused committed the offence of rape. The victim has not lied about it. Being the evidence of a

victim of sexual assault, I also warn myself and the assessors on convicting on the evidence of the victim alone. But in this case, the victim's evidence was corroborated, especially by PW2 and DEX 2, who said the accused stated to PW2 at Police, that, he bought a drink for the victim.

In **Mugoya Vs. Uganda [1999] 1 EA 202 (SCU)**, it was recognized as being trite law that corroboration of the testimony of the victim of a sexual offence is not mandatory. Thus where the victim gives cogent evidence, conviction based thereon is valid, provided the court takes all necessary caution and warns itself and the assessors, before relying on the uncorroborated evidence of the victim. See: **Republic Vs. Cherop A Kinei & another [1936] 3 EACA 124; Chila Vs. Republic [1967] EA 722 at p. 723 (CA); Kibale Ishma Vs. Uganda, Crim. App. No. 21 of 1998 (SCU).**

PW1's evidence has been corroborated by PW2 and DEX2. See also section 156 of the Evidence Act Cap 6 and the case of **Livingstone Sewanyana Vs. Uganda, S.C Crim. Appeal No. 19 of 2006**.

Corroboration affects the accused by connecting him or tending to connect him with the crime; confirming in some material particular not only the evidence that the crime was committed but also that the accused committed it. See: **Republic Vs. Ishwerlal Purolin [1942] 9 EACA 58, at 61**; **Mutonyi Vs. Republic [1982] KLR 203.**

In law, what matters is the quality of the evidence not the quantity of it. See: **Sewanyana Livingstone Vs. Uganda, Supreme Court Criminal Appeal No. 19 of 2006 (*supra*)**.

In this case, the fact that only two witnesses testified for the Prosecution, suffices. Whereas she contradicted herself, I did not find PW1 very contradictory in material respect, especially in her identification of the accused. I found her to be truthful in material respect. See: **Alfred Tajar Vs. Uganda (1969) EACA Crim. Appeal No.167 of 1969)**.

Given the above findings, I accordingly convict the accused, Komakech Francis of rape, contrary to section 123 and 124 of the Penal Code Act.

Dated, signed and delivered at Kitgum this 18th August, 2023

18/8/2023

George Okello
JUDGE HIGH COURT

Ruling read in Court

4: 45 PM

18th August, 2023

Attendance
Accused person in Court
Mr. Silver Oyet Okeny, on State Brief, for the accused

Mr. Patrick Ojara, Senior State Attorney, for the Prosecution

Assessors

Ms. Jennifer Lubik, Court Clerk/ Acholi Interpreter

Hon. 18/8/2023

George Okello

JUDGE HIGH COURT