**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA**

**AT KAMPALA**

**CRIMINAL APPEAL NO.67 OF 1998**

**KYAMUSUNGU IVAN ……..……APPELLANT**

**VERSUS**

**UGANDA ……RESPONDENT**

**(Appeal from a judgment, of the High Court of Uganda at Mubende (Lady Mrs. Justice S.B. Bossa, dated 3/11/98 in C.S.C. No 107 of 1998)**

**CORAM: HON. MR. JUSTICE S. T. MANYINDO, DCJ.**
**HON. MR. JUSTICE J. P. BERKO JA.**
**HON. MR. JUSTICE C. B. N. KITUMBA, JA.**

**REASONS FOR THE DECISION**

The 35 year old appellant was on 23.11.98 convicted by the High Court of rape, contrary to section 118 of the Penal Code and sentenced to 10 years imprisonment. He appealed against the conviction and sentence. We dismissed the appeal for reasons which we reserved and which we now give. The prosecution case against the appellant was that on 19.6.1995 at about 5.30 p.m. the complainant was walking home through a swamp when she was attacked and ravished by the appellant.

The appellant's defence was an alibi, that at the material time he was at his house. The defence was not accepted by the trial Judge as she was satisfied with the prosecution evidence which put the appellant at the scene of crime at the time of the incident.

The appeal against the conviction is based on two grounds, namely, that the circumstances did not favour correct identification of the attacker by the complainant and, secondly, that the trial

judge did not resolve the grave inconsistencies in the prosecution evidence. The third ground of appeal related to the sentence.

During the hearing of the appeal Mr. Zagyenda, Counsel for the appellant did not point to any contradiction in the state case. It was clear therefore that the first ground of appeal relating to alleged contradictions was misconceived.

Like the trial Judge, we were satisfied that the evidence of the eye witnesses clearly put the appellant at the scene of crime, thereby destroying his alibi. For that matter we found it unnecessary to call upon the Senior Principal State Attorney, Mr. Byabakama, to address us on the conviction.

This incident happened in broad day light, at about 5.30 p.m. The appellant and the complainant were known to each other as they were neighbours in their village. During the rape the complaint raised an alarm which was answered by, among others, the complainant's husband, John Nteziyeremye (PW2) and Stephen Nzarure (PW3) who found the appellant having sexual intercourse with the complainant. They arrested him there and then and took him to the authorities. In our view the question of mistaken identification did not arise. Again as the appellant was caught red-handed, the alibi could not be true. Even, his witness, DW2 who claimed to have been with him the whole day, testified that they parted company at about 6.00 p.m. and near the scene of crime. He could not say whether the appellant actually proceeded to his home or not. So his evidence did not and could not assist the appellant.

The complainant was examined by a Doctor whose evidence was that the complainant had had sexual intercourse, had sustained injuries on the thighs, legs and elbows and that she had inflammation around her private parts. In his opinion the injuries were consistent with her having put up a struggle with the person who had sexual intercourse with her. That evidence clearly supported the complainant's claim that she had not consented to the sexual act and that the appellant had manhandled her and injured her in the course of the rape. We had no doubt that the appellant was rightly convicted.

The maximum sentence for this offence is death. We do not consider a custodial sentence of 10 years as manifestly excessive in the circumstances of this case. The learned trial Judge gave

sound reasons for the sentence she imposed, including the danger that the complainant and her husband could be infected with venereal diseases or even AIDS.

For the reasons given above we dismissed the appeal. Before we take leave of this case we wish to comment on the manner in which the medical evidence of Dr. Wabona was received by the trial court. At the beginning of the trial it was noted that there were no agreed facts to be admitted under section 64 of the Trial on Indictments Decree, 1971. The trial then commenced. Two witnesses testified for the prosecution. At that juncture, and before calling the third witness, the State Attorney requested the court to admit the Medical Report of Dr. Nabwona who had examined the complainant. The defence Counsel did not object. The trial Judge then received the report under section 64 of the Trial on Indictments Decree. As the Supreme Court and this court have pointed out in several decisions, the preliminary hearing under S.64 referred to above must be conducted before the commencement of the main trial. The Assessors are to be sworn in after the preliminary hearing - section 65. However, we were satisfied that the irregularity did not occasion a miscarriage of justice.

DATED at Kampala this 12th day of May 1999.

**S. T. MANYINDO**
**DEPUTY CHIEF JUSTICE**

**J. P. BERKO**
**JUSTICE OF APPEAL**

**C. N. B. KITUMBA**
**JUSTICE OF APPEAL**