THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL NO. 56/2006

KABEGAMBIRE WILBER::::::::::::::APPELLANT

VERSUS

UGANDA::RESPONDENT

CORAM;

HON. JUSTICE A.TWINOMUJUNI,JA;

HON. JUSTICE S.B.K. KAVUMA,JA;

HON. JUSTICE M.S. ARACH AMOKO,JA;

JUDGEMENT OF THE COURT

(Appeal against conviction and sentence of the High Court of Uganda at Rukungiri (J.B Katutsi.J.) given on the 24th day of November 2006 in criminal session case No.HCT-05-CR-S.CR-S.C212-2005)

Introduction

This is an appeal against the judgement of the High Court of Uganda sitting at Rukungiri (J.B Katutsi J) whereby the appellant was convicted of rape contrary to Ss 123 and 124 of the Penal Code Act and was sentenced to10 years imprisonment.

Background

The background to the appeal can be partly discerned from the judgement of the learned trial judge who stated it thus:

"Ngabirano Jennifer the prosecutrix testified that on 3rd day of September 2003 at about 11.00 P.m. while a sleep was awakened by the accused who was calling her. When she called back he asked her whether she was aware that her husband had been attacked and badly injured. He offered to go with her and bring him home. She got up and the two walked to the direction indicated by the accused. After walking for about 300 metres accused grabbed her and proceeded to sexually ravish her. He was holding her by the mouth and the place was a bit secluded. It was a diary farm. When he left her, she went back and narrated her ordeal to her mother-in-law. Her husband was not at home. The following day she reported to the area L.C.1 Chair Person who gave her a letter to go to the sub-county chief. There the Sub-county Chief in turn sent her to Rukungiri Police."(sic)

The appellant was subsequently arrested and charged.

At the trial his defences were, a denial of having committed the offence, an alibi that he was at his house throughout the night in issue and a grudge between him and the victim. The learned trial judge disbelieved the appellant's evidence and rejected his defence. He convicted him as charged and sentenced him as already stated herein, hence this appeal.

The grounds of Appeal

There are three grounds of appeal, set out in the Memorandum of Appeal as follows:

1. **The learned trial judge erred in law and fact when he failed to hold the medical report findings against the prosecution.**
2. **The learned trial judge's analysis of the evidence was biased towards the prosecution.**
3. **The sentence given to the appellant was harsh and uncalled for.**

Representation

At the hearing of this appeal Mr. Tumwesigye Charlie (counsel for the appellant) represented the appellant on state brief.

Mr. Andrew Odiit, Principal State Attorney (counsel for the respondent) represented the respondent.

The case for the appellant

At the beginning of his submissions, counsel for the appellant abandoned ground No. 3. He argued grounds 1 and 2 together.

Counsel submitted that the learned trial judge erred when he rejected the medical evidence on record as trash. He submitted, further, that the learned trial judge erred when he relied on the evidence of the prosecutrix and that of P.W.3, her mother in law, which was not wholly independent. According to him, the learned trial judge was biased in evaluating the evidence against the appellant.

Counsel contended that since the offence was committed during a dark, moonless and rainy night and considering that the medical evidence on record had discounted rape, the dirty soiled clothes of the prosecutrix should have been exhibited to corroborate her evidence and that of P.W.3. He prayed court to subject the evidence on record to a fresh review and scrutiny and make its own inferences.

The case for the respondent

Counsel for the respondent argued the two remaining grounds of appeal together. He submitted that the learned trial judge was entitled to reject the medical evidence on record which he found confused and of no probative value. He gave his reasons for doing so in his own style that could not, and did not, amount to his being biased against the appellant.

Counsel further submitted that besides the medical evidence on record, there was other cogent evidence in the testimonies of the prosecutrix. (P.W.2) and P.W.3 who identified the appellate visually and by voice respectively. According to counsel, the learned trial judge had properly analyzed the evidence before him and came to the correct decision.

He prayed court to find in favour of the respondent on these two grounds, dismiss the appeal and uphold both the conviction and sentence.

The Duty of Court

It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions bearing in mind, however, that it did not see the witnesses testify.

See **Rule 30 of the Judicature (court of Appeal Rules) Directions S.I.13-10**. **Pandya VR [1957] EA 336, Okeno V Republic [1972] E.A 32 and Kifamunte Henry V Uganda SCCA NO. 10 of 1997** unreported). We shall now proceed to perform that duty.

The court's resolution of the grounds of appeal

Ground of appeal No. 3 having been abandoned, we shall now proceed to deal with grounds 1 and 2 and consider them together.

The gist in these two grounds of appeal is basically the appellant's complaint that the learned trial judge was biased against the appellant and erroneously analyzed the evidence before court. He criticized the learned trial judge on his handling of the medical evidence on record.

This evidence was in part as set up in the medical reporting thus:-

> ***"L/O Attempted rape X 3/2 but he never penetrated her vaginally." No bruises nor cut wounds at the thighs, legs, elbow, back. Vaginal hymen ruptured years ago. No visible inflammation, tears, nor discharge vaginally." Hence "Harmed" instead of attempted rape as there is no subsequent findings pointing to attempted rape or rape."***

We find no cause to fault the learned trial judge on the way he considered this evidence and that in the testimony of P.W.4, a witness he found to be inexperienced. Further, the learned trial judge was under no obligation to accept that medical evidence if he had reason not to. We are fortified in this view by what Lord President Cooper stated when commenting on the functions of exparte witness in **Davie V Edinpurgh Magistrates, [1953] S.C 34 at 40,** His Lordship said,

> ***"Their duty is to furnish the judge with the necessary scientific criteria for testing the accuracy of their conclusions, so as to***

enable the judge or jury to form their own independent judgement by the application of these criteria to the facts proved in evidence"

Besides, there is other cogent evidence on record considered by the learned trial judge to support the appellant's conviction and sentence.

The appellant, by his own admission, was no stranger to P.W.2 and P.W.3. The three knew each other very well as neighbours. They had had, in the past, dealings among themselves revolving around land belonging to the appellant and its use by the prosecutrix and her family. Although, according to the evidence on record, the offence was committed during a dark and rainy night, P.W.2 was with the appellant for a very long time. He collected her from her house and took her out on a fake mission of rescuing the prosecutrix's husband from danger. They walked closely together for some time and for a distance of about 300 metres, talking to each other, before the appellant grabbed her by the hand, gagged her mouth, pounced on her and threw her on to the ground. The appellant ravished the prosecutrix for a whole hour, certainly at point blank distance. P.W.2 had also heard the appellants voice, which she knew very well, as they were together throughout her ordeal.

On her part, P.W.3 was very clear and emphatic in her evidence. She very well knew the voice of the appellant. She heard the appellant call the prosecutrix out from her house which was a mere ten metres from that of P.W.2 on the same compound. She was unshaken in her testimony during cross examination on her assertion that the voice she heard calling P.W.2 out was that of the appellant.

P.W.2 returned to her home after the ordeal she had been subjected to by the appellant and went straight to the house of P.W.3 to whom she reported how the appellant had mercilessly ravished her and how he had inflicted injuries on her mouth, chin and cheek, areas P.W.3 saw were swollen.

It is settled law that evidence of a complaint by the victim of a sexual offence is admissible when it is made to a third person. Any information to the identity of her assailant to the third person is admissible evidence. See **Patrick Akol vs Uganda (sc) Criminal Appeal No. 23 of 1992, Badru Mwindu vs Uganda, Court of Appeal No 11 of 1997.**

All the above evidence which is on record and was, in our considered opinion, properly analyzed by the learned trial judge, placed the appellant at the scene of crime thus effectively destroying his alibi.

It also supports the appellants correct identification as it shows there were favourable conditions for his proper and correct identification by the prosecutrix and P.W.3. The dark moonless night notwithstanding, it left no room for any mistake.

On the question of the alleged bias of the learned trial judge against the appellant, we find no credible evidence on record to support the contention and we reject the same.

Courts of law act on credible evidence adduced before them and do not indulge in conjecture, speculation, attractive reasoning or fanciful theories.

See **Okala vs Republic 1965 EA 555,** and **Kanalusasi vs Uganda [1998-1990] HCB 10,**

We have considered the appellant's defence of a grudge between him and the prosecutrix and found it un sustainable and a deliberate lie concocted by him in his attempt to pervert the course of justice in the case against him. There is evidence on record to show that even the appellant himself did not believe it. He had this to say during cross-examination.

> **"I did not mind when Jennifer did not pay me my rent in kind. I was happy. There was no any other grudge. I had no grudge with them……"**

We, therefore, reject and dismiss that defence.

In the final result, we find in the negative on both grounds 1 and 2 of the appeal.

We dismiss the appeal for want of any merit.

We uphold both the trial court's conviction of the appellant and the sentence it imposed on him.

Dated at Mbarara this…**24th**…..day of…**November**…2010

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A. Twinomujuni

Justice of Appeal

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S.B.K. Kavuma

Justice of Appeal

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M.S. Arach Amoko

Justice of Appeal