THE RE PUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CRIMINAL SESSION CASE NO. 442 OF 1996

UGANDA
PROSECUTION

VERSUS

KALAWUDIO WAMALA
ACCUSED

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE.

JUDGEMENT

1. The accused, Kalawudio Wamala, is indicted of the offence of rape contrary to sections 117 and 118 of the Penal Code Act. It is alleged that on the 11th September 1994 at Luyiiyi village in Masaka District the accused had unlawful carnal knowledge of J.A. without her consent. The accused denied the charge.
2. The case for the prosecution is to the effect that J.A., on the night in question, at about 9.00 p.m. was walking home from Kyamukama. Along the way she met Kalawudio standing near the plantation of Kasumba. Kalawudio asked for sexual intercourse. J. replied that he should not ask for sex when "slim" was so rampant all over the world. Kalawudio swore by his mother's name that for sure he would have sex with her. J. ran and Kalawudio gave the chase. Just before Lugemwa's home Kalawudio tripped her and she fell down. Kalawudio pushed her clothes upwards, tearing the gomasi she

was wearing. He set her legs apart and proceeded to have sexual intercourse with her. In the meantime she was struggling against him and raising an alarm. She cried out that Kalawudio was raping her.

3. Lugemwa heard the cries from his house where he had gone to bed. He clearly heard J. cry out that Kalawudio is raping her. He got up from bed and came out of the house. He came with a tadoba lamp. As he approached the place the call was coming from he blew out the tadoba lamp. He saw a man hide under a tree. He was not able to identify him because of the darkness. The man ran away. Lugemwa found J. lying down in a helpless state. She had an injured eye. He raised an alarm and a porter came. The man hiding behind the tree took off running and the porter chased him.

4. Lugemwa helped J. dress up and offered her to spend the night in his place. She declined and he escorted her partially to her home. The following day J., Kalawudio and another man came to his house. He was asked what had occurred the previous night and he narrated the incident and took them to the scene. He advised that they could settle the matter but no settlement was reached. He does not recall what Kalawudio may have said at the time. They went away.

5. J. reported the matter to Kiwangala police post and Kalawudio was arrested. He was taken to Masaka police station. J. found him there when she went to make a statement. She was refereed by the police to Masaka hospital for examination and treatment of her injuries. Dr. Jimmy Ssekitoleko of Masaka hospital examined J. on the 12th September 1994. He found no injuries around her private parts. He found assault marks involving the face and left eye. The left iris was swollen and lacerated. There were injuries around the arms and thighs consistent with resisting. He made a

report that was admitted into evidence as exhibit P1. And that was principally the case for the prosecution.

6. Kalawudio testified on oath in his own defence and he also called a witness in support of his case. He testified that on the day in question he was at home all day and all night. After dinner at about 8.30 p.m. he went to bed and woke up in the morning. He slept in a different house from that where his children sleep. Present was his son who testified in support of the defence. Godfrey Nkoba testified that Kalawudio was his father and on the day and night in question, he spent it at home. After dinner that night at about 8.30 p.m. they went to bed and only woke up in the morning. According to Nkoba, Kalawudio and himself spent the night in the same house. Kalawudio stated that the J. was well known to him. She had previously lent him some money, which he paid on the 12th September 1994. And that was essentially the case for the defence.

7. The offence of rape contrary to section 117 of the Penal Code Act has three elements. Firstly, there must be sexual intercourse between a male and female. Secondly, the male must be the accused before the court and the female the complainant. Thirdly the sexual intercourse must have taken place without the consent of the complainant. The defence has conceded that that sexual intercourse definitely did take place on the day in question involving J.A. but contend that it is not the Kalawudio who was responsible for the assault and rape of J..

8. Mr. Kamugunda, learned Counsel for the accused, submitted that the evidence of identification of the assailant was not sufficient to show that it is the accused that committed this offence. The circumstances in which the victim was raped were not

conducive to correct identification, as it was a very dark night. J. in her testimony said she had never seen the accused prior to this incident and later in the same breath she stated she takes a long time without seeing Kalawudio. He submitted that she was lying. He submitted that Kalawudio had testified to show where he was at the time the crime was committed and his son who was present at the time supports his testimony. He prayed that Kalawudio be acquitted.

9. Mr. Simon Khaukha, learned Resident Senior State Attorney, submitted that the prosecution had adduced sufficient evidence to prove beyond reasonable doubt that it was Kalawudio who committed this offence. He submitted that from her evidence and that of Kalawudio they were not strangers. The incident took some thirty minutes according to J.. This was ample time for her to recognise her assailant who was previously well known to her. She has been consistent in her naming of the Kalawudio as the assailant. In her first report to Lugemwa she named the assailant as Kalawudio. J.'s testimony was supported by that of the Doctor who examined her in regard to her injuries.

10. In the instant case it is clear we are dealing with the question of a single identifying witness. The law applicable in such cases was discussed in the case of Abudalla Nabulere and others v Uganda, Criminal Appeal No. 9 of 1978 (unreported) in the following words, " A conviction based solely on visual 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. For this reason, the courts have over the years evolved rules of practice to minimise the danger that innocent people may be wrongly convicted. The

leading case in East Africa is the decision of the former Court of Appeal in Abdalla Bin Wendo and Another v R (1953) 20 EACA 166 cited with approval in Roria v R [1967] EA 583. The paragraph which has often been quoted from Wendo (supra) is at page 168. The ratio decidendi discernible from that case is that: (a) The testimony of a single witness regarding identification must be tested with the greatest care. (b) The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult. (c) Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to the guilt. (d) Otherwise, subject to 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 a conviction on such evidence alone."

11. The court continued and later on in the same judgement stated, " The reason for the caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of identification evidence. If the quality is good, the danger of mistaken identity is reduced but the poorer the quality, the greater the danger."

12. I am also mindful of the rule of practice in sexual offences, which still obtains in this jurisdiction. This is to the effect that, " The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied

that her evidence is truthful." Chila v R [1967] E.A. 722 at page no…….

13. Examining the situation at hand, it is clear that this was a dark night. Lugemwa, PW4, who rushed to scene, was not able to recognise the assailant much as he saw a figure crouching behind a coffee tree and run away when another person answered the alarm he made. Kalawudio was well known to Lugemwa. Both belonged to the same clan. In order for J. to recognise her assailant she needed something beyond sight. If the person who attacked her was well known to her it would be possible to recognise such person by voice if he spoke, regardless of the lack of light. J. claimed that prior to this incident she had not seen Kalawudio before. This portion of her testimony states, " I had never seen Kalawudio before prior to this incident. This is because I never often move from home. He comes from Luyiyi Kate zone. I could take a year or five months without seeing the accused. I do not go to his home."

14. At the beginning of her testimony she stated, " I know the accused. He is called Kalawudio. That is the only name I know. I came to know him because he raped me. Prior to this, I used to hear that there was someone called Kalawudio but I did not see him. He was on Luyiyi, Kate zone." From her testimony if believed it is unlikely that she would then recognise Kalawudio on such a dark night without light. As she talked to her assailant, she would have had to use voice recognition or some other identifying feature to identify her assailant. Previous knowledge or acquaintance of the person identified would be essential. In this case she does not assert that she had such knowledge of Kalawudio. On the contrary she has been careful to create the impression that they were not known to each other.

15. Mr. Simon Khaukha submitted that the testimony of the accused settled this point.

Kalawudio testified that they were quite well known to each other. On occasion he borrowed some money from her and subsequently repaid it, it turns out a day after the alleged rape. It may appear, on the one hand, as suggested by Mr. Khaukha that the accused's testimony on this matter fully establishes the previous knowledge by J. of Kalawudio. It would, on the other hand, lead to the conclusion that J. was telling a lie about a matter essential for her recognition of her assailant. It raises a more unsettling question as to why then J. chose to deliberately tell a falsehood in a matter that is directly related to her recognition of her assailant?

16. I think the words of the Supreme Court in the case of LT. Mike Ociti v Uganda, Supreme Court Criminal Appeal No. 7 of 1988(unreported) point to the direction this court should take in the present circumstances. "….if a sole witness to the identity of an accused is found to be deliberately lying on part of the case, great care must be taken considering whether the false part of his testimony can be excluded legitimately from the rest of his evidence, or whether, it affects his whole evidence. Generally speaking, where a sole witness as to identity is found to be deliberately lying on an important aspect of his evidence, it is not logically possible to believe the witness in part and reject his evidence in part." Page 4 of the typed copy of the judgement.

17. It is logically possible to accept the evidence of J. on the other aspects of this case, apart from the issue of identification, for some independent witnesses like Lugemwa and Dr. Jimmy Ssekitoleko corroborate it. On the other hand having been found to be lying in part on a particular relevant to the issue of identification, it is unsafe to accept her evidence of identification in this case. In addition the conditions favouring correct

identification free from error are not available on examination of her testimony. For those reasons I find myself unable to agree with the opinion of the remaining gentleman assessor in this case who advised me that the prosecution had adduced sufficient evidence to prove this case beyond reasonable doubt.

18. I find that the prosecution has not adduced sufficient evidence to prove the case against Kalawudio beyond reasonable doubt. I accordingly acquit him of the offence of rape. He is to remain at liberty unless held on some lawful charge.

19. There is one matter that I must deal with now. During the course of the trial, the prosecution sought to introduce in evidence a charge and caution statement of Kalawudio recorded by PW2, a police officer, above the rank of Detective Assistant Inspector of Police. The statement was not a confession. It was to an extent exculpatory. It was objected to by learned Counsel for the defence, Mr. Kamugunda on the ground that on the face of the statement that it was obtained from the accused long after forty eight hours since his arrest and detention in police custody before being produced before a court of law as required by the constitution. The statement stated that the accused was taken into custody in Masaka Police station on the 13th September, 1994 and the statement was made on 23rd September 1994. He was unable to refer to any particular provision of the law as authority for his submission.

20. Mr. Simon Khaukha, the learned Resident Senior State Attorney, conceded that at the time this statement was obtained Kalawudio was in illegal detention but in his submission this did not mean the statement had been illegally obtained. An officer of the rank of Assistant Inspector of Police obtained it. The defect of illegal detention did not go to the root of admissions made by the accused in that statement. The

yardstick, he submitted, was whether the accused was giving his statement out of his free will. In this case there was no duress, promise or inducement offered to the accused. He prayed that the objection be dismissed and the charge and caution statement admitted.

21. I upheld the objection, rejected the admission of the charge and caution statement and promised to give my reasons later. I now do give my reasons. In Uganda the law governing the recording of statements by the police from members of the public and prisoners is The Evidence (Statements to Police Officers) Rules. Statutory Instrument 43-1 made by the Minister of Justice vide Legal Notice No. 227 of 1961. In Rule 2 thereof prisoner is defined as any person (a)under arrest by any proper authority with powers of arrest and detention; or (b) is in the lawful custody of any authority. In the instant case it was conceded that Kalawudio was not in illegal detention. Since this was in 1994 this was not governed by the new constitution but the law obtaining at the time. Unlike in the new Constitution, the 1967 Constitution did not specify the time within which a person could be held before being produced before a magistrate. In Article 10(3) it requires a person to be brought before a court within a reasonable time.

22. The time for holding a person seems to be specified by the Criminal Procedure Code Act in sections 27 and 31, the combined effect of which is that a person had to be produced before a magistrates' court within 24 hours of his having been arrested. For Kalawudio who spent ten days in police custody, before recording a statement from him, he was clearly at the time in unlawful detention, once he passed the 24-hour limit. To that extent under The Evidence(Statement to Police Officers) Rules he was

not a prisoner within the rules as he was not in lawful custody. At the time he was called to make a statement he was in unlawful custody of the police.

23. Is this sufficient to sustain an objection to the admission of a statement made in such circumstances ? I think it is. Before I give my reasons for such a conclusion, I wish to examine one other aspect of the rules that was not complied with. PW2 stated that Kalawudio was speaking in Luganda, a language which the witness understood very well. He proceeded to record the statement in English. This clearly contravened Rule 7(a) which provides, " If a police officer decides that the statement of any person should be taken down in writing and is likely to be tendered in evidence in any proceedings, then- (a) if there is present any police officer literate in the language being used by such person, the police officer literate in such language shall write down the statement as nearly possible in the actual words used by the person making the statement; or"

24. PW2 was the police officer literate in the language Kalawudio was speaking. He was asked to record his statement. He recorded it in English and not in Luganda which was the language being used by Kalawudio. In compliance with the Rule 7 (1) of the Rules, he ought to have recorded it in Luganda and then provide a translation into English. In R. v. Petero Apudo, Cr. C. No. B 233 of 1962 (quoted from a digest of Uganda High Court Cases, Volume 3, Cases on Civil Procedure and Evidence produced by The Law Development Centre), the accused made a statement in Swahili and it was recorded in English by the police officer. It was held to be inadmissible as it was not recorded in accordance with Rule 7 of the Rules. Following this decision, I find that the statement of Kalawudio, already rejected, violated Rule 7(a) of the

Rules which was sufficient reason to render it inadmissible.

25. I now turn back to the question of the statement having been recorded while Kalawudio was in unlawful custody. There is ample authority in past decisions that it was within a court's power to reject a statement that did not comply with the Rules. See Nayinda s/o Batungira V R [1959] E.A. 688; R v Petero Apudo (supra) and R v Salim Kaggwa s/o Mugema [1961] E.A. 153. The police kept Kalawudio in custody, initially lawful custody but spilling over into unlawful custody and did not charge him for ten days. The courts have frowned upon this conduct of the police for decades. In the case of Njuguna s/o Kimani V R (1953) 21 E.A.C.A. 316 the Court of Appeal for Eastern Africa stated at page 319, " The notion that the police can keep a suspect in lawful custody and prolong their questioning of him by refraining from formally charging him is so repugnant to the traditions and practice of English law that we find difficult in speaking of it with restraint. It must be recognised that once a police officer has made up his mind to charge any person it is his duty so to inform that person as soon as practicable and thereafter produce him before a magistrate as required…"

26. I have no doubt that detaining a person illegally and then procuring a statement from that person for use against such person at his trial is definitely repugnant to the values and standards set forth in our new Constitution. In article 20 (2) thereof it is provided, " The rights and freedoms of the individual and groups shall be respected, upheld and promoted by all organs and agencies of Government and by all persons." The police and courts alike, being organs and or agencies of Government are obliged under this provision to ensure that fundamental rights and freedoms are respected, upheld and

promoted. How can this court comply with its duty here if it permits the state, or even the society for whose protection prosecutions are commenced, and in whose name this Constitution was made, to benefit from the wrongful and unconstitutional conduct of the police or any other organ or agency of government, in its investigation of crime? In my mind it would be a dereliction of duty for this court to let that to happen.

27. The Constitution has set a new threshold for all organs and agencies of government and all persons, including men and women serving in those organs and agencies. It positively commands all organs and agencies of government which includes the officers serving in those organs or agencies to respect, uphold and promote the fundamental rights and freedoms set forth in the constitution. This imports in my view that each officer is beholden, in carrying out his duties, to respect, uphold and promote those rights and freedoms. Where an officer of an organ or agency of government fails to respect or uphold or promote the rights and freedoms set forth in the bill of rights such officer and consequently the organ or agency he belongs to is in breach of Article 20(2) of the Constitution. This has consequences depending on the nature and extent of violation.

28. Where the police, as in this case, instead of respecting, upholding and promoting a prisoners' fundamental rights, breach such rights and freedoms, and in the course of such breach, obtain an inculpatory or exculpatory statement from an accused, the police or prosecution ought to be denied use of such a statement at the accused's trial. This is not so much as to 'punish' the police for their wrongful conduct, for the police does not necessarily suffer if the statement is admitted or not, but to protect such

accused person whose rights have been trampled upon. Secondly, it is to protect those values and standards that society has determined in our Constitution as of crucial importance to warrant protection as fundamental rights and freedoms of the individual which all organs of government and their officers must respect, uphold and promote. Thirdly, it is to ensure that a clear message is sent to those organs and agencies involved in this area that the courts will not condone the trampling, or breach of the rights of those in the most vulnerable position when ranged against the might of the state power. The organs and agencies of the state will be held to the standards and values the Constitution has ordained. Nothing is to be gained from cutting corners. And fourthly it is to promote the observance of the rights and freedoms set forth in the bill of rights as we are commanded to do.

29. It may be argued that the events complained of occurred before the promulgation of the new Constitution and that to that extent may not be affected by the new Constitution. That in my view would be limited to determining if what was done at the time was lawful or not within the law of the time. As the trial is occurring during the currency of a new constitution the accused would be entitled to that trial conforming with the standards and values now obtaining under the new Constitution. In any case the fundamental rights of the accused that in my view were breached obtained both under the old Constitution and the new Constitution. These are the rights to liberty and to a fair trial.

30. According to the Concise Oxford Dictionary at page 420, fair is defined as, " just, unbiased, equitable; in accordance with the rules." This is the ordinary meaning to be ascribed to the word fair and should therefore assist us in understanding what a fair

trial entails. If a statement to be used at the trial has been procured in breach of rules it seems to me it would be unfair to the victim to entertain that statement at his trial for had it not been a breach of the rules the statement would not have been obtained. The police had an opportunity to take a statement from the accused when he was in lawful custody. For some reason this was not done. The police continued holding the accused beyond the lawful period they could hold a suspect. During the unlawful period they obtained a statement which they hoped to use at his trial. In the absence of any lawful explanation it is reasonable to conclude in my view that the statement would not have been obtained but for the unlawful custody. It would therefore be unfair to an accused to use a statement obtained in those circumstances against him at his trial. To use it would render his trial unfair, in my view, contrary to his fundamental right to a fair trial.

31. I find persuasive authority for this view in three Supreme Court of Canada cases considering, among other things, fair trial analysis. In R v Stillman [1997] 1 S.C.R. 607 the Supreme Court of Canada was of the view as far as fair trial analysis was concerned that admission of evidence which did exist at the time of the charter breach or existed independently of the charter breach would not render the trial unfair. Such evidence was termed non-conscriptive. On the other hand, admission of evidence that would not otherwise have been obtained but for the breach of the charter, like incriminating statements would render the trial unfair. This was followed in the case of Michael Feeney v R [1997] 2 S.C.R. 13 where a statement was taken from the accused persons before they had opportunity to consult counsel among other breaches of the charter. The statements were found to affect the fairness of the trial for they

were obtained as a result of the charter breaches and would not have been available had it not been for the charter breaches.

32. Speaking for the majority in Feeney[supra], Sopinka J stated, " If the exclusion of this evidence is likely to result in an acquittal of the accused as suggested by L'Heureux-Dube J. in her reasons, then the Crown is deprived of a conviction based on illegally obtained evidence. Any price to society occasioned by the loss of such a conviction is fully justified in a free and democratic society which is governed by the rule of law." (paragraph 83). In my view, this statement is equally applicable in Uganda in light of the standards and values set forth in our new Constitution.

33. In R. v. Duguay [1989] 1 S.C.R.93, the defence sought to exclude the admission of statements obtained from the accused persons while in arbitrary detention contrary to the Canadian charter of rights. The trial court ruled the statements to be inadmissible because of the charter breach in accordance with section 24(2) of the charter authorising exclusion of such evidence. The Court of Appeal and Supreme Court of Canada upheld this on appeal.

34. It may be argued that in the case of Uganda we do not have a similar or equivalent provision in our Bill of Rights to section 24 of the Canadian charter of rights under which exclusion of evidence is permitted for charter breaches in Canada. To that, I would respond that we have ample authority in the previous decisions of courts in Uganda to reject evidence obtained in violation of the law. See paragraph 25 above. This power is also available by necessary implication in Article 20 (2) of our Constitution. For in order to uphold, or ensure respect for, or promote observance of a right, i.e. liberty or fair trial, it is necessary to cast aside what is inconsistent with, or

detracts from, or the consequences of a breach of such right or rights. Authority to provide relief or redress in respect of breaches of fundamental rights and freedoms is available in Article 50 of our Constitution. Such relief or redress may be granted in proceedings such as the instant case without filing a fresh action, where the violation or breach complained of, occurs in relation to, or otherwise touches on the proceedings before a competent court.

35. I would also wish to refer to one other case on this point from the Court of Appeal of Western Samoa. Attorney-General v U[1996] 1 Commonwealth Human Rights Digest 96. The Court of Appeal opined at page 97, " Where there was an evidential foundation for the view that a confession had been obtained by breach of the Bill of Rights, the onus was on the prosecution to negative that conclusion on the balance of probabilities and, if the breach was not negatived, the statement should prima facie be ruled out in the absence of some special reason making it fair and right to admit it. The mere facts that the police acted in good faith or that there was other evidence (in the form of alleged omissions or otherwise) pointing to the accused's guilt were not such special reasons. Nor was the seriousness of the offence charged or the likelihood that the prosecution would fail unless the statement was admitted (Police v Kohler (1993) 1 HRNZ 304; R v Te Kira (1993) 1 HRNZ 230 considered). Illegality in breach of the constitution or a bill of rights was especially serious and it would not be right to suggest that the judge had a discretion which could be used to whittle away the constitutional protection."

36. I respectfully wish to associate myself with those remarks and would find that the charge and caution statement having been obtained from Kalawudio while he was in

unlawful custody of the police is inadmissible as it was obtained in breach of his liberty and fair trial fundamental rights.

Signed, dated and delivered this 6th day of November 1998.

FMS Egonda-Ntende

Judge