THE REPUBLIC OF UGANDA

IN THE HIGH COURT UGANDA

AT THE SESSION HOLDEN AT MTJBENDE

CRIMINAL SESSION CASE NO. 30 OF 2000

UGANDA: :::::::: : : : : : : : : : : : : : : : : : : **PROSECUTOR**

VERSUS

NO. 125182 APOLLO BAKAHEBWA::: **ACCUSED**

BEFORE: THE HONOURABLE MR. AG. JUSTICE PAUL K. MUGAMBA.

JUDGMENT

The accused was indicted for rape contrary to section 117 and 118 of the Penal Code Act. The prosecution called a total of five witnesses, namely, Kotilda Nabutono (PW1 the complainant), Moses Kisenyi (PW2), Private Opolot Gabriel (PW3), Nakyambadde Rosemary (PW4) and Dr Charles Kizza (PW5 a medical officer). For the accused the only witness was the accused himself.

Briefly the prosecution case was as follows. On the night of 7th July 1998 PW1, an old woman aged about 70 years was sleeping alone n her house when a stranger broke into her house by forcing the main door inside. Against her will the stranger proceeded to have sexual intercourse with her. On several occasions the stranger inserted his penis in both her vagina and her anus. He beat her up every time she tried to resist or raise alarm. At one time PW1 tricked the stranger that she was going to check on her door and ran outside in an effort to escape. But the stranger soon caught up with her and had sexual intercourse with her outside her house and forced her back inside the house. PW1 raised alarm several occasions but there was no answer to these. The stranger told PW1 that he was a soldier who had been transferred from Gulu to the army detach at Kirawula and that he had been at Kirawula for two days so far. In the absence of any light PW1 was not able to see any features of the stranger on that dark night. The stranger continued to have sexual intercourse with PW1 intermittently from about midnight to 7 a.m. In the morning PW1 was able to see the stranger clearly. At about 7 a.m the stranger demanded that PW1 accompany him and show him the road leading to

Kirawula. PW1 was weak but managed to take the stranger to the road leading to Madudu. Madudu is in a direction opposite to that of Kirawula. No sooner had PW1 parted company with the stranger than she headed for The house of PW2 and PW4. She gave a brief description of the stranger to the two and stated that she had left him heading for Madudu. PW2 immediately left PW1 at his home being nursed by PW4 and headed straight for the road to Madudu. Soon after, PW2 met a lone stranger on the road to Madudu near a swamp. The stranger, asked PW2 for the way to Kirawula barracks. PW2 offered to take the stranger, who he identified as the accused, to Kirawula on his bicycle. PW2 had to turn his bicycle to the opposite direction in order to head for Kirawula. On the way to Kirawula PW2 met a soldier called Kasozi who moved along with him and the stranger towards the barracks. The stranger told PW2 that he had spent the previous night with a certain woman. The accused who wanted to attend the regular morning parade, was reluctant to enter the barracks through the quarter guard. PW3 told court how he had arrested accused after accused was handed over to him by PW2 and Kasozi. The accused had recently been transferred to Madudu detach at Kirawula, where PW3 served, in the past three days. PW4 had nursed PW1 at home and had observed fluids flowing from PW1's vagina. PW1, according to PW4, had much pain from her private parts. PW5, the medical officer, testified that there were signs of penetration such as inflammation of the private parts and bruises around the private parts. Accused denied being at the scene of crime, let alone having sexual intercourse with PW1.

In order to successfully prosecute the offence of rape the state has to prove three ingredients which are:

(i) that there was unlawful carnal knowledge;
(ii) that there was lack of consent.
(iii) that it was the accused who committed the offence.

The first two ingredients shown above are not contested by the accused. What is contested however is whether it was the accused who committed the offence. In the result therefore, it should be the final ingredient to determine the course of this case. Suffice it to say the accused denied having had sexual intercourse with the complainant, PW1. He also denied being in her abode at the time in question.

It is the duty of the prosecution to place the accused at the scene of crime. The accused is entitled to state, as he did under oath, that he was not present at the scene of crime at the alleged time. Where an accused puts forward an alibi in answer to a charge, he does not assume the burden of proving it. It is the duty of the prosecution to destroy or disprove it by adducing evidence which puts the accused at the scene of the crime at the material time. See the case of Sekitoleko Vs Uganda [1967] EA 531.

The prosecution on the other hand has to rely in the evidence of PW1. During the night there was no opportunity for PW1 to identify the person responsible for the act of sexual intercourse with her. At dawn she was able to see the person who had had sexual intercourse with her. She accompanied the person for a distance up to the road to Madudu. She did not see that person again until she pointed him out in court when the person was in the dock. He was the only prisoner in the dock. PW1 did not know the accused before. She did not see him again before court, let alone be availed opportunity to point him out at an identification parade. Neither PW1 nor PW2 relate to any particular features she could have pointed out to PW2 concerning the identity of the stranger. I have warned myself, as indeed I did to the gentlemen assessors concerning testimony of a single witness regarding identification. As was held in Nabulere & Anor vs. Uganda [1979] HCB 77 such testimony must be accepted with great care, particularly so where conditions are such that they do not favour easy identification.

See also Roria vs. P. [19671 EA 583 and Abdalla bin Wendo & Anor vs. R (1953) 20 EACA 166. PW1 impressed me as a truthful witness and in court she did not hesitate in pointing accused out. She did not waver under cross examination either. PW2 told court that following what PW1 had told him regarding the direction the stranger had taken, he had taken the road to Madudu where indeed, he had met a stranger who is now accused, who said he was a soldier looking for the way to Kirawula. He went a head and took the stranger to Kirawula where the accused was arrested. PW3 Pte Opolot told court that accused was indeed a soldier stationed at Kirawula. PW3 confirmed also the accused had been at the detach for the past three days, a period not dissimilar to the period disclosed by the stranger of the night to PW1. Clearly the accused had not spent the night within the detach. The house of PW1 is within the vicinity of the detach. Accused had also told PW2 that he had spent the night with a woman.

In Simon Musoke vs. R [1958] EA 715 the Court of Appeal for Eastern Africa held that in a case depending exclusively upon circumstantial evidence court must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The same August court quoted the case of Teper vs. R (2) [1952] A.C.480 at page 489 which stated:

> "It is also necessary before drawing the inference of the accused's gilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

In his defence the accused denied responsibility. Significantly he did not appear startled by the allegation against him. He said he and PW2 were known to each other, having trained together at Kabamba. He stated that PW2 and PW3 had conspired to plant the offence against him because he had given PW2 a loan of Shs. 50,000/= which PW2 had been reluctant to pay back. He said further that PW2 and PW3 wanted eventually to get Shs. 2000, 000/= from him which they would invest in some business. At no time were PW2 and PW3 cross examined by the defence regarding these serious allegations by the accused. Again were it true that the offence was a frame up the sequence of coincidences is striking. Accused happened to be roaming in an unfamiliar area on the night in issue, the area being the area in which the offence took place. The man who raped PW1 on the same night has a soldier who had been transferred to Kirawula recently, just like accused. The man who raped PW1 had been transferred to Kirawula from Gulu, just like accused. It is noteworthy that in his defence accused also mentioned that he had given a loan to PW2 a month earlier. According to the evidence of PW3 and the fact that PW2 had found accused looking for the way to the barracks the accused had recently arrived in the locality. The fact that accused seemed not to know where he wanted to go the morning he was arrested also lends credibility to the fact that he was the man who went to the house of PW1.

I have stated how uneasy I would be to reach a decision on identification in the evidence of PW1 alone, persuasive as it appears. I have warned the assessors on the need to have that evidence corroborated. According to Chila & Anor vs. R [1967] EA 722 court may convict on

the evidence of a complaint in sexual offences. Nevertheless as a matter of practice court always looks for corroboration. Court should warn itself and the assessors of the danger of convicting on the uncorroborated testimony of a complainant particularly where consent is in issue. It is upon being satisfied with the truthfulness of the testimony that it can proceed and convict.

I am satisfied that the prosecution has proved the identity of the accused and put him at the scene. The evidence of PW1 who I found a truthful witness has been buttressed by circumstantial evidence. The gentlemen assessors have given me their opinion and in their joint opinion they advise me to convict the accused.

The accused is convicted of the offence of rape accordingly.

Paul K.Mugamba **AG.**
JUDGE
27/03/2000

27/03/2000
Accused in court.
Ms Nandaula SSA for state
Mr. Kamya holding brief for Ms Bugembe

Assessors present.
Mr. Ssubi Court Clerk/ Interpreter
Judgement read in open court.

Paul K.Mugamba **AG.**
JUDGE
27/03/2000

ALLOCUTUS

Ms Nandaula:

The convict is a first offender. He has been convicted of a serious offence of rape carrying a maximum death sentence. The manner in which this offence was committed was very brutal. Accused attacked an old woman fit to be his grandmother and assaulted her and had sexual intercourse with her by force several times. This court has a duty to protect society such as the victim from the likes of the convict. The conduct of accused shows he is a dangerous person to society. I pray for a deterrent sentence.

Mr. Kamya:

Accused is a young man aged 37 years old. He has been on remand for 2 years. He has very young children and a *wife.* He is a first offender who can reform. I pray for a lenient sentence.

Accused:

I have one arm. I have spent a long time on remand. I never committed the offence.

SENTENCE

I have heard the submissions of both counsel. This offence carries a maximum sentence of death in some circumstances. The offence was committed on an old woman in a very brutal manner by a member of a disciplined force. His act is a shame to him and he should be punished for it. I sentence him to six years imprisonment. The period he has been on remand shall be taken into account.

Paul K.Mugamba AG.

JUDGE.

Accused has a right to appeal this decision within 14 days of today.

Paul K. Mugamba **AG.**

JUDGE.

27/03 /2000