THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT MBARARA

CRIMINAL SESSION CASE NO.18 OF 1999

UGANDA……. PROSECUTION

VS

BENSON BAGANDA…….. ACCUSED

BEFORE: THE HON. JUSTICE V. F. MUSOKE-KIBUUKA

JUDGEMENT

Benson Baganda "the accused" was indicated for rape contrary to sections 117 and 118 of the Penal Code. He made a plea of not guilty.

In an effort to prove the case against the accused person beyond reasonable doubt, the prosecution led evidence from four witnesses. The defence consisted of evidence given by the accused upon oath.

The prosecution's case, in summary, was that the complainant, PW1, was a widow aged about 45 years at the time. The complainant and the accused lived at Kashuro village, Ndejje, Rwampara in Mbarara District. On 29th August, 1998, the complainant together with one Jadresi Kansiime, PW2, were proceeding to their respective homes. The two were neighbours. Each had been on a different visit in the village. They met as each of them tried to hurry home at about 8.00 p.m.

To reach their homes, the two had to pass through an isolated area called Bukinda. The area was extensively covered by omuteete grass. The two suddenly saw the accused person squatting among the omuteete grass. The accused was a neighbour to both women. They both recognized him. As they approached near where he was, he sprang up like a leopard and captured the complainant. PW2 who was walking ahead of the complainant turned and saw the accused wrestling the complainant to the ground as the complainant screamed for help. PW2 fled to her home hoping to ask her husband to go to Bukinda and rescue the complainant. Unfortunately she did not find her husband at home. He returned nearly three hours afterwards.

After throwing the complainant to the ground, the accused proceeded to have sexual intercourse with her but after a prolonged struggle. The complainant was released by the accused after a duration which she estimated to have been about two hours.
Early the following morning, the complainant reported the matter to one Mwesigye Christopher, PW3. He was the secretary for defence, LC 1 of Kashuro village. The LCS arrested the complainant and forwarded him to Ndeija sub-county headquarters. He was, subsequently, brought to Mbarara Police Station.

Dr. Nyehangane, then Medical Superintendent of Itojo Hospital, examined the complainant against Police Form 3, Exhibit P1, on 1st September, 1998. He found a large bruise exhymosis (bleeding beneath the skin) on the left forearm. There was another bruise on the inner side of the right leg below the knee. A large abrasion was on the right leg on the upper third in front. The doctor also found signs of trauma inside the complainant's vagina. A laboratory test showed numerous dead spermatozoa and recent venereal infection.

The medical report which was prepared by Dr. Nyehangane was explained and tendered in evidence by another doctor, PW4, Dr. Mugisha, who had worked with Dr. Nyehangane and knew his handwriting. Dr. Nyehangane himself could not be obtained without undue delay as he was out of the country on further studies.
In his sworn statement, the accused totally denied the charge against him. He acknowledged the fact that the complainant was his neighbour. He also stated that PW2 was another of his neighbours. He put up an alibi claiming that on 29th August, 1998, he was at home the whole

day and night. He said that he had been surprised to learn of the charge against him on 30th August, 1998 when the LC 1 vice chairperson informed him of it.

The accused claimed that the complainant, PW2 and Dr. Nyehangane had framed up the case against him because the accused's father had had a land dispute with Abeteraine Group to which the three were members.

So much for both sides of the case.

In all criminal trials in Uganda, as a general rule, the burden of proof lies upon the prosecution *Sabuni vs. Uganda (1982) HCB 1* and *Ntura vs. Uganda (1977) 203.*

In the case of a charge of rape contrary to sections 117 and 118 of the penal Code Act, the prosecution has to prove beyond reasonable doubt, three essential ingredients of that offence:

a) act of sexual intercourse
b) lack of consent on the pert of the complainant; and
c) participation of the accused

On the first essential ingredient, the complainant gave evidence to the effect that after the accused wrestled her down, he played sex with her. She specifically stated that the accused had one round of sexual intercourse with her after a very long struggle. The complainant was a woman of 45 years of age. She had been married for many years before the death of her husband. Her husband had died a few years before the incident constituting this offence. It is, therefore, safe to assume that she understood filly what an act of sexual intercourse involved.

Besides, the complainant gave her evidence in a highly credible manner She left me with the impression that she was a person who was very sure and confident of what she was testifying about. Even in the absence of any independent evidence corroborating her claim that she had sexual intercourse, this court would have acted upon her evidence alone after duly alerting the assessors and myself of the danger of action upon uncorroborated evidence of a complainant in a sexual offence. *Chila vs. R. (1967)E.A. 722.*
However, the evidence of PW4 and Exhibit P1 as well as the circumstantial evidence arising out of the evidence of PW2, duly in my view, corroborate the evidence of the complainant in respect of her claim that she experienced forceful sexual intercourse on 29th August, 1998.

Even though Dr. Nyehangane, upon medical examination of the complainant found that she was a woman of 45 years whose hymen had long ruptured, he found signs of trauma (body injury) inside her vagina. That trauma, according to the doctor, was evidence of forceful sexual intercourse and of full penetration. The doctor also found dead spermatozoa and signs of venereal infection yet the complainant gave evidence to the effect that from the time of the death of her husband she had lived a sexless life until the incident constituting this offence.

The evidence of PW2 constitutes circumstantial evidence which also corroborates the complainant's claim of having had sexual intercourse. See *Kayondo Robert vs Uganda Court of Appeal Criminal Appeal No. 18 of 1996.* PW2 saw the accused springing up from the Omuteete grass and gripping the complainant. She saw him wrestle the complainant down and heard the complainant scream as PW2 scampered to the safety of her own home. The following day, PW2 found the complainant at the home of the vice- chairman LC 1 of Kashuro village reporting that she had been raped the previous evening. And upon medical examination she was found with trauma in her private parts and injuries which were consistent with force having been applied against her sexually.

For those reasons I have no doubt at all that the prosecution has proved that the complainant experienced an act of sexual intercourse on 29th August, 1998, and that she did not consent to such act.

I will now move to the last essential ingredient of the offence of rape. That is whether the accused was the person who forcefully had sexual intercourse with the complainant.

The key evidence produced by the prosecution is that of the complainant. She had known the accused for many years. The accused was her neighbour. The accused, she claims, kept her at the scene of crime for a period close to two hours during half of which the two were struggling. The evidence of an identifying witness is more reliable when the recognition is based upon prior familiarity with the accused other than when the identifying witness is identifying a complete stranger. *John Ruhakana vs Uganda (1971) ULLSR 80*.

Learned counsel for the defence argued that the conditions for correct identification were missing in this case. The time was at night and the complainant was suddenly overwhelmed. She could not properly have identified her attacker and the evidence did not rule out a possibility of error. He argued that the benefit of that doubt be given to the accused.

I fully agree with learned counsel for the defence that identification in this case was made under difficult conditions. I also agree that a court should approach evidence of identification, especially where the identification made under difficult conditions, with greatest care so that any possibility of error is removed before a conviction is based upon such evidence. *Roria vs Republic (1967) E. A. 583* and *Abdalla Bin Wendo & 2 Sheh Bin Mwambere vs Reginam (1953) 20 E. A. C. A. 166.*

In the instant case, I have already pointed out that the complainant knew the accused, prior to the alleged attack; she knew him as a neighbour whom she had known for many years. Both PW and PW2 stated in their testimonies that there was moon light which enabled both to spot and even recognize the accused as he squatted among the Omuteete grass. They also testified that the accused was not squatting very far from the road. And when he was struggling with the complainant he was quite close to her for all the period of time which she estimated to have been close to two hours.

Even where there is only one identifying witness, court can rely upon the witness' evidence provided the judge warns the assessors and himself or herself of the danger involved. *Abdalla Bin Wendo v. R.* (supra) and *Boona Peter v. Uganda C. A. C.A. No. 16 of 1997* (unreported).

But the evidence of PW2 renders corroboration to that of the complainant. Her evidence was that she saw and recognized the accused before he jumped from the side of the road among the Omuteete grass and apprehended the complainant. She even called him by his names as she fled from the scene fearing that the accused would rape her as well. She probably thought that if she mentioned the accused's name he would let her friend go. But that never happened. The accused appears to have had an extraordinary very sharp appetite for sexual intercourse that evening. Nothing would render him change his mind.

I, therefore, have no doubt that the complainant had ample opportunity to correctly identify the accused even though the conditions were difficult..

The accused had no duty to prove his alibi. *Ssekitoleko vs Uganda (1967) E. A.* 531 However, the prosecution by the evidence of PW1 and PW2 have fully destroyed the accused's alibi that he stayed home day and night on 29th August, 1998. He has been placed at the scene of crime.

The accused claims that the case was framed up against him by the complainant, PW2 and Dr. Nyehangane, as I have already stated above, I find no credible reason to believe the accused's allegations in that regard. I take that claim to be an empty lies put forward by the accused hoping to receive the sympathy of this court.

Indeed, the accused appears to be a person who does not easily run short of such lies. In the same sworn statement in which he claimed that the case was framed against him by the three witnesses mentioned above, he also lied to court about his arrest. He stated that he willingly and voluntarily went to the home of the vice-chairperson LC 1 from where he was arrested by the LC 1 .The Secretary for defence himself, who appeared as PW3, testified that after the complainant had made a report to him in the morning following the alleged rape, he advised her to report to the vice-chairperson to whose home both of them proceeded. The vice-chairperson then ordered the secretary for defence to go and arrest the accused. The Secretary proceeded to the accused's father's home from where he arrested the accused. The accused himself, in his charge and caution statement, Exhibit P2, which was admitted into evidence without any objection from the defence, acknowledges that he was arrested by PW3 from his home. Thus, since the accused deliberately lied about an important aspect of his evidence, it would not be logically possible to believe him on the claim of the existence of a grudge which was never put to the relevant witnesses in cross-examination. See *Lt. Mike Ociti vs Uganda SCCA No. 7 of 1988* (unreported).

The lady and gentleman assessors in this case advised me to convict the accused as charged. Both were of the opinion that the prosecution had proved the case against the accused beyond reasonable doubt. I have no reason to differ from that advice.

I accordingly, convict the accused person of the offence of rape contrary to sections 117 and 118 of the Penal Code.

V. F. Musoke-Kibuka
Judge
29/06/2001

29/06/2001

Accused in court

Court as before

Same for assessors.

MS Tumuhimbise — court clerk.

Court: Case for judgment

Judgment read and signed.

V. F. Musoke-Kibuuka

Judge

Mr. Murumba:

The convict is a first offender. The charge of rape is a very serious one. It carries the maximum sentence of death. It is made more serious by the fact that the prevalent AIDS HIV infections spread through sexual intercourse. That renders it more risky to victims of such offences. The courts should punish seriously offenders of this nature as a lesson to others. I therefore pray for a long period of custodial punishment.

Mr. Magoba:

I pray for a lenient sentence. The accused is a young man capable of reforming. He has confided in me that he is sorry about what happened. Cases of rape are not very prevalent like defilement. The accused person has been on remand since 30th August, 1998, I pray that court takes into account such period. In all I pray for a lenient sentence.

V. F. Musoke-Kibuuka

Judge

29/06/2001

Accused:

I pray for lenience. I have cough and ulcers.

V. F. Musoke-Kibuuka

Judge

29/06/2001

Court: Sentence And Reasons:

The convict is convicted of a very serious offence of raping a widow and neighbour under circumstances that are very aggravating indeed. The victim was at the time suffering from a sour throat. The convict caused her several injuries including a venereal infection. He caused her a lasting psychological trauma. I consider him as a young man and a first offender. I also take into account his expressed remorse and willingness to reform. The appropriate custodial sentence I would give him considering all the factors in mitigation is 10 years imprisonment. But since he has been on remand for about 2 years and 10 months, I sentence him to 7 years and 2 months' imprisonment.

V. F. Musoke-Kibuuka
Judge
29/06/2001

Court: Right of Appeal explained.

V. F.Musoke-Kibuuka
Judge
29/06/2001