THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

HCT-05-CR-SC-0074 OF 2003

UGANDA :: PROSECUTOR

-VERSUS-

EKYORINKWASA DEUS :::::::::::::::::::::::::::::: ACCUSED

BEFORE: **HON MR JUSTICE PAUL K. MUGAMBA**

JUDGMENT:-

The indictment against the accused, Ekyarinkwasa Deus, comprises two counts. The first is of rape, contrary to section 117 and 118 of the Penal Code Act. The second count is of Theft, contrary to section 245 and 252 of the Penal Code Act. Both offences are said to have been committed to the prejudice of the complainant, Kyomuhendo Patience at Kyamabare, Bubare Sub-county,

Kabale District. In support of its case the prosecution called three witnesses. The complainant herself was PW1, Kyarisiima Gauda was PW2 and Dr Tumuhimbise Robert was PW3. The defence of the accused was in from of a statement on oath. Accused had no witness to call.

Briefly the prosecution case is that on 19th November 2000 the complainant and her two companions, namely Kyarisiima Gauda and Tukamushaba, were returning home from a mission to buy some sorghum at Kamara. They had failed to get sorghum but on the way back the complainant met one Kaguredi who promised to get her some sorghum. While the complainant discussed this new development with Kaguredi her two companions moved on towards home leaving her behind. The complainant followed afterwards but before she could join her companions she met accused who snatched from her

a handkerchief in which her shs.59,000/= was tied. Accused proceeded to wrestle the complainant to the ground where he had sexual intercourse with her without her consent. The act of sexual intercourse took place along a village path where there were no homes in the vicinity. When accused realized the complainant had raised an alarm, which had attracted the complainant's two companions back, he ran away. The complainant later reported the matter to the authorities who arrested accused. Accused was later charged.

In his defence accused set up an alibi. He stated that on the day in issue he did not leave his home. He stated further that that day he neither went to the scene of crime nor saw the complainant who he acknowledge as a schoolmate at one time.

It is the duty of the prosecution to prove all the ingredients of the offences charged beyond reasonable doubt if it is to secure a conviction for any of the offence. See **Uganda Vs Kahitira [1988-1990] HCB 30.**

Where rape is the offence as in the first count, the following ingredients must be proved:-

(i) That there was unlawful sexual intercourse;

(ii) That the sexual intercourse was without the consent of the complainant;

(iii) That accused participated in committing the offence.

In her testimony PW1, the complainant, stated that she had sexual intercourse on the occasion alleged. No other person positively saw the complainant have sexual

intercourse. Although courts may convict on the evidence of a complainant in sexual offences as a matter of practice courts will always find it safe to look for some corroboration before convicting on the evidence of a single witness. See **Chila & Another Vs R [1967] EA 722,** court must warn itself and the assessors of the danger of convicting on the corroborated evidence of a single witness, but may go ahead and convict if it is satisfied that the witness was truthful. In the instant case PW3 examined the complainant two days after date of the alleged act of sexual intercourse. Police Form 3 which is reserved as exhibit P1 and indeed the testimony of PW3 show there is no evidence to suggest sexual intercourse happened. I hold therefore that the prosecution has not proved beyond reasonable doubt that there was sexual intercourse of that occasion.

As for consent, only the complainant could give or withhold her consent. Her testimony is that she never granted consent for sexual intercourse. I find the prosecution has proved this ingredient beyond reasonable doubt.

Accused was known to the complainant, PW1, as well as to PW2. accused had been to the same school at Kitagyenda Primary School as PW1, a fact the accused himself acknowledges. It is still daylight at about 6.30p.m. Accused was close to PW1 when he took her handkerchief and wrestled her to the ground. They were closed to each other for about 5 minutes. I am satisfied that complainant had ample opportunity to identify the accused. According to PW2 she heard complainant cry out that she had been left alone with Deus who had “entered her”. From a distance of 10 metres she saw the complainant lying on the ground and the accused, when

she knew before as someone from her locality, was putting back his trouser and running away. PW2 testified that it was after 6.00p.m. but it was not dark yet.

I have shown that accused's defence is of alibi. Where an accused's defence is of alibi it is not his duty to prove it. It is the duty of the prosecution to disprove the alibi by adducing evidence which places the accused squarely at the scene of crime. In the instant case I find that PW1 and PW2 properly identified the accused to have been at the scene. I hold therefore that the prosecution has proved the ingredients also beyond reasonable doubt.

The assessors in their joint opinion find no proof of sexual intercourse. They advised me to convict of a lesser offence. I have related to the same finding in the course of this judgment. Given the evidence of PW1 and PW2

showing the accused threw the complainant on the ground and lay on her on a footpath. I find the accused guilty of the indecent assault, contrary to section 122 (1) of the Penal Code Act and convict him accordingly.

Concerning the second count of Theft prosecution must prove that something of value capable of being stolen was taken and that it was stolen by the accused to permanently deprive the owner of the same. Here again the prosecution has the onus to prove the case against the accused beyond reasonable doubt. Both PW1 and PW2 testified that PW1 had been in possession of shs.59,000/=. According to PW1 the accused grabbed her handkerchief containing the shs.59,000/= from her. At that time she was above with the accused. Later when PW2 came to the scene she saw the complainant searching around the scene for her money. According to PW2 the complainant told her, her money had gone

missing at the scene. That money was never recovered anywhere, let alone on the accused. Had the accused been seen to take the money as alleged by PW1, the natural thing would have been for PW1 to tell PW2 that had been the case. In the event PW1 merely searched around the scene. Consequently I find the prosecution has not proved beyond reasonable doubt the charge of theft against the accused.

In the joint opinion the assessors advised me to acquit the accused of the second count. Fro the reasons I have given in the course of judgment I agree with that opinion. I find accused not guilty of theft and acquit him.

P.K. MUGAMBA

JUDGE

6th November 2003.