THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CR-SC-01 75-2003

UGANDA ……PROSECUTOR

VS

SSENYONGA DIDAS ……ACCUSED.

BEFORE: THE HON. MR. JUSTICE P K MUGAMBA

JUDGMENT

Ssenyonga Didas is charged with rape, contrary to sections 123 and 124 of the Penal Code Act. Four witnesses were called by the prosecution to prove its case. The prosecutrix was PWI, Jane Katahweire was PW2, Barigye Stephen was PW3 while D/Cpl. Charles Mutegaya was PW4. Medical evidence contained in PoliceForm3 was agreed and admitted. The report is Exhibit P.1.

In his defence accused gave an unsworn statement. He called no witnesses.

In brief the prosecution case is that at about 9.00 p.m. on the night of 21st October 2002 the prosecutrix was returning home from a visit to a friend at nearby Kahunga trading centre. About 400 metres from the trading centre accused emerged from the side of the road and pulled the prosecutrix on the side. At first the prosecutrix did not know who her attacker was but after a struggle which lasted about two hours while she resisted him, she recognized the person to be accused. She knew accused earlier. In the end accused had overcome her resistance and had forcefully had carnal knowledge of her. In the process accused had not only pulled her to the ground but also torn her skirt. The prosecutrix had raised an alarm which was not answered. Accused had left afterwards. That is when the prosecutrix went and reported what had happened to PW2 and later to PW3. Accused was not arrested that night because he was not at his house. Early next day accused was arrested and taken to the Sub-county headquarters before Police detained him. He was charged with this offence.

The prosecution has a duty to prove the charge against the accused person beyond reasonable doubt. It is not the duty of the accused to prove his innocence. See ***Sekitoleko vs. Uganda*** **[1967] EA *531***. Any doubt in the prosecution case should be resolved in favour of the accused. The prosecution ought to prove the following ingredients of the offence:

i. that there was unlawful carnal knowledge,

ii. that there was lack of consent, and

iii. that accused participated in the offence.

PW1 testified that she had sexual intercourse with someone. He was not her husband. It was her evidence she resisted sexual intercourse for two hours before her assailant overpowered her. It was she only who testified that sexual intercourse had taken place. Two days later she was examined and was found to be 40 years old. Medical evidence further revealed that her hymen had long been ruptured. Neither injuries nor inflammations were evident in her private parts. There were no injuries on her body. PW1 was strong enough to put up resistance. While it is not safe to convict on the uncorroborated evidence of a single witness court may proceed to convict on such evidence where it is satisfied the witness is a truthful witness. See ***Chila vs. R*** **[1967] EA 722.** The prosecutrix was an elderly woman. She cried and immediately went to report her experiences to PW2 and PW3. Her skirt was torn and had soil on it. She certainly knew what it means to have sexual intercourse and being a widow there was no good cause why she should falsely allege she had sexual intercourse. I believe her. I am satisfied the prosecution has proved this ingredient beyond reasonable doubt.

It was the evidence of PW1 that she did not give consent for the sexual intercourse she had. It was her evidence also that the person who had sexual intercourse with her had undressed her against her wish. PW2 and PW3 stated that the skirt of the prosecutrix was torn and was dirty with soil. It was PW1‘s testimony that she had raised an alarm, which was not heard. As soon as she was free she went and reported what had happened to her. Both PW2 and PW3 testified that the prosecutrix was crying and unsettled. This evidence is not disputed by the defence. I am satisfied the prosecution has proved this ingredient beyond reasonable doubt.

PW1 told PW2 and PW3 that accused was the person who molested her; It was her evidence in court also. PW1 knew accused before. They lived in the same neighbourhood. While the material time was 9.00 p.m., according to PW1 it was hot too dark for her to recognize her attacker. PW3 also said it was dark but not very dark. The person who attacked PW 1 was with her for over two hours as they struggled on the ground and eventually had sexual intercourse. There was no certain source of light. There was no verbal exchange between PW1 and the person who molested her. On receiving the report PW3 had gone to accused's house that night to check whether he was there. He was absent. There was a padlock outside the door, which was locked. Accused was not arrested at the scene but at the stage where he usually worked. It is unsafe to found a conviction on the testimony of a single identifying witness although it is not illegal to do so. See ***Roria vs. Republic*** **[1967] EA 583.** A conviction might be founded on the evidence of a single identifying witness, but as I warned the assessors and I warn myself there is a danger in doing so as it is possible the truthful witness might be mistaken in making the identification particularly where conditions for making correct identification were difficult. In such circumstances it is better to look for some other evidence which supports such identification.

In his defence accused stated that he was not the person who molested PW1. He said on the night in question he was not in the locality but some distance away in Kitwe where the vehicle he had gone with had got stuck in the mud. He had gone to load matoke on the truck. Consequently he had spent the night away. When an accused person sets up a defence of alibi he is not under a duty to prove it. The prosecution has the onus to disprove the alibi by adducing evidence which places the accused person squarely at the scene of crime. See ***Uganda vs. Phostin Kyobwengve*** **[1988-1990] HCB 49.**

The offence is said to have taken place at night when conditions for identification are not propitious. Accused was not arrested at the spot. When PW3 went to the house of accused to check on him he found accused was away. Accused said he was at Kitwe. The prosecution has not produced evidence to show accused was not at Kitwe or away from the scene. It is possible the prosecutrix was mistaken in her identification of the person who molested her. In the event I find the prosecution has not disproved the alibi.

This ingredient of participation has not been proved beyond reasonable doubt.

The gentlemen assessors in their joint opinion advised me to find accused not guilty and to acquit him. I agree with their opinion as I have shown in the course of this judgment. Accused is acquitted of the charge.

P.K. Mugamba

Judge

23 June 2006