

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA SITTING AT LUWERO**

**CRIMINAL SESSIONS CASE No. 0154 OF 2015**

**UGANDA .....**

**PROSECUTOR**

5 **VERSUS**

**No. RA 215245 PTE WAFULA SAMUEL ..... ACCUSED**

**Before Hon. Justice Stephen Mubiru**

**RULING**

10 The accused in this case is indicted with one count of Rape c/s 123 and 124 of the *Penal Code Act*. It is alleged that the accused on the 7<sup>th</sup> day of September, 2014 at Nyimbwa Health Centre IV in Nyimbwa sub-county in Luwero District, had sexual intercourse with Tina Nakibuule Scovia, without her consent. The accused pleaded not guilty to the indictment. In a bid to prove the indictment against the accused, the prosecution called one witness and then closed its case.

15 At the close of the prosecution case, section 73 of *The Trial on Indictments Act*, requires this court to determine whether or not the evidence adduced has established a *prima facie* case against the accused. It is only if a *prima facie* case has been made out against the accused that he should be put to his defence (see section 73 (2) of *The Trial on Indictments Act*). Where at the close of the prosecution case a *prima facie* case has not been made out, the accused would be  
20 entitled to an acquittal (See *Wabiro alias Musa v. R [1960] E.A. 184 and Kadiri Kyanju and Others v. Uganda [1974] HCB 215*).

A *prima facie* case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, would convict the accused person if no  
25 evidence or explanation was set up by the defence (See *Rananlal T. Bhatt v. R. [1957] EA 332*). The evidence adduced at this stage, should be sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. It is the reason why in that case it was

decided by the Eastern Africa Court of Appeal that a *prima facie* case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution though at this stage is not required to have proved the case beyond reasonable doubt since such a determination can only be made after hearing both the prosecution and the  
5 defence.

There are mainly two considerations justifying a finding that there is no *prima facie* case made out as stated in the Practice Note of Lord Parker which was published and reported in [1962] *ALL E.R 448* and also applied in *Uganda v. Alfred Ateu* [1974] *HCB 179*, as follows:-

- a) When there has been no evidence to prove an essential ingredient in the alleged offence,  
10 or
- b) When the evidence adduced by prosecution has been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it.

Both counsel chose not to make any submissions as to whether the accused had a case to answer  
15 and left the determination of that issue to court. At this stage, I have to determine whether the prosecution has led sufficient evidence capable of proving each of the ingredients of the offence of Rape, if the accused chose not to say anything in his defence, and whether such evidence has not been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it. For the accused to be required to defend himself, the  
20 prosecution must have led evidence of such a quality or standard on each of the following essential ingredients;

1. Carnal knowledge of a woman.
2. Absence of consent of the victim.
3. That it is the accused who had carnal knowledge of the victim.

25 The only evidence before court is that of the arresting officer to the effect that on 7<sup>th</sup> September 2014 at around 8.50 pm he was at Nyimbwa Police Post with a Crime Preventer, a one Byron, when one old woman, a one Namatovu Margaret, came complaining that her daughter Nakibule was abducted by two men as they were nursing her at Nyimbwa health Centre IV. The men claimed that she had stolen her phone and they went slapping her and pulling her. One of the

men was identified as Bosco, an army man resident at Asu village, by the rest of the patients. He went with Byron to Asuru village to look for the suspects and the victim and with the assistance of the Parish Chief Ali, they began searching. They were directed to the residence of the accused.

5 Upon arriving there at around 9.00 pm, they found the door was closed and locked from inside. They knocked at the door and flashed torches inside when the accused opened the door. The accused was putting on a Kanzu and the victim was also in the same house and she came from the same room, emerging from an army tent that had been constructed in the same room. She had wrapped herself with a bed-sheet. They asked the old woman whether that was her daughter and  
10 she responded positively. They asked her where her clothes were and she said the accused and another Bosco had stripped her naked and hidden her clothes. They indeed found her clothes hidden under the tent. It was a skirt and a blouse. The girl was asked whether the accused had had sexual intercourse with her and she replied in the affirmative. She said they had had two rounds without her consent. The accused too admitted and said he had had one round and that the  
15 victim was his girlfriend. The witness then told the suspect that he was under arrest. The accused said he should be allowed to go back inside the house to pick his medicine. He entered the tent and closed it with a zip and said he was not willing to come out. The witness pleaded with him to come out but he refused to.

20 The Parish Chief then decided to go and call the Chairman L.C1 to come and persuade him. He did not find the Chairman at home but he returned with six Young men. They carried the accused together with his tent and took him outside. From there the accused accepted to come out and the witness handcuffed him and took him to the police station. He recorded his statement, that of the victim, the mother and his and forwarded the file to Bombo.

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Regarding the first ingredient, carnal knowledge means penetration of the vagina, however slight, of the victim by a sexual organ of an assailant, where sexual organ means a penis. Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence. The victim in this case has not testified, there is no eyewitness account nor  
30 other circumstantial evidence or medical evidence regarding this element. Consequently, there is

no evidence before court to show that Tina Nakibuule Scovia was the victim of an act of sexual intercourse that is alleged to have occurred on 7<sup>th</sup> day of September, 2014.

On the other hand, proof of lack of consent is normally established by the victim's evidence,  
5 medical evidence and any other cogent evidence. In absence of the victim's testimony, eyewitness account, other circumstantial evidence or medical evidence relating to this element, there is nothing before court to suggest that Tina Nakibuule Scovia did not consent to the act of sexual intercourse, if at all it did occur on 7<sup>th</sup> day of September, 2014 as alleged.

10 Lastly, the prosecution had to prove that it is the accused who committed the unlawful act. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime not as a mere spectator but as the perpetrator of the offence. Although the evidence places the accused at the scene of crime, since most of it is hearsay and circumstantial creating a situation of inadequacy in supporting the first two ingredients, I find that the evidence  
15 taken as a whole at best raises suspicion of the offence charged having been committed. The accused cannot be put to his defence based on evidence which raises a mere suspicion.

If the accused chose to remain silent, this court would not have sufficient evidence to convict him for the offence of rape. I therefore find that no prima facie case has been made out requiring  
20 the accused to be put on his defence. I accordingly, find the accused not guilty and hereby acquit him of the offence of Rape c/s 123 and 124 of the *Penal Code Act*. He should be set free forthwith unless he is lawfully held on other charges.

Dated at Luwero this 2<sup>nd</sup> day of February, 2018.

.....

Stephen Mubiru

Judge.

2<sup>nd</sup> February, 2018.