

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
CRIMINAL SESSION NO. 241 OF 2019

UGANDA

.....

PROSECUTOR

VERSUS

NIWAGABA DICKSON

.....

ACCUSED

BEFORE: HON. LADY JUSTICE FLORENCE NAKACHWA

JUDGMENT

1. The accused was indicted for rape contrary to sections 123 and 124 of the Penal Code Act, Cap 120. Section 123 states the definition of rape as follows:
"Any person who has unlawful carnal knowledge of a woman or girl without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act, or in case of a married woman by personating her husband, commits the felony termed rape.
Section 124 gives the punishment for rape. It states *"A person convicted of rape is liable to suffer death."*
2. It was the prosecution's case that on 30th March 2018 at Kyamugungu village in Kyegegwa District, the accused had carnal knowledge of Natukunda Jackline without her consent.

3. The prosecution called three witnesses to prove its case. The victim Natukunda Jackline testified as PW1; PW2 was Kayesu Edisa, aged 13 years who gave sworn evidence after court ascertained that she appreciated the importance of telling the truth; and PW3 was Assistant Inspector of Police Opolot Godfrey. Police Form 3A in respect to the medical examination of the victim was an agreed document which was admitted as prosecution evidence and marked PE1. Police Form 24A in respect to the medical examination of the accused was also an agreed document which was admitted as prosecution exhibit and marked PE2. The sketch plan was admitted in evidence as PE3 and the photo taken of the scene was exhibited as PE4.
4. The accused denied the indictment against him and he made an unsworn statement. He stated that it was at 9:00 p.m. and there came Ochen and Hamada who arrested him and took him to police. They started beating him that he should confess whether he knows the girl or not. He told them that he did not know the girl and after beating him, they put him inside the cells where he spent three weeks and thereafter driven to Kyegegwa Police. From Kyegegwa, he was transferred to Katojo.
5. On 23rd February 2022, the assessors, Padda Paul Amooti and Agaba Anolyn, gave a joint opinion to court. In summary, based on the evidence before court, they advised the court to convict the accused.
6. Article 28 (3) (a) of the Constitution of the Republic of Uganda, 1995 provides that every person charged with a criminal offence shall be presumed innocent

until proved guilty or unless that person pleads guilty. In *Uganda v Okumu Steven*, Criminal Session No. 42 of 2020 it was held that

"the prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and he can only be convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See Ssekitoaleko v. Uganda [1967] EA 531). By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see Miller v. Minister of Pensions [1947] 2 ALL ER 372)."

7. For the accused to be convicted of rape, the prosecution must prove each of the following essential ingredients beyond reasonable doubt:
- (a) a sexual act was performed on the victim;
 - (b) the victim did not consent; and
 - (c) it is the accused who performed the sexual act.

Issue 1: Whether a sexual act was performed on the victim.

8. In the Kenyan case of *Nakholi v Republic* [1967] E.A 337 it was stated on page 338 that "the lack of consent is an essential ingredient in a charge of rape and this is so whether the complainant is a woman or a girl." The court

then cited the definition of rape similar to that of Uganda's section 123 of the Penal Code Act, Cap 120 stated in paragraph 1 of this judgment. The court further stated thus:

"the two essentials are therefore carnal knowledge of a woman or girl and lack of consent and both these essentials must be established by the prosecution and accepted by the court before a conviction for rape can be arrived at. It is a fact that age of the girl is material and that in some cases the girl may be of such tender years that mere proof of her age may be sufficient to establish the lack of consent on her part, as the girl would on account of her age be unable to understand what was happening and would not be able to consent as she would not know what she was consenting to. In such a case then, the age of the child would be evidence from which the court could arrive at the conclusion that the act was done without her consent, but the court would still have to find this as a fact before convicting of rape."

In Uganda v. Nguche Yoweri, Criminal Session No. 130 of 2012 it was held that "It is trite law that the evidence of the victim is the best evidence. (see *Badru Mwindu v. Uganda CAA No.1/1997.*"

In the instant case, Natukunda Jackline (the victim who is PW1) testified that the accused pulled her, took her to a swamp which had water, put his sandal made from tyres in her mouth, removed her knickers and had sex with her. The accused got his penis and put it in PW1's vagina after he made PW1 lie on her back facing upwards. The victim's sister who is PW2 made an alarm and the neighbours came to the victim's rescue. The medical examination in PE1 also indicated that the victim's hymen was ruptured caused by

penetrative sexual intercourse. Based on that evidence, this ingredient has been proved

Issue 2: Whether the victim did not consent

9. In the English case of **R v. Ronald Harling (1937) 26 Cr. App. R. 127** at page 128 it was stated that *"In every case of rape, it is necessary that the prosecution should prove that the girl or woman did not consent and that the crime was committed against her will."*

This case was followed in *Nakholi v Republic* cited above.

10. PW1 testified that she knows the accused as a resident of their village. On 30th March, 2018, at around midnight, she, PW2 and Birakunda Hilary were coming from church on Friday when they met the accused. He asked them where they were coming from and PW1 who was scared asked him why he was asking. The accused responded that it was PW1 that he wanted and proceeded to strangle her using the sweater she was wearing. Thereafter, the accused pulled her, took her to a swamp which had water, put his sandal made from tyres into her mouth, removed her knickers and had sex with her. The accused got his penis and put it in PW1's vagina after he made PW1 lie on her back facing upwards. PW2 made an alarm and the neighbours came to the victim's rescue.
11. The people who came to her rescue found the accused on top of her in the swamp and they hit him with a stick. The accused ran away. She remembered Pastor Namara Emmanuel and Hamada among those who came to rescue her. After the accused ran away, they ran after him and caught him. She was able to see that it was the accused because there was moon light. That night,

PW1 slept at Pastor Namara's home and went to Police the next day where she made a statement. She was taken to Kyegegwa Hospital where she was examined and given tablets.

12. In cross examination, it was PW1's evidence that she knew the accused for three days and had been seeing him. They were neighbours in the village but she did not know the accused's parents. There was a distance of 10 miles between the church and where the accused grabbed her from. When PW2 made an alarm, it was Bonabana Sarah who came whose home was near where the accused grabbed her. It was Bonabana who hit the accused but Pastor Namara also came. When she came out of the swamp, she was wet. She insisted in court that it was the accused who raped her and started crying with tears running down on her face.

13. PW2 testified that PW1 was her relative and they stay in the same home. She knew the accused because she usually saw him in Kyarugungu. On 30th March, 2018 at about midnight, PW1, PW2 and Akampulira were coming from church and they saw Dickson standing on a road coming on the right hand side. They reached a swamp and the accused asked them where they were coming from to which PW1 responded by saying "why are you asking us?" The accused held PW1's sweater by the neck and she told her to go and call Pastor Namara. They went to call the pastor and they remained at his home till the next morning. She was able to identify the accused because there was moonlight and she knew him before. By the time they went to call the pastor, PW1 and the accused were in the swamp and the accused was holding PW1's sweater by the neck.

14. In cross examination, PW2 said in her evidence that it was not the first time to see the accused and she used to see him in Kyamugungu where they have a relative. She insisted that she did not mistake the accused for someone else and he was putting on a black sweater and black trouser.

15. In summary, PW1's evidence is that while on her way back from night prayers, the accused grabbed her by her sweater, dragged her in a swamp with water, pushed his sandal made from car tyres in her mouth and forcefully had sex with her. Although PW2 did not see the accused rape PW1, she corroborates PW1's testimony of the accused holding her by her sweater and running to call for help. This proves that the accused applied force on PW1. It was PW3's evidence that at the scene, there was sign of grass which had fallen down in the effort of struggling as a sign that people had laid on it. This evidence proves that the sexual act was performed on the victim (PW1) without her consent and forcefully. This ingredient has been proved.

Issue 3: Whether it was the accused who performed the sexual act

16. In **Abdala Nabulele & Another vs Uganda, Supreme Court Cr. App. No. 1978 reported in (1979) HCB 77** it was held that:

"Where the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a

possibility that a mistaken witness can be a convincing one, and even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger....

When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution"

This case was followed by the Supreme Court in **Moses Bogere and Another (Supreme Court Criminal Appeal No 1 of 1997)**.

17. It was both PW1's and PW2's evidence that they found the accused at around midnight in a swamp but they were able to recognize the accused because there was moonlight. The fact that the accused was known to both PW1 and PW2 before this incident, there was moonlight, PW1 first exchanged some words with the accused, and the accused held PW1 by the neck of her sweater in close proximity proves that there were proper conditions and enough time for identification of the accused.

18. PW3 testified that in 2018, he was attached to Isunga Police Post in Kyegegwa District. On 30th March 2018 at around 3 a.m. he received a call

from the Chairperson Kyamugungo LC1 informing him that the locals had arrested a suspect who was found defiling a girl and they were taking him to police. The accused took off but they followed him and arrested him and that is the reason they took him to police. In the morning, PW3 was led to the scene by Bonabona and other people like Namara which was in a swamp at the side of the road. He did not go with the victim to the scene because she was still weak and making the statement.

19. At the scene, he recovered a car tyre sandal (rugabire) and one of its strips was cut and had gone off. When they went back to police, the suspect had been brought with one sandal (rugabire) so they were assembled and brought as an exhibit. He described the shoes as tyre cutters (rugabire) with stripes. He also drew a sketch plan of the scene. He also took a photo of the scene. The shoe found at the scene was compared with the one the accused had and when they were found to be matching, they were exhibited. He forwarded them together with the suspect to the main station but the sandals were misplaced. In answering questions from court, PW3 clarified that the suspect brought by the locals was the accused in the dock.

20. The circumstantial evidence of the accused's arrest after chasing him and the sandal he had matching the one at the scene corroborates PW1's evidence that it was the accused who raped her. This helps rule out any chances of mistaken identity. This honourable court therefore finds that it has been proved that it was the accused who raped PW1. Based on all the above analysis, the prosecution has proved beyond reasonable doubt that the accused raped PW1. The accused is accordingly convicted of rape in agreement with the opinion of the assessors. I so hold.



This judgment is delivered this 11th day of March 2022 by



FLORENCE NAKACHWA
JUDGE

In the presence of:

- (1) Mr. Kwesiga Michael, State Attorney, for the Prosecution;*
- (2) Ms Ruth Ongom, Defence Counsel on State Brief;*
- (3) Mr. Niwagaba Dickson, the accused;*
- (4) Mr. Birungi Boniface, Court Clerk.*