

IN THE HIGH COURT OF UGANDA AT ARUA HOLDEN AT ADJUMANI
CRIMINAL SESSION CASE NO 0003 OF 2008

PRIVATE AKUTE STEPHEN

(BEFORE HON. JUSTICE J.W.KWESIGA)

The prosecution called 3 witnesses to prove its case while the accused gave his defence on oath but called no witness.

The law on Rape was well stated by the court of Appeal for East Africa in the case of **KIBAZO Vs UGANDA (1965) EA 507** that in a charge of Rape the onus is on the prosecution to prove that sexual intercourse took place without the consent of the complainant. The court should address its mind to the question of reasonable doubt on the issue of consent. The fact that non-consent must be proved to the satisfaction of the court and where the court is not satisfied beyond reasonable doubt in the issue of non-consent there cannot be a conviction.

There are three essential elements of the offence that the prosecution must prove beyond reasonable doubt. All the three elements must be proved and failure to prove any of them to the required standard of beyond reasonable doubt, the prosecution case must fail.

The essential ingredients are:-

1. That there was sexual intercourse with the complainant.

2. That the complainant did not consent to the sexual intercourse.
3. That it was the Accused who did participate in the complained sexual intercourse.

His Lordship, Chief Justice Lord Campbell (**as he then was**) In **FLETCHER (1959) 8 Cox CC 131** had this to say on definition of rape. "...The definition of rape may now be considered Res judicata... It is carnal knowledge of a woman against her will or without her consent."

In **DPP Vs MORGAN and 3 Others (1976) AC 182**. **LORD HAILSHAM (as he then was)** said "Rape consists in having unlawful sexual intercourse with a woman without her consent and by force... It does not mean there has to be a fight or blows have to be inflicted. It means there has to be some violence used against the women to overbear her will or that there has to be a threat of violence as a result of which her will is over borne.

In the instant case PW1 ERENA MOLUMA, the complainant explained how the accused person forcefully had sexual intercourse with her continuous from eight o'clock in the evening until five o'clock the next morning.

The accused declared his intention immediately he met the complainant, he told her

"you are one of the women who take vaginas to be fucked by Dinkas in Sudan today I will fuck you".

When she pleaded with the accused not to carry out his threats he slapped her twice, he held her, tore her blouse and forced her to climb into the lorry where he raped her. The accused got a gun, cocked it and put it on the victim's chest to force her climb the vehicle. He slapped her twice and ordered her to climb the vehicle. She further described what followed.

"He removed my underwear, he lay me on the sacks of maize on the vehicle and he started having sexual intercourse with me... he remained on top of me, repeatedly had sex with me until 5:00 am".

In cross-examination she stated

"...I did not consent, he forced me, he threatened to shoot me".

PW3 Private Gabriel Maliamungu confirmed that he was with the accused person, guarding a vehicle belonging to UNHCR at Mai-Achiku together with other UPDF soldiers and the accused was their commander. When the complainant arrived at the scene the accused said,

“There are the women who go to Sudan to sell sex to Sudanese” He slapped her and ordered her to climb the vehicle. I told him to let the woman go, he picked his gun and cocked it. He pulled her into the vehicle, we got scared, and we left him and went to our guard positions.”

The above evidence of PW3 corroborates the victim’s evidence on fundamental material elements of the offence. It was the accused that assaulted the victim and pulled her into the vehicle, the scene of crime. It is the accused that slapped the victim.

In his defence, the accused admitted that he met the victim at the alleged scene of the crime. He denied having sexual intercourse with her and that he only had a quarrel with her over the money he alleges he owed her. He alleges that the victim was at one time his Lover which the victim denied. Although she had known that Akute had married a girl from her village she did not know him until he was identified as Akute in the morning following the rape when he was arrested.

According to the evidence of PW3 Maliamungu, it is the accused that forcefully took the victim into the vehicle on the material night. It is the accused who openly accused the victim to be one of the women who were selling sex to Sudanese. This is confirmed by PW1 and PW3’s evidence. He declared he was also going to have sex with her before he slapped her, threatened violence with the gun which scared off the other soldiers including PW3 leaving the accused alone with the victim.

The above evidence proves that if the victim was subjected to sexual intercourse at the scene, it was by the accused person and the circumstantial evidence rules out of any possibility that it was committed by any other person other than the accused.

As regards whether or not there was sexual intercourse, I am satisfied that PW1 the victim’s evidence is sufficient to prove sexual Intercourse. She elaborately testified as to the force the accused used to procure sexual Intercourse. I did observe this witness through out her testimony and I found her truthful. There is no doubt that the victim who was of 38 years old and a mother

to a number of children had had sex before and therefore she knew what she was talking about when she said the accused had sexual intercourse with her several times through out the night without her consent.

It was not absolutely necessary for the prosecution to adduce medical evidence although it would have been desirable if consent had been alleged in defence which would help court to infer violence as evidence of force from the evidence of PW1 and PW3 which the court has believed.

As regard penetration as proof of sexual intercourse the evidence of PW1, the victim has been found truthful, detailed and cogent. In the case of **KATUMBA JAMES Vs UGANDA Criminal Appeal 58 of 1997 (Court of Appeal)**, the victim had been medically examined but the medical doctor did not testify on issue of penetration. The court of Appeal held, inter alia,

“ There can be no doubt that there was penetration, notwithstanding that no medical evidence was led on the point. The complainant was an old woman of 40 years. She had 9 children... she must have known what she was talking about.”

The above authority is both convincing and binding on this court. The evidence of PW1, the victim is cogent in proof of the fact that there was sexual intercourse without her consent.

PW3 Private Maliamungu corroborates the evidence of the accused person's Mensrea, the intention to rape the victim. The victim testified that immediately before she was raped the accused assaulted her and declared that he was going to “fuck her”. PW3 testified that he slapped and forced her into the lorry carrying maize. That before he did that he claimed this is one of the women who go to Sudan to sell sex. PW3 pleaded with the accused to let the woman go away but the accused become annoyed, cocked his gun, scared off PW3 and others, slapped the victim and forced her into vehicle.

I have evaluated the testimony of PW1 the victim together with the above circumstantial evidence I have found that the accused was properly identified, his use of force against the victim is overwhelmingly proved and the fact that he accomplished the sexual intercourse he declared as he assaulted the victim by slapping and threatening to use a gun amounted to obtaining sexual intercourse with the victim with brutal force. This was brutal rape.

Both Assessors are of the opinion that the prosecution proved all the essential ingredients of the offence on this case beyond reasonable doubt and they advised me to convict the accused person.

I do agree with the Assessors and I find the accused person guilty of Rape contrary to sections 123 and 124 of the Penal code Act. I accordingly convict him.

Signed

Judge

9/9/2008

STATE:

The state has no previous criminal record. Accused is 34 years old. He has spent 1 year 26 days on remand. Rape is a serious offence. Assault on integrity of woman. Victim's oldest child is 20 years. This embarrassed the children. He was Army officer, duty to protect her. We pray for strong sentence.

DEFENCE:

The Accused is a first, repentant young man, 34 years, bread winner of his family, lost his Job due to this conviction. Lost his pension. Pray for mercy.

SENTENCE

Rape as a capital offence carries a maximum sentence of death. I have considered the fact that the accused person is a first offender and he has spent on remand a period of 1 year 26 days. I have considered the manner in which he committed the offence. This was brutal rape. The accused, a soldier, who is charged with the responsibility of protecting the people and the property of Ugandans and for which purpose he was armed, abused this authority and duty and used the gun to commit rape. He assaulted the victim, he threatened to use a gun, a matter that makes it rape committed in extreme brutal manner. The accused deserves a punishment that will teach him a lesson and send a message to others to learn from this case. In the circumstances I do hereby sentence the accused person to (7) seven years imprisonment.

Signed

JUSTICE J.W KWESIGA

9/9/2008