

S. 117
Rape 9 years

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA.

HOLDEN AT MBALE.

CRIMINAL SESSION CASE NO. 26/92.

UGANDA PROSECUTOR

VERSUS

ISAYA GUDOI alias KUTOYI MUWERA ... ACCUSED

BEFORE: THE HON. MR. JUSTICE S.G. ENGWAU.

J U D G M E N T

The accused is charged with Rape contrary to sections 117 and 118 of the Penal Code Act.

In the particulars of offence, it is alleged that Isaya Gudoi alias Kutoyi Muwera on the 19th day of September, 1991 at Bubirabi village in the Mbale District had unlawful sexual intercourse with Betty Ajilong, without her consent. 5

In brief, the prosecution evidence is that on 16.9.91, the accused bought some "ajono" (malwa) from the victim on credit. The victim provided the accused with her jerrycan with which he took the said malwa. The accused was well known to the victim before the incident. He used to buy malwa from her neighbours for sale. 10

On 19.9.91, the accused informed one Kolositika Ainyo, a neighbour of the victim to tell her to go for her money and the jerrycan. The complainant did not know the home of the accused or his place of work at the bar. However, her neighbour K. Ainyo offered to take her to the accused. They did not get the accused at his bar and one Isaya Okello who worked with the accused told them that the accused had gone out at the time. 15

The victim and her friend K. Ainyo then decided to go back. On their way, they met the accused who asked them to go with him to his home for the money and the jerrycan. When they were approaching his home, the accused told them, "You have been proud with your army men but to-day you will see." Both the complainant and K. Ainyo on hearing that retreated wanting to go away but the accused persuaded them to ignore that and asked them to enter his house which they refused. Immediately the accused grabbed one hand of the victim and started dragging her into the house. At that time, K. Ainyo also grabbed the complainant on the remaining hand and started pulling her away from the accused in a bid to rescue her. The accused got annoyed and boxed K. Ainyo. 20 25 30

When the accused boxed K. Ainyo, the victim started raising alarm. K. Ainyo ran to the accused's bar to inform his friend Isaya Okello what the accused was doing to them. The accused continued pulling the victim to his house but when she overpowered him, he rushed into the house and came back armed with a panga. At that time the complainant got chance and started running away trying to get back to her place. Her alarm was answered by the father of the accused. She saw the accused chase his father with the said panga. The father ran away and escaped unhurt.

At the material time the complainant was in her late pregnancy and could not run fast. So the accused caught her and dragged her into a nearby banana plantation. The accused pushed her and she fell down. The accused then threatened to kill her with the panga if she refused to have sexual intercourse with him. Apparently she was dressed in a "gomas" and some under wear without any nicker. In that way and also for fear of her life, the accused had an easy access and started to have sexual intercourse with her against her will. He finished the first round.

As if that was not enough, the accused again moved her by force to another banana plantation. All this transaction took place in broad day light between 3 p.m. and 4 p.m. In the second banana plantation, the accused continued having sexual intercourse with the victim until it became dark. All the time he was threatening the complainant with death if she refused to comply. As it was already dark, the accused forced her to go with him to a nearby house. In that house they found an old woman whom the complainant did not know. She offered them supper which the victim declined to eat. After his supper, a bed was prepared for them in the said house apparently by the said old woman. Despite her complaints of pain and tiredness due to heavy pregnancy, sexual intercourse continued the whole night. The accused said the pregnancy was not his.

The next morning the accused allowed the complainant to go and sell her malwa on condition that she returned later for more sex. The victim feeling great pain, slowly walked back to her home. She found that her husband had already reported the matter to the R.Cs of the area who gave him a letter to report the same to the Police. On receiving the report, the Police and the R.Cs mounted a search in the area. The complainant was found at her home and was taken for medical examination and treatment. The Police also took her gommas as exhibit and when it was tendered in court as P1, for identification purposes only, it was found still to be dirty and mud on it could be seen.

The doctor, PW2, who examined and treated the complainant had this to say. On the 23.9.91 he examined Mrs. Betty Ajilong Ojii, now the complainant and found that she was of the apparent age of 30 years. She had bruises on the right elbow and also on the right knee all about 3 days old. Her hymen had ruptured long ago. She also had bruises in the vagina and the vulva of recent onset about 3 days ago. She had pass discharge from the introitus (opening of the vagina) which was suggestive of an infection. She was a lady of strong build capable of giving resistance. She was pregnant about 32 weeks (i.e. 8 months). The medical report was tendered as exhibit P2.

The defence is a total denial. The accused testified that he does not know the complainant and even her home or place of work. He did not buy her "malwa" on credit on 16.9.91. or at all. He also does not know the said Kolositika Ainyo and as such, he never sent her to inform the victim to collect money and the jerrycan. In his business of selling malwa, he does not buy on credit but on cash terms. He never met the complainant and the said K. Ainyo on 19,9,91 or at all. He did not rape the victim as alleged or at all. He did not chase his father with any panga on that day or at all. He does not know the oldwoman whom PW1 alleged had offered him food nor did he spend a night with PW1 in the said house.

The accused says that he was arrested by 3 army personnel in September, 1991 on the allegations that he was a member of F.O.B.A. It was at Mbale Police station where he was told that he had raped somebody's wife. He denied the allegation. On 19.9.91 the accused says he was at his home the whole day and night. He never went anywhere but stayed at home with his family for 3 days. On the 4th day he reported for duty at his bar and that was when the soldiers arrested him. He knows Isaya Okello because they used to sell malwa together. At the time of his arrest, he had already separated his business from that of Isaya Okello.

Elements of rape are having unlawful carnal knowledge of the victim without her consent and that it was done by the accused.

The learned State Counsel submitted that the only eye witness, the victim PW1, stated that the incident took place during day time and also at night. She knew the accused before the incident as he used to buy malwa in her place. Therefore she could not have been mistaken into the identity of the accused.

It is also submitted that the accused had sexual intercourse with her by force. Medical report shows that she was raped and force was used on her as she had bruises on the body and in the vagina 3 days old. She also had an infection of about 3 days old.

Defence total denial that the accused never knew the victim and that he had never seen her anywhere before the incident be rejected. He told court a lie. In cross-examination the accused admitted knowing the complainant and her home before the incident happened. His defence of an alibi be rejected and evidence of the victim PW1 be believed in regard to the identity of her assailant which fact can be proved by evidence of a single witness. She was not discredited in her demeanour and she was consistent in her testimony. Moreover the accused admitted that he had no grudge with her. There is corroboration in the instant case. Force as explained by injuries on the body and in the vagina all corroborates the complainant's story.

It is the defence submission that the prosecution has called only the complainant as an eye witness. If court believes her evidence there will be no need for corroboration provided it warns itself of the danger to do so: Chila & Anor. Vs R. (1967) EA 722.

It is submitted that corroboration is required in the instant case, especially the old woman in whose house PW1 alleged the accused had raped her therein should have been called to adduce evidence. Even the said Isaya Okello should have been called to adduce evidence in support of what PW1 had told court. Evidence of PW1 that the accused was armed with a panga stands alone and leaves room for corroboration.

As regards the medical evidence, it is admitted that PW1 had been sexually assaulted. Bruises in the vagina and on the body which were found to be 3 days old corroborate the complainant's story that she was raped. However, it is submitted that the accused should have also been examined in the circumstances.


Having heard both sides of the story, it is evident that the complainant in this case was raped on 19.9.91. The cardinal principle is that the judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful.

The court and assessors took this precaution and found that the evidence of the victim in the instant case is truthful. She was not discredited in her demeanour in cross-examination and she was consistent in her testimony. However, in the instant case, evidence of the complainant is corroborated by the medical report. She had bruises in the vagina and the vulva, and had puss discharge from the introitus (opening of the vagina) which was suggestive of an infection, all about 3 days old, though her hymen had ruptured long ago. In addition she had bruises on the right elbow and also on the right knee also about 3 days old.

Medical evidence supports the complainant's story that the accused knocked her down and she sustained injuries which injuries the doctor found on her right elbow and on the right knee. Her evidence of penetration is reflected in the medical evidence that she had bruises in the vagina and the vulva and there was also puss discharge from the opening of her vagina all about 3 days old. The court is satisfied that there is corroboration in the instant case. The complainant was raped without her consent and force was used to implement the act of the rapist.

What remains now is who raped the complainant without her consent? It is on record that the incident commenced during day time and continued even during the night time. The complainant knew the accused very well before the incident as he used to buy malwa from her place. In corss-examination, the accused admitted knowing the victim and her home before the incident. He also knew the husband of the complainant before the incident. The court is satisfied that she was not mistaken in the identity of the accused as she had known him before the incident and because there was more than ample time for her to properly identify the accused. The defence counsel's submission that the old woman and Isaya Okello should have been called to corroborate what the victim has told court is of no probative value in the circumstances. Moreover, the defence admits that the complainant in the instant case was sexually assaulted.

In the light of all that, the court agreed with the gentlemen assessors that the accused is guilty of the offence charged. He is guilty of rape contrary to sections 117 and 118 of the Penal Code Act and he is accordingly convicted.


S.G. ENGWAU
JUDGE

19.8.93.

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19.8.93: Accused before court.

Mr. Owori for accused on State brief.

Nandawula for the State present.

Judgment delivered in open court.



S.G. ENGWAU

JUDGE

19.8.93.

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Nandawula: The offence with which the accused is convicted carries maximum sentence of death. He is not first offender. He committed similar offence of rape. He is therefore very notorious and dangerous rapist in the society. The society needs protection from the likes of the accused especially these days when Aids is very rampant. Pray a deterrent sentence be imposed on the accused most probably is that of death sentence so that others may be deterred.

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In case my prayer is not granted, refer to Criminal Session Case No. 13/92 where the accused and another were convicted of rape by this Honourable court and they were imprisoned for 7 years with 4 strokes of the cane.

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This being the second offence of similar nature, pray for a higher custodial sentence beyond 7 years be imposed on the accused.

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S.G. ENGWAU

JUDGE

Owori: Accused has instructed me to inform court that he is very repentant. He realises that his conduct was outrageous. He concedes that in Criminal Session Case No. 13/92 he was sentenced to 7 years' imprisonment and 4 strokes of the cane.

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He is a father of 6 children who will definitely be affected. He prays that long sentence of 7 years court be lenient to him in this case. Everything now is left to the discretion of the court.

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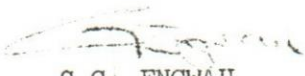
S.G. ENGWAU

JUDGE

Sentence: Accused has record of rape in Criminal Session Case No. 13/92 in which he is sentenced to 7 years' imprisonment with 4 strokes of the cane. He is now second offender as he is convicted also in the instant case. The conduct of the accused is outrageous as submitted by his counsel. He seems to be a specialist in raping women. Court takes judicial notice of the deadly disease, Aids which is rampant in the country and in the world wide. Accused is repentant and the court has saved by opting to pass a custodial sentence, otherwise this is a fit case where the accused should be sentenced to death. 5 10

Having said all that, the court has taken this case on its own merits and has considered the circumstances under which it was committed. Mitigating factors equally considered. In the light of all that he does not agree that a lenient sentence would be appropriate in the present case. 15

Accordingly, accused is sentenced to 9 years' imprisonment. 20


S.G. ENGWAU

JUDGE

19.8.93.

R/A against conviction and sentence within the statutory period explained to the accused in the presence of his counsel. 25


S.G. ENGWAU

JUDGE

19.8.93.