THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT SOROTI

CRIMINAL SESSION CASE NO. 156 OF 1994

UGANDA ..... PROSECUTOR

VERSUS

A1: LEVI OUMO)
..... ACCUSED
A2: JAMES OKIROR)

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

J U D G M E N T:

In the first count, Levi Oumo - A1 is charged with rape contrary to sections 117 and 118 of the Penal Code Act.

It is alleged that Levi Oumo on or about the 25th day of April, 1993 at Oburi village in the Soroti District had unlawful carnal knowledge of Agoe w/o Etionu without her consent.

In the second count, James Okiror, A2 was also charged with rape contrary to sections 117 and 118 of the Penal Code Act. It was alleged that James Okiror - A2 on the same day at the same place had unlawful carnal knowledge of Agoe w/o Etionu without her consent.

In the 3rd count, both Levi Oumo - A1 and James Okiror - A2 were indicted for robbery contrary to sections 272 and 273 (1) (b) of the Penal Code Act.

The allegation is that Levi Oumo and James Okiror on or about the 25th day of April, 1993 at Oburi village in the Soroti District, robbed Agoe w/o Etionu of shs 8000/-, one gomas, two dresses, one disco watch and at or immediately before or immediately after the time of the said robbery used actual violence on the said Agoe w/o Etionu.

The prosecution called six witnesses to prove the above allegations. Briefly, the victim of the alleged rape and robbery, PW1 testified that on 25.4.93 she had taken food to a patient at Soroti Hospital but failed to get any means of transport back home. However she was saved by a Good Samaritan, PW3 who gave her a lift on a bicycle. It rained on them on the way but when they reached the village of PW3, there was desire for enguli to warm themselves. So PW3 branched to a certain home near the road for enguli, leaving the victim to walk slowly towards the home of PW3 where she was going to spend a night.

After a period of about 30 minutes, PW3 started following PW1 but never found her on the way nor did he find her at his home.

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In that period PW1 had fallen into the hands of the two L.D.U soldiers who dragged her by the hands into the bush. It was sunset by then but the victim identified Levi Oumo - A1 whom she had known before the incident. It was still bright enough for her to recognise A1 but she did not know the second guy - A2.

The aunty of PW1 is married to the father of A1 and PW1 used to go and see her aunty and she even grew together with A1. Each accused held her by hand and took her into the bush off the road. She was thrown down and A2 started the game while A1 was pointing a gun at her.

After A2 had played to the end, A1 also took her in turn. In the same fashion, A2 also weilded the gun at her while A1 was in the act. When both accused persons had in turns retired from having sexual intercourse with the victim, she was ordered to go away but her assailants refused to hand over, one gomas, two dresses, one disco watch, cash 8000/- which she had put all in two cavera bags as it had rained.

On reaching the home of PW3, the victim who was crying promptly narrated the story and PW2 her in-law, advised her to tolerate the situation until the following morning. She was also advised not to have a bath so that medical examination in regard to rape should not be destroyed. However, PW3 saw her wet with dirty clothes and some thorny scratches on the arms indicating foul play for sex. She also mentioned Levi Oumo to PW3 but did not know A2.

The following morning, 26.4.93 PW3 took the victim to report the matter to the area R.C.1 official which she did. She then led the team to the scene. At the scene an army belt was recovered and there were also bootmarks seen and above all the place where the said rape took place, the grass was pressed to the ground indicating the spot where the victim was thrown down and raped.

As the victim had mentioned Levi Oumo - A1 whom PW3 also knew as a villagemate, the team traced A1 up to Asamuk detach. When A1 was brought before his bosses with the allegations of rape and robbery, he pleaded being totally drunk at the time and also mentioned A2. Both A1 and A2 used to share a hut in the detach and with vigorous investigations led to the recovery of two cavera bags and a disco wrist watch all identified by PW1 as hers. Both accused persons were arrested and subsequently handed over to the Police by PW6 together with two empty cavera bags and one disco wrist watch; all received as exhibits by storeman, PW5 and tendered in court as Exhibit P4.

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On 29.4.93 while in Police custody both accused persons on their own free volition voluntarily made charge and caution statements recorded by PW2 Each accused admitted having had sexual intercourse with PW1 without her consent and also admitted having robbed her of some property including those found in their possession.

The defence did not raise any objection to the confessions being admitted in evidence against both accused at the trial. It was therefore not necessary to have trial within a trial. The charge and caution statement of each accused person was tendered in court without any objection as Exhibits P1 and P2 respectively.

Medical report on the victim made on 7.5.93, revealed that there was no evidence of tear or any injury on the external part of the vagina, laboratory results indicated heavy pus in the urine with no syphillis in the blood. In his opinion, PW4 concluded that there was damage in the uttarus due to forceful entry of an object like the penis which damaged the surface and because of lack of treatment blood flow turned into heavy pus.

In his defence, A1 admits having made a charge and caution statement to PW2, but goes round at this eleventh hour to allege that he made the extra judicial statement after torture by one Levi Olupot and PW2. He said Levi Olupot, the brother of the husband of PW1m slapped him several times while PW2 engaged in kicking him about before he was forced to sign his charge and caution statement. However, this allegation was not raised to warrant trial within a trial nor was it put to PW2 in cross-examination. The prosecution was therefore taken unaware by that latest development intended to be an afterthought. A1 maintained that on 25.4.93 for the whole day he was inside Asamuk detach. He denied having raped or robbed PW1. He also denied ever knowing PW1 before the alleged incident.

In similar design and fashion, A2 in his defence also alleged that his charge and caution statement was recorded by PW2 after torture. He alleges he was assaulted by one Levi Olupot and also by PW2 who actually recorded their statements eventually.

On 25.4.93 A2 says he did not leave Asamuk detach for the whole day except at 7 p.m. when he went to buy cigarettes for A1 from N.R.A. soldiers within the "andakis" in the barracks. He denied having raped or robbed PW1 on that material day or at all.

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Both accused persons denied having been taken to Soroti Police Station with two empty cavera bags and one disco wrist wach as Exhibit P4, yet the same were tendered in court as exhibits without the defence raising any objection.

In the background of all that, it was submitted by the defence that the evidence of identification in the present case was based on the evidence of a single witness, the victim - PW1 of the alleged rape or robbery. In Abdalah Bin Wendo v. R (1953) EACA, 166; Roria v. R (1967) EA 585 and in Emmanuel Nsubuga v. Uganda, Criminal Appeal No. 16 of 1988, it was submitted that before a conviction can be based on the evidence of a signle witness, such evidence must be tested as truthful and without any possibility of an error, and where conditions for correct identification are difficult, it would be unsafe to convict an accused person in the absence of some other evidence connecting the accused with the offence charged.

In the present case, it was the submission of the defence side that conditions did not favour correct identification of both accused persons since the alleged incident took place at 7.30 p.m. when visibility would not be favourable. It is submitted also that her assailants allegedly had guns at the material time when in the normal circumstances would frighten her thereby making it more difficult for her to identify the alleged rapists or robbers.

It was further submitted that there were material contradictions in the evidence of PW1 and PW3 in that PW1 alleges that A2 had sexual intercourse with her for 2 hours after which A1 in turn had sex with her for an hour. Evidence of PW3 is that since PW1 fell into the hands of wrong elements up to the time when she resurfaced took about an hour only. Since the nature of rape or robbery is hit and run, it was submitted that it would be inconceivable for both accused persons to take three hours with the victim.

It was further submitted that the procedure adopted by PW2 in recording the alleged confessions made by both accused persons was risky and dangerous in that the accused persons talked to PW2 in Ateso language but PW2 recorded their statements in English which they did not understand.

As regards the medical report made by PW4, it was submitted that the report had no probative value since it was compiled after 12 - 14 days after the alleged rape. It was submitted that since PW1 is a married wife, pus in the vagina could have created an ambignuus result in that she was not in isolation to exclude the husband from either injuring her vagina or infecting her resulting into pus being found in her vagina vis-avis any injury allegedly on the surface of her vagina, according to PW4 by use of forced penis.

Finally, it was the defence submission that there is no evidence that actual violence was ever used or threatened to be used on the complainant at or immediately before or immediately after the said robbery. The defence raised an alibi and it was put to the prosecution even at that late hour to rebut it under section 74 of Trial on Indictment Decree, 1971. In the premises, it was submitted that both accused persons be found not guilty and be acquitted of the offences charged.

On the other side of the coin, the prosecution submitted that in the first and second counts of rape, it is proved beyond reasonable doubt that A1 and A2 in turns had sexual intercourse with PW1 without her consent. She was the only identifying witness. She knew A1 before and her aunt was married to the father of A1 and in addition she grew together with A1.

As her evidence was not sufficiently rebutted, evidence of A1 was nothing but a pack of lies and fabrication. There was sufficient light and the victim took considerable time in the company of both accused persons and moreover she knew A1 before. The following morning A1 was arrested and he disclosed that he was with A2 before and during the commission of the alleged offences and that admission led to the recovery of Exhibit P4.

It was further submitted that the same admission led to the recovery of property - Exhibit P4 as contained in the confession of both A1 and A2 before PW2. Therefore, it was submitted, the issue of identification is proved beyond reasonable doubt.

In the alternative and without prejudice to the foregoing, it is submitted that the prosecution relies on the doctrine of recent possession: Semogerere & Anor. v. Uganda (1979) HCB 71. In the instant case, a disco watch and two cavera bags were recovered from accused persons the following morning some hours after the robbery took place the previous evening. It is submitted, both accused failed to account for the property found in their possession. In the premises the accused persons were either the robbers or guilty receivers knowing that the property in their possession was stolen.

In their extra-judicial statements to PW2, both accused admitted having raped the victim and thereafter robbed her of some of the property found in their possession. Therefore, it is submitted, the defence of an alibi does not apply and should be rejected as mere lies fabricated to save their skins from this case.

In light of the above submissions, there is overwhelming evidence to show that both A1 and A2 had sexual intercourse with PW1 on 25.4.93 without her consent. Evidence of the victim who knew A1 before led to his arrest together with A2 the following morning and some of the property stollen from her Exhibit P4 was recovered.

In addition both A1 and A2 made extra-judicial statements voluntarily in which they admitted having raped and also robbed PW1. The defence did not retract their confessions during the trial. In the premises, there is no better witness than an accused person who voluntarily narrates the truth of the wrong he had done.

Accordingly, A1 and A2 are guilty as charged and accordingly convicted hereof.

STEVEN GEORGE ENGWAU

J U D G E

15.9.94.

16.9.94: Both accused before the court.
Mr. Oyoit for both accused on State brief.
Nandawula for the State.
Judgment delivered in open Court.

STEVEN GEORGE ENGWAU

JUDGE

16.9.94.

SENTENCE: Rape is quite rampant in this area and in view of killer disease AIDS victims of rape should be protected by imposing fairly harsh penalty to the accused persons. The victim in the present case is a married wife and to rape her easily puts her to be agent of AIDS which can also kill her husband if medical examination to that effect revealed.

The accused persons misused their guns to take advantage of the victim who was not armed at all at the material time. The guns are bought for them to protect the citizens of this country against foregin aggression and also to protect their property against such intruders.

In the instant case the accused persons used the guns to satisfy their lustful act at the expense of an innocent citizen and a wife indeed. Both accused are said to be married, I see no good reason for them not to fully satisfy themselves with their wives.

Drinking is a voluntary act which should not be used as a licence to rape victims and rob their property.

Although the accused persons are young first offenders but in my view the society needs protection from such sex maniacs. Accordingly, A1 in the 1st count is sentenced to six years' imprisonment and three years imprisonment in the 3rd count. Both sentences to run concurrently.

A2 is also sentenced to six years' imprisonment in the 2nd count and three years in the 3rd count. Both sentences to run concurrently.

STEVEN GEORGE ENGWAU
J U D G E

16.9.94.

R/A against conviction and sentence explained.

STEVEN GEORGE ENGWAU
J U D G E

16.9.94.

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