

PW1, Mary Nasolo aged 62 years testified that before the attack, she had seen the Accused on 19<sup>th</sup> May 2015 when he found her in her garden asking for raw matooke.

- (a) There was sexual intercourse or penetration of the victim's vagina by a male sexual organ, however slight it may have been.
- (b) That she did not consent to the sexual intercourse.
- (c) That the accused person is the person who had the sexual intercourse.

The Accused pleaded not guilty and in defence he denied knowing the victim and denied participation in committing the offence. Following the fact that he pleaded not guilty, the prosecution has the duty to prove the whole case against the accused person. To prove the case, the prosecution must prove:-

It is alleged that Mugabirwe Vicent, in the night of 21<sup>st</sup> May 2015 at Kimbeja village, Sentema Parish in Wakiso District had unlawful sexual intercourse with Nasolo Mary without her consent.

The Accused person is indicted under Sections 123 and 124 of the Penal Code Act with the felony of rape.

**JUDGMENT**

**BEFORE: HON. MR. JUSTICE J. W. KWESIGA**

**MUGABIRWE VICENT :::::::::::::::::::: ACCUSED**

**VERSUS**

**UGANDA :::::::::::::::::::: PROSECUTOR**

**HCT-00-CR-SC-0948-2016**

**IN THE HIGH COURT OF UGANDA AT ENTERBE**

**THE REPUBLIC OF UGANDA**

On 21<sup>st</sup> May 2015 at 3:00 a.m he forced himself in her poorly secured house. He found her awake in her morning prayers. There was bright moonlight that lit inside the house. He hit her three times and forcefully had sexual intercourse. He threw her outside in her compound before he left. On identification evidence she states:- **"I was able to recognize him as the man I used to see at the neighbour's house"**. She reported to LC.1 Chairman, reported to police and accused was traced and arrested.

She got injuries in her private parts. The Police Medical Officer examined her.

Under cross-examination she stated:- **"He entered and pulled me from the bed. I was praying while lying on the bed. I got scared and stopped praying. I had always seen him during the day and I mastered his face"**.

She was able to identify him on an identification parade. She stated in re-examination that she used to pass by the neighbour's home where the accused was guarding. She had seen him more than twice before the attack and at the identification parade he was still dressed in the very t-shirt he had when he raped her.

PW2, Sakwa Julius (AIP) conducted the identification parade and Mugabirwe Vicent was picked from the parade of (9) nine people by this witness.

PW#, Kabogoza Robert, LC.1 Chairman of Kimbejja, Sentema saw the victim Nasolo injured and swollen, he learnt that she had been assaulted and raped.

He arrested Naboth who had aided the culprit to escape from the village, he led the arresting team including PW3 to trace and arrested the accused who was at Nabweru on the same day.

This situation was considered by Court of Appeal for Uganda in **Oyeki Charles Versus Uganda – Criminal Appeal No. 126 of 1999**. The Appellant's Advocate contended that because medical evidence did not reveal injuries on the victim, the prosecution had failed to prove penetration and lack of consent. The Court of Appeal held that the presence of injuries on the body of a woman alleging rape is not an ingredient of offence. Court can convict in the absence of injuries. What is necessary is proof of penetration and lack of consent. Notwithstanding, the above settled legal position, in the instant case, the victim gave

In my view, where there is medical evidence that establishes injuries in the vagina would support evidence of penetration, however, penetration can be proved by testimony of the victim, in any case, it is not always that every penetration leaves behind injuries. The victim's evidence is the best proof because it is direct evidence of penetration. The medical evidence would have been of corroborative support to her testimony.

Although the victim was medically examined, the prosecution did not adduce any medical report to prove sexual or bodily assault. I have considered this omission against the rest of the evidence and in my view, despite this omission, I have found the testimony of PW1, the victim believable. She is a woman aged 62 years, she was once married and a mother of a number of children. Therefore, when she described sexual intercourse, she fully knew what she was talking about, that is, that there was penetration. I am satisfied that her evidence proved penetration of male sexual organ into hers.

***"When I was at the farm on 23<sup>rd</sup> May 2015 at 7:30 a.m, my friend Naboth rang me and told me that police was looking for me to arrest me. I left and went into the trees, I saw two men approaching. Naboth came with a boda boda and told me I was suspected to have raped a woman. Naboth took me back to Kafunda at the school"***

In his defence, the accused admitted the role of Naboth. He stated:-

detailed evidence of her bodily injuries and the same was corroborated by PW3, the LC.1 Chairman who found her lying on the ground in pains and unable to walk due to the injuries. Her account is that she was beaten by the Rapist who threw her off the bed and after the rape, threw her and abandoned her in the compound. Therefore, there is overwhelming evidence of lack of consent.

The commission of this offence was at night and the culprit was identified by a single identifying witness. I have examined the circumstances under which the victim identified the attacker. First and foremost, rape is an offence committed when there is no distance between the victim and the Rapist, therefore, she observed him closely. Secondly, the accused person was well known to her. She had seen him two days earlier when he found her in the garden. She said she had, for sometime seen him at the neighbour's home where he worked or guarded.

She gave un-challenged evidence that there was bright moonlight that lit the house where the Accused attached her from. The victim of this rape is a single identifying witness and the settled legal principal is that the trial Judge should caution the Assessors and himself, which I have done about the dangers of relying on evidence of a single identifying witness. I have been helped and I have followed several decision of the superior courts that have settled the relevant considerations on the matter.

The Supreme Court of Uganda in Bogere Moses & Another Versus Uganda – Criminal Appeal No. 1 of 1997 cited with approval decisions of the Court of Appeal for East Africa in Roria Versus Republic (1967) EA 583, then George William Kalyasubule Versus Uganda – Criminal Appeal No. 16 of 1997, and Abdalla Nabulere & Another Versus Uganda (1978) HCB 77 where it was settled in the following words: - ***"Where the case against an accused depends wholly or substantially on the evidence 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***

If he had not been guilty of the alleged rape he should have stayed and explained himself to the police. This escape from Kimbejje was a conduct not consistent with innocence. This is good circumstantial evidence that

**23<sup>rd</sup> May 2015 at 7:30 a., my friend Naboth rang me and told me police were looking for me to arrest me. I left and went into the trees. I saw two men approaching and Naboth came with a boda boda and took me to kafunda”;**

He learnt that he was being looked for as a rape suspect, he decided to hide and escape from the village. He abandoned his employer's property that he was employed to guard. He stated **“When I was at the farm on 23<sup>rd</sup> May 2015 at 7:30 a., my friend Naboth rang me and told me police were looking for me to arrest me. I left and went into the trees. I saw two men approaching and Naboth came with a boda boda and took me to kafunda”;**

Although, in my view the conditions favouring correct identification are available, namely, moonlight, long opportunity to observe the culprit and the fact that the accused was known to the victim, I have found circumstantial evidence from the defence to support the evidence of participation.

In **Moses Kasana Versus Uganda (1992-93) HCB 47** held that where the conditions favouring identification are difficult, there is need to look for other evidence whether direct or circumstantial.

It was held that where the quality of evidence of identification is good, a conviction can be based on a single witness identification evidence without any other corroboration provided the court adequately warms itself of the special need for caution.

**----- 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 of good, the danger or a mistaken identity is reduced -----”;**

**convicting the accused in reliance on the correctness of the identification or identifications.**

- Tuhairwe Julius – SSA for state
- Mr. Sekyondwa Ivan for Accused.
- Ms. Gorret Boogere – Court Clerk

**In the presence of:-**

30/05/2018

**High Court Judge**

J. W. Kwesiga

Dated this **30<sup>th</sup>** day of **May 2018**.

I have considered the opinion of the Assessors and I have agreed with their findings that the state proved all the essential element of the offence of Rape that the Accused person is charged with. Therefore, I find the accused person guilty and I do convict him under Sections 123 and 124 of the Penal Code Act.

I have considered the defence evidence of denial and the Accused person's testimony that he believes the victim had seen him before as he went to the shops as a new person at the village. This supported the fact that the victim knew the accused before.

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This is overwhelming evidence of participation.

things he was still dressed in the same t-shirt he had when he raped her. out of the identification parade and she emphasized that among other supports evidence of identification. Secondly, the victim readily picked him

**SENTENCING:**

**State submissions by Mr. Tuhairwe Julius.** The convict has been found guilty of an offence where maximum sentence is death. He committed the offence with brutality. He assaulted his victim. He was just 23 years old and raped a woman aged 62 years, capable of being his mother. Throughout the trial, he appeared not remorseful at all. We pray for a deterrent sentence of 20 years imprisonment.

**Defence Submission by Mr. Ivan Sekyondwa.** The convict is a first offender. He is a young man capable of reforming and becoming useful to society. He has been on remand for 3 years. He had been working for a living and supporting dependants. We pray for a lenient sentence and we suggest 8 years sentence.

**Court sentence and Reasons for it.** I have considered the submissions of both the state and the defence. I have taken into account how the offence was committed. The convict acted brutally when he assaulted and raped a woman of advanced aged capable of being his mother. The convict deserves a sentence long enough to have him reformed before returning to society. I find a sentence of Twelve (12) years imprisonment appropriate for this purpose. The 3 years spent on remand shall be deducted from the sentence.

J. W. Kwesiga

**High Court Judge**

30/05/2018