THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT LIRA

CRIMINAL SESSION CASE NO. HCT-CR-009 OF 2015

UGANDA……..……..PROSECUTOR

VERSUS

OTIM JAMES……ACCUSED

BEFORE: HIS LORDSHIP HON. JUSTICE ALEX MACKAY AJIJI, JUDGE.

JUDGMENT.

The accused was indicted with the offence of Rape Contrary to **Sections 123** and **124** of the penal Code Act. The facts leading to the offence are that on the 2nd of February 2014 at Oder Gweno village in Dokolo district, the accused had unlawful Sexual Intercourse with Adero Stella without her consent. The accused on arraignment, pleaded not guilty. He gave sworn evidence and did not call any witnesses. He also raised a defence of alibi that on the alleged date of the incident, at 5:00 pm, he went to Aganga market and returned home at about 7:00 pm. By 8:00pm he entered bed and slept together with all the children in the house. Further that there was a land grudge between him and the victims' husband. The prosecution called 4 witnesses in a bid to prove its case.

Akello Gloria-State Attorney appeared for the prosecution and Counsel Atyang Christine represented the accused on State Brief.

Burden of proof

The burden of proof is always on the shoulders of the prosecution requiring them to prove all the ingredients beyond reasonable doubt. **(See: woolmingtion versus DPP (1935) Ac 463, Andreya Obonyo & Others versus R (1962) EA, 550.)**

Standard of proof

The standard of proof is 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 of the accused is innocent. As in the **case of Miller v Minister of Pensions [1947]2ALLER 372**

The prosecution case against the accused person should be so strong as to leave only a remote possibility in his favor. **(See: Section 101 of the evidence Act, Woolmington versus DPP (1935) Ac 462; Miller versus Minister of Pensions)**

The law on Rape was well stated by the court of Appeal for East Africa in the case of **Kibazo versus Uganda (1965), E.A 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 convict.

The essential elements requiring proof beyond reasonable doubt in the offence of Rape are:

1. That there was unlawful Sexual Intercourse with the complainant.
2. That the complainant did not consent to that Sexual intercourse.
3. That it was the accused who had the unlawful Sexual Intercourse with the complainant.

Section 123 of the penal code act defines rape as;

*"**any person who has unlawful carnal knowledge of a woman or girl, with 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 the case of a married woman, by personating her husband, commits the felony termed rape."***

His Lordship, Chief Justice Lord Campbell (as he then was) in the case **of 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."

Also, in that case of **DPP versus Morgan & 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 she will over borne."***

Whether there was Unlawful Sexual Intercourse with the complainant?

The law with regard to proof of Sexual Intercourse has long been settled. In the case of **Bassita Hussein versus Uganda, Criminal Appeal No. 35 0f 1995**, the Supreme Court of Uganda held as follows:

"The act of Sexual Intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence must always be adduced in every case of Defilement to prove Sexual Intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt."

Regarding the first ingredient, carnal knowledge means penetration of the vagina, however slight, of the victim by a sexual organ where sexual organ means a penis. Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence. The victim in this case did not testify because she was reported to have separated with the husband in 2016. The medical officer who examined the victim died before commencement of the trial.

Pw4, Ogwang Ambrose, a medical clinical officer, at Dokolo Health Centre IV presented a report of an examination carried out by a one Okello Moses, a senior clinical officer as he was conversant with his handwriting.

He said the officer examined the head, neck, chest, breast, abdomen and the back, the upper and lower limb of the victim and noticed there was no abnormality detected in those areas. She was

found to be HIV negative. This evidence was admitted in court as **P. Exhibit No. 2. And P. Exhibit No.3.**

Pw4, added that the victim was examined on 3/2/2014, a day after the day on which the offence is alleged to have been committed. This report was admitted by virtue of section, 30 of the Evidence Act which permits the receipt of statements made by persons who cannot be found or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to be reasonable to court . The attendance of this witness could not be procured without an amount reasonable delay within the limited time of the current criminal session. It was also found to be admissible under section 30 (a) of the same Act as a statement made in the ordinary course of business, in records kept in the ordinary course of the discharge of his professional duty, as a document dated, written and signed by him. In this report, Exhibit No.2 and P. Exhibit No.3 **(P.F.3A)** the clinical officer certified that he examined, the victim who was of the apparent age of 32years. His findings were that the victims hymen was raptured, vulva was soiled with whitish substance and that the probable cause was active penis penetration. On the posteris there were plenty of fluids as a result of unprotected sex. From the medical report the act of Sexual Intercourse took place. This corroborates the victim's statement that she was a sleep and only realized that the accused was having sexual intercourse with her. In my opinion there was no resistance by the victims and she only rejected to the sexual act when she realized it was a different person from her husband having sex with her. The victim did not have any evidence of injuries or bruises on any other parts of her body. I do however agree that it is not necessary for the victim to have injuries in her genital since she is a married person and who has been having sex consistently.

In the case of **Katumba James versus Uganda Criminal Appeal 58 of 1997 (Court of Appeal),** the victim had been medically examined but the medical doctor did not testify on issues of penetration. The court of Appeal held, inter alia that;

*"**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."***

In the instant case, the medical personnel who examined the victim died but still the report was presented to court by a clinical officer Pw4 who knew the handwriting of the doctor. If I applied the same authority, I am able to form an opinion that there was an act of sexual intercourse on the victim. The issue to be determined is whether the sexual act was unlawful.

Circumstantial evidence:

The prosecution relied on the evidence of Pw1 who visited the scene. In his statement in cross examination, he said he did not check the victim to find whether there was sexual intercourse. PW2 said he found bed sheets on the ground and there was some smelly substance in it like sperms. However to constitute a sexual act, it is not necessary to prove that there was deep penetration. The slightest penetration is sufficient.

PW1- the husband of the victim told court he knew the accused person as a member of the neighboring village. He testified that on the 2nd .February.2014, while selling Beb Wine at Adwoki trading centre at around 10-11pm, the wife came running towards him and told him that while she was already asleep in her house, she woke up only to realize that Otim was having sex with her. When he reached home, he found the bed sheet on the door way and the police also confirmed part of the bed sheet had sperm because it was smelly, and the bed sheet was taken by himself and a police officer. On the other hand, PW2 (LC1) a peasant farmer and the Vice Chairperson L.C 1 confirmed to court that he knew one Adero Stella the wife of his brother called Okwir Patrick. That the accused person is from a neighboring village called Ajokdong.

His testimony was that on the 2nd.February.2014, at around 9: 00pm, Adero Stella came running while making an alarm and told him that she caught Otim James having sex with her in her house unwillingly. Considering the above, I am in agreement with the opinion of the assessors and I am satisfied that the prosecution has proved beyond reasonable doubt that, there was carnal knowledge of the victim.

He also denied his earlier statement made at police during cross examination on page 37 of the record of proceedings. The statement reads "…at the police the OC ordered him to open his pant and when it was discovered wet, Otim complained that the wetness was caused by the water he crossed at Amodo swamp." Much as he denied making confession, a trial within a trial revealed that he made the statement voluntarily.

Whether the complainant did not consent to that Sexual Intercourse?

Proof of lack of consent is normally established by the victim's evidence, medical evidence and any other cogent evidence. The victim in this case did not testify because she was reported to have deserted the husband in 2016 before commencement of the trial. The prosecution instead relied on the circumstantial evidence of the nature of injuries sustained by the victim and that the bed sheet was found on the floor. They are indicative of resistance having been put up by the victim. PW1 and PW2 confirmed on arrival in the house they saw bed sheet down on the floor. In agreement with the opinion of the assessors, I am satisfied that the prosecution has on the basis of the circumstantial evidence available proved beyond reasonable doubt that, the victim did not consent to that sexual intercourse although the medical report did not indicate any kind of bruises or injuries on the other part of the victim's body or show some resistance when she realized the person having sex with her was different from her husband.

PW1 told court that the wife said she had been raped by the accused meaning that they had sexual intercourse without her consent. However, prosecution has to prove whether there was lack of consent by the victim. PW1 said the victim told him she was already asleep in her house and woke up to realize that Otim was having Unlawful sexual intercourse with her. In my understanding, this was sex by impersonating her husband and thus procured by impersonation. The fact that the victim ran to her husband while making an alarm shows that she did not consent to the sexual act.

Whether it was the accused that had the unlawful sexual Intercourse with the complainant?

Lastly, the prosecution had to prove that it is the accused who committed the unlawful act. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime not as a mere spectator but as the perpetrator of the offence. There is no direct evidence save for the confession of the accused and although he tried to deny making a confession. The prosecution also relies on what the victim told PW1, PW2 and PW3. Naming the accused as her assailant although it remains hearsay evidence since she do not testify.

The court must be satisfied that the circumstances were favored for identification considering;

- What was the lighting?
- The distance between the witness and the assailant.
- Familiarity with the assailant by the witness.

In the instant case, PW1 told court that she was raped by Otim James and apart from her testimony; there is nothing on court record to show that it was the accused person who raped her. The prosecution is silent on how the victim identified the accused person since she was asleep at first. In my understanding even if the victim is familiar with the accused person, the alleged rape took place at night which raises some doubt as to whether the accused was properly identified. There was no conversation between the accused person and the victim at that material time.

In my opinion even though the victim told PW1 that she was raped by the accused, the prosecution did not prove any evidence whatsoever regarding the identification. However I shall rely on the confession by accused person himself since he admitted in a charge and caution statement to have gone and had sex with the victim without her consent. He later retracted having made the statement.

In the case of ***Kasule v Uganda (1992-1993) HCB 38*** it was held by Muyindo.J:

"it is trite law that a retracted confession or admission will not normally support a conviction unless it is corroborated by other evidence but court might do so if it is fully satisfied in the circumstance of the case that the confession must be true."

I have noted in the instant case that the admission by an accused person does qualify to be called a confession upon which I shall now convict the accused person.

The accused also raised a defence of alibi, that at the night of the alleged incident he was at home sleeping therefore he did not commit the offence. PW3 testified that he got the accused person at home in his house sleeping at the time of arrest. Again I shall rely on his charge and caution statement which puts him at the scene of crime.

"*However, it is not the duty of accused person to prove his alibi. It is up to the prosecution to destroy it by putting the accused person squarely at the scene of crime and thereby proving that he is the one who committed the crime"- Sekitoleko versus Uganda [1968'EA 531.*

Instant case, in my opinion the accused was sufficiently placed at the scene of crime by the prosecution. Through his confession in the charge and caution statement.

I am not in agreement with the assessors hence my finding of a conviction against the accused person.

Right of appeal explained.

HON. JUSTICE ALEX MACKAY AJIJI

JUDGE

16/11/2018

Judgment delivered in open court in the presence of;

1. Akello Gloria-Resident State Attorney
2. Counsel Christine Atyang for the accused on State Brief.
3. Assessors.
4. Court Clerk-Egac Fred

HON. JUSTICE ALEX MACKAY AJIJI

JUDGE

16/11/2018.