

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CR-SC-0384-2017

UGANDA PROSECUTOR

VERSUS

AYINAMANI BOAZ ACCUSED

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

JUDGMENT:

Ayinamani Boaz, hereinafter referred to as the Accused person stands charged with Rape contrary to Section 123 and 124 of the Penal Code Act. It is alleged that on the 18th day of August 2016 at Kampala he unlawfully had carnal knowledge with Namuli Fausta without her consent.

The Prosecution represented by M/s. Babirye Sarah and Jean Nareeba both State Attorneys while Mr. Gaston Kamugisha represented the Accused on private brief.

The Accused person denied the charges and in defence pleaded that this was a fabricated case.

The moment any person charged with a criminal offence pleads not guilty, the state assumes the burden of proof.

The state has the duty to adduce evidence that proves all alleged relevant facts necessary for this count to convict the Accused person.

In the instant case the prosecution evidence must prove:-

- (a) That there was sexual intercourse with Namuli Fausta at the alleged time.
- (b) That the sexual intercourse was done without her consent.
- (c) That the Accused person is the culprit.

On the fact of sexual intercourse PW1 Namuli Fausta aged 21 years told court that the Accused, a friend of her parents. That her uncle from Lyantonde entrusted the Accused person with her. The uncle gave the Accused Shs. 500,000/= to help get her a place to study. She also gave him Shs. 100,000/= that after a long day it became late and he took her to a building where they stayed overnight. He forced her to have sexual intercourse.

She informed her uncle while the Accused was asleep, using his phone. The uncle called police who came and arrested the Accused person. Under cross-examination she told court that her nickers were torn during the Rape. That she did not give the nickers to the police. She said she saw blood after the Rape.

PW2, Amos Kabikire (Sgt) said he was informed that there was a problem at Kampala Guest House, Kisenyi B. He found the girl (PW1) crying that the man who was sleeping had raped her. He arrested the man (Accused).

PW3, Dr. Nsereko Mukasa presented a medical report made by Dr. Barungi Tadeus (deceased). The Medical Report PE1 established that PW1 Namuli suffered no exterior injuries. She had no injuries on her private parts. She

had no hymen, lost long ago. She had blood discharge due to her monthly periods. Her vaginal swab showed no spermatozoa. She was sexually active. This closed the prosecution story.

The defence story is that on 17th August 2016 he spent most of the day taking Namuli (PW1) to the Ministry of Education, Kampala to get admission letter to Kabale College of Commerce. They separated at 5:00 p.m. She called him at 9:30 p.m saying that she had been robbed. She traced him to the guest house at Kisenyi. ***"She looked traumatized, I told her to bathe. I gave her a blanket, a bedsheet and a pillow to sleep on the floor. I fell asleep"***. While asleep she communicated using a phone she alleged had been stolen.

Semakula Yoram, who had connected her to him appeared with her bag she had during the day that she alleged was robbed. Semakula came with police who included a police woman. The police demanded that he pays them Ug. Shs. 1, 000,000/= and Ug. Shs. 500,000/= to Semakula which he refused to do and he was arrested and charged with Rape.

The defence contention is that there was no sexual intercourse as alleged in the indictment.

The only witness who gave direct evidence of the alleged sexual intercourse is the alleged victim PW1 Namuli. This, ordinarily is the best witness since she would have experienced the sexual Act. However, there cases were falsification lead to doubts on whether or not there was a sexual intercourse was settled by the Supreme Court of Uganda in **Basita Hussein Versus Uganda – Criminal appeal No. 35 of 1995** that ***"The act of sexual***

intercourse or penetration may be proved by direct or circumstantial evidence. Sexual intercourse is proved e.g by the victim's own evidence and corroborated by medical or other evidence. Though desirable it is not mandatory that the victims evidence must always be supported by medical evidence".

In my view, sexual intercourse in cases of defilement and/or rape provided there is adequate proof of penetration or evidence of a third party who saw the act can prove sexual intercourse. While medical evidence, once available, it must be considered because it may corroborate the victims' evidence or disprove her allegation.

In the instant case, I have highlighted the findings of medical examination of the victim. She was sexually active and the hymen was lost long ago. She told court that after alleged rape she saw blood. Dr. Barungi found that this was blood related to monthly periods of the girl and therefore, not proof of penetration.

The vaginal swabs did not test positive of spermatozoa that were expected within the short time that lapsed.

I must add that where the victim's evidence is found free from doubt, I am mindful of the Law that to establish sexual intercourse the prosecution does not need to establish the rupture of the hymen or emission of semens because the slightest penetration of the vagina would be enough.

Reference is made to **Arch bold General Pleadings evidence and Practice 36th Edition Page 2879: "To Constitute the offence of rape**

there must be penetration. But any, even the slightest penetration will be sufficient. Where a penetration was proved but not of such depth as to rupture the hymen still it was held to be sufficient to constitute the crime of rape”.

In this case's evaluation I have noted in favour of the Accused person:-

- (i) The blood attributed to penetration by the victim was found to be ordinary/normal monthly period blood.
- (ii) Sexual intercourse in the last one day is ruled out by the vaginal swabs tested.
- (iii) The alleged torn underwear of the girl as she alleged was not anywhere. The Accused stated the police woman who saw it found it not torn.
- (iv) The state did not adduce evidence of an Investigating Officer. This court is denied evidence that would have established what prompted the police to act as it did. The Defence allegation that this was a case fabricated by police and Semakula to extort money from him is left not displaced due to prosecution failure to call Semakula or the Investigating Officer to testify.

In **Woolington Versus DPP (1935) AC 462** it was held that the Accused person's defence may cause a doubt as to his guilt. It is sufficient for him to raise a doubt as to his guilt, he is not bound to satisfy the Judge of his innocence.

In absence of cogent evidence proving sexual intercourse in the circumstances of this case I do entertain reasonable doubt which I discharge in favour of the Accused person.

I agree with the advice of the Assessors, I find the Accused person not guilty. He is hereby acquitted.

Dated this **27th** day of **June 2019**.



J. W. Kwesiga

Judge

27/06/2019

In the presence of:-

1. Ms. Amina Namale – SSA for state.
2. Mr. Wanda holding brief for defence.
3. Mr. Irumba – Court Clerk.