THE REPUBLIC OF UGANDA

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

HCT-11 -CSC-NO. 14 OF 2011 KAB-00-CR-CSC-AA NO. 240/2009

 CRB 3738/2009

UGANDA ::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::PROSECUTOR

VERSUS

A1. AKANKWASA JOHN

A2. BEHANGANA KOMBOZI:::::::::::::::::::::::::::::::::::::::::::::::::::::::::ACCUSED BEFORE HON. MR. JUSTICE J.W. KWESIGA

JUDGMENT

Akankwasa John alias Juma and Behangana Kombozi are jointly indicted for Rape contrary to Sections 123 and 124 of the Penal Code Act. It is alleged that on 24th December, 2008 at Katuna Primary School, in Kabale District the Accused persons had unlawful carnal knowledge of Nyirahabimana Alphonsine without her consent.

Each of the Accused persons pleaded not guilty to the charges. According to our Criminal Law Rape is committed by completion of penetration into a female sexual organ using a male sexual organ without the female’s consent. The essential elements of the offence include penile penetration into the victim’s vagina and for it to be rape it must be non-consensual penetration. Therefore for the prosecution to secure a conviction, must prove the following:-

1. That there was sexual intercourse which amounts to penile penetration into a female sexual organ.
2. That the penile penetration was non-consential.
3. That the Accused person (s) participated in commission of the offence.

Since the Accused persons pleaded not guilty to the charges, the State has the duty to prove all the above elements of the offence beyond reasonable doubt.

The duty to prove the charges falls upon the prosecution throughout the trial. The Accused persons have no duty to prove anything. I will now proceed to consider the evidence adduced in this case as a whole. I will approach this case by examining evidence on each element of the offence.

PW 1 Dr. Osinde examined Nyirahabimana on 26th December, 2008. He found her 17 years old. Her vagina had bruises. She had gross vulva injury and the hymen was torn and she was still bleeding. He concluded that she was sexually assaulted. The doctor’s report made in Police Form PF 3 was admitted as prosecution exhibit P.1. NYIRAHABIMANA testified as PW 3. She testified that at about 12:00 noon she met A1 and A2 on the way to a market at Katuna. A1 pretended to have dropped money and A2 who was following her told her to pick it which she did not do. He picked it and held her arm deceiving her they were going to share the money off the road, A2 followed them demanding for the money as she tried to get away, A1 held her, and A2 helped A1 to remove her knickers, covered her mouth to stop her from making alarm and they had forced sexual intercourse with her in turns. She remembered that A1 raped her first and A2 raped her next. The process took about 2 hours. They left her crying. She was bleeding. She met ELIVAIDA, an old woman to whom she narrated what had happened and described the rapists. She gave her a piece of cloth to cover her bleeding and escorted her home. She later learnt some suspects had been arrested after some days and out of six people she looked at in Katuna Police Cells she identified A1 and A2. She explained that she had been raped during the day and therefore she recognized A1 and A2. Under cross-examination she maintained her story that she positively identified her assailants and properly pointed them out at the Police Station on first sight.

P.W.4: KAKIYE ELIVAIDA corroborated PW 3, the victim that on 24th December, 2008, at about 12:00 noon, she met the victim with a torn skirt, covered in blood and she removed her own piece of cloth, covered her up and escorted her home. She was bleeding from her private parts and she disclosed she was damaged by men. Considering the evidence of PW 1, PW 3 and PW 4 there is no doubt left in my mind that the complainant had been subjected to sexual intercourse which resulted into injuries that were the source of bleeding observed by PW 4 and medical officer PW 1. Evidenced by prosecution exhibit P.1. PW 5 KATO MARIKO the victim’s brother stated that the girl had swollen face. PW 4 stated that her clothes had been torn and she had been traumatized, she was crying and wanted to drown herself in the river. In my view these physical signs of swollen face and torn clothes when considered with traumatic reaction of crying and attempted suicide by drowning herself go to prove that she had been subjected to sexual intercourse forcefully. She explained the circumstances under which she was led off the main road, she was deceived that she was going to share the lost and found money. Secondly her mouth was covered to stop her from making an alarm. I have no doubt this was non-consential sexual intercourse. Doctor Osinde’s evidence shows that apart from bruises on the face she had multiple bruises in her vagina and the hymen was raptured. These vaginal injuries were overwhelming evidence of penetration. The multiple facial bruises corroborate the victim’s evidence that her mouth was covered to surpress her alarm and resistance to the penetration.

The final crucial issue to determine is whether the Accused persons are the culprits. Determination of this issue fundermentally depends on the credibility of the evidence of identification given by the victim PW 3 Nyirahabimana.

PW 2 D/CPL Mwesigye Lawrence told Court that A1 Akankwasa was arrested by LC I Chairman of Katuna Town Council as a suspect in a robbery case. While in custody there was a report of defilement against him. These events happened after the complainant had lodged a complaint over rape and had been referred for medical examination. A2 was arrested much later over another case.

The victim used to come to Police following up investigation of her complaint and she saw and pointed out the two suspects as the people who raped her. Therefore they had been arrested when she pointed them out at the Police station among other prisoners.

Sexual offences, by their nature, are often committed not in the open and therefore the victims are most of the time the only eye witnesses. In the instant case the victim was the only eye witness and no body else saw the culprits committing the offence. Therefore PW 3 Nyirahabimana is a single identifying witness. The practice is that evidence of a single identifying witness desires to be corroborated by other independent evidence. The Assessors were duly cautioned that where there is no independent corroborative evidence, the testimony of a single identifying witness must be examined with great caution before convicting on it to rule out a possibility of mistaken identification. I am mindful of this danger because a single identifying witness though truthful may be honestly mistaken. I have considered that this witness did not know the Accused persons before. I have also considered the fact that the Police did not hold an identification parade and I have weighed this evidence with the following factors:-

* The offence was committed in broad day light at about 12:00 noon.
* The process involved the victim first meeting the culprits on the road side and moved together to the secluded place where they were supposed to share money.
* The culprits took along period as took turns in raping the girl she stated it took almost two hours.
* After the commission of the offence the culprits remaining by threatening the victim that if she does not stop crying they would repeat the rape.

In view of the above she had opportunity long enough to observe her attackers. There is no doubt that this is a type of offence that is committed when there is no distance between the victim and the culprit. Given the total conditions under which the offence was committed, my view is that the conditions were very favourable to correct identification of the culprits. There is no possibility of mistaken identification. Despite the omission to hold identification parade, I am satisfied that the victim correctly identified A1 and A2 as people who raped her.

I find that the prosecution has proved participation. I agree with the opinion of the two assessors that the prosecution has proved the case against the two

Accused persons beyond reasonable doubt. I find each of the Accused persons guilty of rape and I accordingly convict each of them under Section 123 and 124 of the Penal Code Act.

J.W. KWESIGA JUDGE 23/10/2012

S E N T E N C I N G

Mr. Arinaitwe RSA for State: We do not have any previous record against the convict. The maximum sentence is death. The offence was committed in crude manner against a young girl. We pray for serious deserving sentence.

The court has a duty to protected the weak woman. This protection can be achieved by keeping them away for a long time.

A1: John Akankwasa: I have been on remand, 3 years and 10 months. I lost my wife while in prison, left 6 orphans are in secondary school others are in primary, I was looking after an old woman aged 85 years, she is deaf, I am sickly. I pray for lenience, I pray for light sentence. I am 42 years old.

A2: Behangana Kombozi: I pray that you forgive me. I lost my people who were left un cared for. I have been on remand for 3 years and 10 months I am 21 years old.

Mr. Bakanyebonera: Considering the period the convicts have spent on remand and the problems each one has stated, I pray for a lenient sentence.

S E N T E N C E

Court: I have considered the period of three years and ten months the convicts are said to have spent on remand. I have also considered what each of the convicts has advanced as they pray for leniency. However the offence of GANG RAPING is cruel and most condemnable. The two men, with impunity raped a young girl whom they left both physically and psychologically shattered to the extent that she was left bleeding excessively and traumatized to extent of attempting to end her life by drowning in the river. These factors point to the manner the offence was committed which this court has considered seriously. The convicts deserve to be kept away long enough to protect society and to have them regret the grave criminal Acts they committed with impunity. I hope this will sent a warning to other potential rapist not to convict similar offences. I hereby sentence each of the Accused persons to (14) Fourteen years imprisonment.

J.W. KWESIGA JUDGE 23/10/2012

In the presence of:

Mr. Arinaitwe Rajab RSA for the State.

Mr. Nakanyebonera holding brief for Rev. Bikangiso. Ms Evelyne Ampeire-Court Clerk.