

UGANDA / JUDGMENT

Uganda v Bekunda Silver

(HCT-05-CR-SC-0086 of 2002)

[2004] UGHC 13 (31 March 2004)

[2004] UGHC 13

COURT

High Court of Uganda

CASE / FILE NUMBER

HCT-05-CR-SC-0086 of 2002

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The accused was indicted for rape contrary to sections 117 and 118 of the Penal Code Act with the particulars alleging that Bekunda Silver on the 15}{\super\insrsid5768531 th}{\insrsid5768531

day of August 2000 at Kihinga Forest (Mafuga) in Rukungiri District had unlawful sexual intercourse with Mrs Musasizi Jolly without her consent.

\par

\par The accused denied the offence and the prosecution has to prove all the ingredients of the offence which are thus in issue. The proof must be as is usual in criminal cases beyond reasonable doubt.

\par

\par The following are the issues to be resolved in this case:

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Whether or not there was actual sexual intercourse with the complainant.

\par {\listtext\pard\plain\s16 \f1\fs32 \hich\af1\dbch\af0\loch\f1 (b)\tab}Whether or not it was without consent of the complainant.

\par {\listtext\pard\plain\s16 \f1\fs32 \hich\af1\dbch\af0\loch\f1 (c)\tab}Whether or not the accused as the culprit.

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\par }{\b\ul\insrsid5768531 Uganda Vs Kyambalango Fraseal [1994-95] HCB 32}{\insrsid5768531 .

\par

\par The background to this case is that Musasizi Jolly on 15/8/2000 was on her way to Ishasha and had to pass through Mafuga Forest then via Kihinga.

\par

\par It is the prosecution\rsquote s case that at Kihinga she met a

man at around 7.00a.m. and after an exchange of greeting they moved together. But after some distance he is said to have lifted her up and suggested he wished to have sexual intercourse with her. At a place in the forest he then got hold of her, threw

her down by the roadside and had sexual intercourse with her.

\par

\par The two then walked together until they met one Zadok Twikirize who the woman tipped to call people to arrest the culprit. The person was arrested and it is the accused now in court.

\par

\par In his defence the accused denied meeting this woman that day nor ever seeing her on 15/8/2000. He then told court how he was arrested on 16/8/2000 as he was going to his grandfather\rsquote s home.

\par

\par He says he had never seen this woman till she came to testify in court.

\par

\par Concerning the first issue then, was there any act of penetrative sexual intercourse with the woman?

\par

\par In her testimony Musasizi Jolly told court how the man had sexual intercourse with her twice. This is a grown up woman who knew what she was saying as to the nature of the act and extent of the same. She said he \93raped\94

her. This word connotes forceful sexual intercourse in the words used in Lunyankole/Rukiga.

\par

\par The act took about one hour and she knows it was rape.

\par

\par As for corroboration Zadock Twikirize (PW2) told court how Jolly told him of her ordeal just after the event and pointed to the man who allegedly had raped her.

\par The torn dress was seen by this witness. Her distressed condition is sufficient corroboration in this case.

\par

\par Moreover, her testimony was so straight and uncontroverted that after due warning even in absence of corroboration this court would still be satisfied that she had told court the truth and find this ingredient proved, which I duly find established.

\par

\par }{\b\ul\insrsid5768531 Chila & Others Vs R [1967] EA 722,}{\insrsid5768531 and }
{\b\ul\insrsid5768531 Kayondo Robert Vs Uganda Criminal Appeal No. 18/96 C. A}
{\b\insrsid5768531 .}{\insrsid5768531 (unreported).

\par

\par As to whether there was lack of consent or not, learned counsel for the accused seemed to indicate that the woman could not have been raped twice in a row after walking with the ravisher and still walk with him in the woman\’s words \’93smiling\’94

along the way.

\par

\par Strange as the story seems it is acceptable looking at other circumstances of the case. this woman was threatened with death if she did not give in. it was in a for

est and no people seemed to be coming along that road. So what better manner to behave in than pretend not have been bothered by the act of rape if that meant preserving her life after even giving him shs.5,000/= to restrain him but in vain. Moreover it

was not the accused\’s defence that she consented voluntarily. Any giving in was under threats of death.

\par

\par Clearly her testimony shows that the act was not accompanied with her consent. Corroboration of this is the torn dress immediately seen by Twikirize

who met the duo after the incident. The dress was exhibited and shows clear marks of violence, hence lack of consent. Also her immediate report to Twikirize that she had been raped and her steps to apprehend the culprit without his knowledge suffice with

her other testimony of rape.

\par I do find that there was lack of consent in the act. This issue is resolved in the positive.

\par

\par Lastly as to whether the accused was responsible, the defence story is a denial and a version of how he was arrested on 16/8/2000. This is a day after alleged rape put on 15/8/2000.

\par

\par It is his testimony that when he was arrested he was going to the home of his grandfather called Samwiri which is in Rukoka in Mafuga. He claimed to have been arrested by three men who asked him for graduation

tax tickets. That in course they wanted to take his money forcefully but he fought them while raising an alarm that was answered by people who were at a nearby church. As the captors were alleging that he had stolen money from them it was arranged that

a

two people selected among those who had answered the alarm take him to Rutenga Police Post. This was duly done and he was detained there. On 17/8/2000 he was taken to Kanungu Police Post for theft of shs.170,000/= which to him was actually money stolen

from woman nor ever seeing her till she testified before this court.

\par

\par Turning to the prosecution case, however, there is evidence to show that the offence took place on 15/8/2000 at a spot in Mafuga Forest and Twikirize arranged for people to arrest the culprit

whom he had met with the complainant. The accused was arrested at the home of his grandfather who admittedly is called Samwiri and is within the area where the woman was raped. Also the accused admits he was going to Samwiri

when he was arrested, which tallies with the prosecution story of three men arresting him though he gives a different date and reason for his arrest.

\par

\par The prosecution story is more plausible as reflecting the truth about his arrest just after raping the woman who cleverly fooled

ed him into continuing to walk with her until she got out of the danger zone and meeting Twikirize. Moreover, since he claims he had never seen this woman till court day, how comes it that Samwiri is actually the same as mentioned by her and the circumst

a

nces he described are the same that he was allegedly arrested in as claimed by the prosecution? This woman and Twikirize could not have made up the story with the accuracy of mathematics leading to the arrest of the accused unless they actually witnessed

what transpired or knew the area before. The accused's version is a clear fabrication and afterthought which was not even put to the witnesses in cross-examination thus leaving their version unscathed.

\par

\par This woman clearly described how it was this man she met, travelled with, raped her, and she espied on him till he got to his grandfather's places whereof she kept in hiding monitoring him till he was arrested by people brought by Twikirize.

\par

\par The time was daylight and at no time did this woman allow her attacker to get out of her sight. The attacker was arrested at Samwiri's place and he is the accused.

\par

\par The accused's version is not credible in light of the other evidence showing that the woman did not know him before but the events of that day led to his arrest at his grandfather's

s and after an act of rape. There is no way this woman and Twikirize could have made up the story to frame an unknown person as the accused also says he had never seen Zadock Twikirize till he came to testify.

\par

\par The prosecution has adduced adequate corroborated evidence to show that it was the accused responsible for the rape. In agreement with both assessors I find that the prosecution has proved the case satisfactorily.

\par

\par I find the accused guilty and convict him of rape contrary to sections 117 and 118 of the Penal Code Act.

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\par }{\ul\insrsid5768531 31/03/2004}{\insrsid5768531 :-

\par Accused in court.

\par Mr Waninda for the state.

\par Mr Ndimbirwe for the accused.

\par Ms Namara court interpreter.

\par Judgment is pronounced.

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\par J U D G E

\par }{\b\insrsid5768531 31/03/2004.

\par }{\ul\insrsid5768531

\par Mr Waninda}{\insrsid5768531 :-

\par The prosecution is not in possession of the previous record of the accused. The way the convict harassed the victim was so compromising. She even tried to buy her liberty but in vain. In the circumstances I pray for

a fitting sentence to deter the likes of him.

\par }{\ul\insrsid5768531

\par

\par Mr Ndimbirwe}{\insrsid5768531 :-

\par There is no previous record of the accused, and we pray for leniency, as it appears to be his first time. He is the only family man catering for his family and the punishment on him stretches

to his family. He has been on remand for four years a time long enough for him to reflect on his conduct and repent. Given another chance he will live straight. We pray for leniency.

\par

\par {{\ul\insrsid5768531 Court}}{\insrsid5768531 :-

\par The convict is treated as a first offender. He is remorsefu

1. But the offence is serious and the circumstances were grave indeed and deserve equal penalty. Considering the period spent on remand and these other mitigating factors, also aware of the seriousness nature of the offence, court feels that a sentence

of eight (8) years is adequate to meet both ends of justice to fit the offender and the crime.

\par

\par Consequently the convict is sentenced to eight (8) years\rqote imprisonment. Right of Appeal is explained. Accused duly committed.

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\par {{\b\insrsid5768531

\par D. N. MANIRAGUHA

\par J U D G E

\par 31/03/2004.}}{\b\ul\insrsid5768531

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