

UGANDA / JUDGMENT

Uganda v Okello (Criminal Session Case 421 of 2022) [2025] UGHC 325 (19 May 2025)

[2025] UGHC 325

COURT

High Court of Uganda

BEFORE

Boniface Wamala, J

CASE / FILE NUMBER

Criminal Session Case 421 of 2022

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT SOROTI
CRIMINAL SESSION CASE NO. 0421 OF 2022 UGANDA :::::::::::::::::::::::::::::::
VERSUS OKELLO DAVID :::::::::::::::::::::::::::::::::::::::

Before: Hon. Justice Boniface Wamala

JUDGMENT

Introduction

- [1] The accused person in this case is indicted on two counts. The first count is Rape C/S 123 and 124 of the Penal Code Act [now sections 110 and 111 of the PCA Cap 128]. It is alleged that the accused on the 18th day of December 2021 at Abokoro Village, Awaliwal Parish, Awaliwal Sub- County in Soroti District did have unlawful carnal knowledge of Atubo Suzan without her consent. The second count is Simple Robbery C/S 285 and 286 of the PCA [now sections 266 and 267 of the PCA Cap 128]. It is alleged that the accused person on the 18th day of December 2021, at Abokoro village, Awaliwal parish, Awaliwal Sub County in Soroti District robbed Atubo Suzan of cash, UGX 30,000/= (Uganda shillings thirty thousand shillings only) and at or immediately before or after the said robbery used or threatened to use actual violence. The accused denied the charges and the case proceeded for hearing.

Representation

- [2] At the hearing, the state was represented by **Ms. Adero Doreen** from the Office of the Director Public Prosecutions (ODPP) while the accused was represented by **Mr. Olobo James Felix** and **Mr. Justine Okwalinga**, counsel on state brief. The assessors in this case were **Mr. Erwaku Lawrence** and **Ms. Acheko Proscovia**. Neither the accused, his lawyers nor the state objected to the assessors' appointment.

The Burden and Standard of Proof

- [3] In criminal cases, an accused person is presumed innocent until proven guilty or until he or she pleads guilty; as provided for under Article 28(3)(a) of the Constitution of the Republic of Uganda. As such, the burden of proving each and every ingredient of an offence is always on the prosecution and never shifts onto the accused. See: **Woolmington v DPP [1935] AC 462**. The accused person is only convicted on the strength of the prosecution case and not because of weaknesses in his defence. See: *Ssekitoleko v Uganda (1967) EA 531*. Each essential ingredient of the alleged offence must be proved beyond reasonable doubt. However, proof beyond reasonable does not mean proof beyond a shadow of doubt. The standard is satisfied once any evidence suggesting the innocence of the accused person, at its best, only creates a mere fanciful possibility but not any probability that the accused is innocent. See: **Miller v Minister for Pensions [1947] 2 ALLER 372**.

The evidence in this case

Agreed facts

- [4] The state and defence signed a memorandum of agreed matters wherein some facts were agreed upon, namely that; the victim is an aunt to the accused person and that the parents of the accused are neighbors with the victim. The following documents were also agreed upon in the said memorandum, namely;
- a) The victim's medical examination report for assault (PF3);
 - b) The victim's medical examination report for rape (PF3A)
 - c) The accused's medical examination report (PF24A); and
 - d) The sketch plan of the scene of crime.
- [5] The memorandum of agreed matters was tendered and admitted in evidence in accordance with section 67 of the TIA. The agreed documents were admitted in evidence and marked as PE1, PE2, PE3 and PE4 respectively.

The witnesses

- [6] The prosecution led evidence of five witnesses. The accused gave a sworn testimony and did not call any other witness. PW1 was the victim, Atubo Suzan, a female adult aged 44 years. She stated that she knew the accused as a son to her brother in law and a neighbour. On the fateful day, she went to brew waragi at her daughter's place. She then served the people who had come to drink waragi, including the accused. She remained at her daughter's place up to 10:00 pm. On her way home, she saw someone following her from behind as she approached Kanani Trading Centre. She branched off to a certain house and tried to hide. She identified the person following her as the accused. There was solar light from a house in the trading centre with which she was able to see him. She waited for the accused to pass and reach his home before she could proceed because while he was still taking waragi, he had started talking recklessly saying that; "I will show you today". PW1 also stated that prior to the incident, every time the accused drank and passed by the victim's home, he would say, "you refused me". The accused had asked for a love affair which request the victim had turned down.
- [7] PW1 continued that after some time, she left her hideout to head home but she heard someone tiptoeing from the back. Upon turning, she saw someone approaching and she kept moving. The person said - "Suzan wait" and she asked "why?". The person was the accused, who approached her, held her and they started struggling. The accused demanded for the money she had received from the waragi sales and when she said that she did not have it, he started beating her, and tearing her clothes. The victim collapsed only to wake up in the morning. When she regained consciousness, she found herself completely naked and her body had scratches. She noticed that the accused had raped her as she found bruises in her private parts. She also found that her money UGX 30,000/= and clothes were missing. She started crying as she headed

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home naked. When she reached her home, she sighted the accused behind her house standing near an orange tree with his arms folded. There was moonlight and she was able to see him. She did not branch to her house but went to the house of her children and called them to open for her. In the morning, her children went and reported the matter to the LCI Chairman. The accused was later arrested from the home of the LC Chairperson.

- [8] PW2 was Acen Grace, a female adult aged 21 years, resident of Abokoro village and a daughter to the victim. She stated that the accused was her cousin brother (as their fathers are brothers). On the fateful day, her mother (the victim) returned home at about 2:00am. She was coming from the home of Anyaju Mary (a sister to the witness) where she had gone to brew waragi. When PW2 came out of the house upon hearing her mother calling, she found her mother naked and she screamed. Her mother looked dirty. When PW2 asked what had happened, her mother told her that the accused had taken her money, beaten her and raped her. After the victim entered the house and was given clothes, PW2 went and called

her brother, Okello David (not the accused, but PW3). She then saw the accused standing behind the victim's house. Accused was at a distance of about 10 meters and there was moonlight. When the accused saw Okello David (PW3), he took off. They decided to wait till morning. When PW2 observed her mother, she had bruises all over her body with swollen eyes. She finally stated that there was neither a love relationship nor a grudge between the accused and the victim. She also had no grudge with the accused.

- [9] PW3 was Okello David, a male adult aged 23 years, peasant, resident of Abokoro village, Awaliwali parish and sub county in Soroti District and a son to the victim. He stated that the accused is his cousin brother. On the fateful night, at about 3:00am, his sister called Acen Grace went to his house, called him and informed him that the accused had beaten their mother. He came

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outside but did not immediately go to the house since his sister had informed him that their mother had come in naked. After their mother dressed up, PW3 went in but the victim was unable to talk. She was all dirty and had swellings around her face. Shortly later, her sister informed him that she had sighted the accused behind their mother's house. When PW3 came out, the accused took off and he did not pursue him. At day break, when the accused was sighted around, PW3 and other people chased him and he ran to the home of the LCI Chairperson. The accused was locked inside the house of the Chairperson since the people who had gathered were bitter and wanted to beat the accused. The LC Chairperson called police officers who came, arrested the accused and took him to police.

- [10] PW4 was D/IP Oparet Martin, a police officer attached to Kalaki Police Station. In December 2021, he was attached to Soroti CPS in the Criminal Investigations Department. The accused was brought before him to record a charge and caution statement. He sat with the accused and asked him the language he was comfortable with and he said it was Ateso. PW4 speaks Ateso which he used to interact with the accused. PW4 asked for the accused's particulars which he recorded down. He then recorded the charge brought against the accused, read it to him in Ateso, the accused agreed he had understood, signed and PW4 counter signed. PW4 then recorded the caution, read it to the accused, accused stated he had understood, signed and PW4 countersigned. The accused then made his statement in which he stated, among others, that the victim was his long time woman friend and, on that day, they were together at a drinking place. On their way to their respective homes, the accused developed an interest to have sex with the victim but she refused and told him to first chase away his wife so that they can go to his home and have sex from there. Accused stated that since he had much urge for sex, he then forcefully had sexual intercourse with her. PW4 recorded the statement in Ateso and translated it to English while reading it back to the

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accused in Ateso. Both versions were tendered in evidence after acknowledgment by the accused that he had voluntarily made the statements. They were admitted as PE5A and PE5B for the Ateso and English versions respectively.

[11] PW5 was No. 33124 Sgt. Eringu Noah, a police officer attached to Kabango Police Station in Masindi District. In December 2021, he was attached to Amukaru police post in Soroti City. On 19th December 2021, he went to rescue the accused person from a mob at the residence of the LCI Chairperson. The mob believed that the accused had raped Atubo suzan and stolen money from her. He cooled the mob, arrested the accused and brought him to Amukaru police post. When he talked to the accused, he denied the allegations but partially admitted having been at the residence of the victim that night. PW5 also reached the scene of crime which was along a foot path. At the scene, he found an element of weathering grass due to signs of struggle there. He drew a sketch plan of the scene. PW5 went to the home of the victim and checked behind the house around an orange tree where the accused had been seen the previous night. From there, PW5 recovered a reddish and bluish flowery kitenge which was identified by the victim's children as the attire that the victim was putting on the night she was raped. PW5 took the dress to police, exhibited it and made an exhibit slip. The exhibit slip was admitted in evidence as PE6. The physical exhibit was forwarded to Soroti CPS together with the police file for further management.

[12] In defense, the accused, **Okello David** testified as DW1. He stated that he was aged 34 years, resident of Abokoro village in Soroti District. While he first stated that he did not know Atubo Suzan (the victim), he stated that he knew Anginyet Charles who had a wife called Atubo suzan who is his aunt. He denied raping the victim and stated that on the alleged date, he was at a trading centre called Ganani starting from 10:00am. He stated that he did no

see the victim in the trading centre but saw her nearby where she was selling waragi. He stayed in the centre up to 6:00pm and reached his home before 7:00pm. He stated that he had no problem with the victim. The following day, as he was going to fetch water, he was alerted by the LCI Chairman that the children of Atubo Suzan wanted to beat him up saying that he had beaten their mother. The LC Chairman called police and he was taken to Amukaru police post.

Submissions by Counsel

[13] Counsel for the prosecution and the defence made and filed written submissions which I have adopted and considered in the determination of the matter before the Court.

The law and ingredients of the offences

[14] Section 110 of the Penal Code Act Cap 128 provides that any "person who has unlawful carnal knowledge of a woman or girl, without 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". Under

section 111 of the Penal Code Act Cap 128, a "person convicted of rape is liable to suffer death".

- [15] On the second count of simple robbery, section 266 of the Penal Code Act Cap 128 provides that any "person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or to overcome resistance to its being stolen or retained commits a felony termed robbery". Section 267(1)(b) of the Penal Code Act Cap 128

provides that any "person who commits the felony of robbery is liable, on conviction by the High Court, to imprisonment for life".

- [16] In the instant case, for the accused to be convicted of the offence of rape, the prosecution must prove each of the following essential ingredients/ elements beyond reasonable doubt;

- a) There was sexual intercourse with the victim;
- b) The victim did not consent to the sexual intercourse; and
- c) It was the accused who had the unlawful sexual intercourse with the victim.

Resolution by the Court

There was sexual intercourse with the victim

- [17] The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Such evidence may be corroborated by medical or other evidence. The essential requirement is that such evidence must be such as is sufficient to prove the case beyond reasonable doubt. See: *Bassita Hussein v Uganda*, SC Crim. Appeal No. 35 of 1995. As such, the act of sexual penetration can be proved either by the victim's evidence, medical evidence, or any other cogent evidence. See: *Remigious Kiwanuka v Uganda*, SC Crim. Appeal No. 41 of 1995.

- [18] In the present case, PW1 testified that when she regained consciousness, she realized that she had been raped and had bruises in her private parts. The medical examination report of the victim (PE2) indicated that the victim's hymen was open, accommodating 4 fingers and mild induration. The report states the probable cause of the injury as "blunt object penetration". Counsel for the defense contended that the said medical report did not mention injuries occasioned to the victim's genitalia despite the fact that the victim stated that she had bruises in her private parts. Counsel asked the Court to find that no

sexual act was performed on the victim. It ought to be noted that "induration", in a medical context, refers to the thickening or hardening of soft tissues, due inflammation, swelling or infiltration of other substances. See: to <https://www.dictionary.com>.

- [19] By finding mild induration in the victim's genitalia, upon medical examination, it is clear evidence that she had suffered inflammation, swelling or infiltration of other substances in her vagina. According to the medical report, the probable cause of the injury was "blunt object penetration". This is very consistent with an allegation of forced sexual penetration. The prosecution has therefore proved beyond reasonable doubt that sexual intercourse was performed with the victim.

The victim did not consent to the sexual intercourse

- [20] Lack of consent can be proved by the victim's evidence or from evidence of surrounding circumstances. See: *Nakholi v Republic* (1967) E. A 337. The victim stated in evidence that the accused beat her and tore her clothes before she collapsed. When she regained consciousness, she noticed that she had been raped and she had bruises in her private parts. The victim's medical examination report (PE2), as already stated, revealed that the victim's hymen was open, accommodating 4 fingers and had signs of thickening or hardening of the vaginal walls in reaction to inflammation, swelling or infiltration of other substances. This rules out the theory advanced by counsel for the defence that the victim's hymen was open because she had already had multiple sexual encounters as she was a mother of children. Clearly, the acts of struggling before losing consciousness and finding bruises in her private parts after regaining consciousness is overwhelming evidence of forced sexual intercourse. Prosecution has therefore proved beyond reasonable doubt that sexual intercourse was performed on her without her consent.

It was the accused who had the unlawful sexual intercourse with the victim

- [21] For the court to convict the accused, there should be credible direct or circumstantial evidence placing the accused at the scene of the crime as an active participant in the commission of the offence. In this case, given that the incident happened at night and the court is faced with evidence of a single identifying witness, the Court has to carefully consider the circumstances of identification of the offender. The question to be satisfied is whether the circumstances were favorable to correct and unmistakable identification. In *Abdullah Nabulele & 2 Others v Uganda* [1978] UGSC 5 (5 October 1978), it was held that the factors that determine the quality of identification evidence include the length of time the witness had to watch the offender, the distance, the light and familiarity of the witnesses with the accused person.
- [22] On the case before me, I have considered that the victim and the accused were well known to each other; there was light (solar and moonlight); the time taken by the victim to examine the accused from when he started following her to when they got involved in a struggle; and the closeness of the distance between the victim and the offender during the attack. I am also enjoined to warn myself of the likely danger of acting on evidence of a single identifying witness. I must consider whether the identification evidence is corroborated by any other independent evidence, be it direct or circumstantial.

[23] I have considered the fact that after the attack, the accused was sighted behind the victim's house in the same night. I have further considered the evidence by the victim that all her clothes were taken from her at the scene. I have then considered the evidence that her kitenge dress was recovered by PW5 from behind the house of the victim, near an orange tree, at which place the accused had been seen standing in the night of the incident. I have also taken into account the accused's statement in his charge and caution statement in which he acknowledged having been with the victim that night, as

a woman-friend, whom he asked for sex and when she refused he forced her. The statement was duly admitted in evidence and marked PE5.

[24] The accused in defence totally denied the occurrence and stated that he was at home that evening where he arrived at around 7:00 pm. He thus put up a defence of alibi. Where an accused person puts up a defence of alibi, he has no duty to prove it. The burden lies on the prosecution to disprove it; by adducing credible direct or circumstantial evidence placing the accused at the scene of the crime as a participant in the commission of the offence. In this case, it is clear to me that the circumstances were favourable for correct and unmistakable identification as evaluated above. The accused was clearly recognized by the victim. The victim's evidence is well corroborated by circumstantial evidence of the accused being sighted in the same night behind the victim's house and the recovery of her dress from the same place he was sighted standing. The same dress had left the scene through the perpetrator of the offence who has been identified to have been the accused person.

[25] To my finding, the prosecution evidence has effectively placed the accused at the scene of the crime. Once the accused is placed at the scene of crime, his defence of alibi collapses. See: *Chemonges Fred v Uganda* (Criminal Appeal No. 12 of 2001) [2003] UGSC 7 (19 February 2003). Prosecution has therefore proved beyond reasonable doubt that it was the accused person that performed the unlawful sexual act on the victim.

[26] The prosecution has, therefore, proved all the ingredients of the offence of rape against the accused person. In agreement with the opinion of the lady and gentleman assessors, I find the accused person guilty of the offence in Count I and I convict him accordingly.

[27] Turning to the second count of simple robbery, the prosecution must prove each of the following essential ingredients/ elements beyond reasonable doubt; a) There was theft of property;

b) There was use of actual violence or a threat of use of violence at, before or after the theft; and

c) The acts were committed by the accused.

There was theft of property

[28] In evidence, PW1 stated that the accused demanded from her the money she had made in her waragi sales. When she said that she did not have the money, he started beating her, tearing her clothes and she collapsed. When PW1 regained consciousness, she found out that her money UGX \$30,000/\$ = and clothes were missing. Her dress was later found hidden near an orange tree where the accused had been sighted in the night of the incident. The accused (DW1) also stated that on that fateful day, he had seen the victim near the trading centre selling waragi. I find that the prosecution has proved beyond reasonable doubt that there was theft of UGX 30,000/= from the victim.

There was use of actual violence or a threat of use of violence at, before or after the theft

[29] It was the evidence of the victim (PW1) that the accused beat her and tore her clothes before she fell unconscious. When she regained consciousness, she was naked, all dirty and with bruises all over her body. PW2 and PW3 also testified that the victim was dirty, with bruises and swollen eyes. The victim's medical examination report for assault (PE1) showed that the victim had a bruise on her right cheek bone and laceration on multiple parts of the body. This evidence is sufficient to prove beyond reasonable doubt that during the theft of the victim's money, there was use of actual violence upon the victim. This element of the offence is also proved by the prosecution beyond reasonable doubt.

The acts were committed by the accused

[30] I should point out that the offence of robbery was committed at the same time with the offence of rape. Under count I, I have already evaluated the evidence of identification available before the Court and I have come to the conclusion that the accused has been placed at the scene of the crime by the prosecution evidence. There is no possibility that the two offences were committed by two different persons given the available evidence before the Court. My finding is that prosecution has proved beyond reasonable doubt that the robbery of the victim's property was committed by the accused person.

[31] I am satisfied that the prosecution has proved all the essential ingredients of the offence of simple robbery against the accused person beyond reasonable doubt. In agreement with the opinion of the lady and gentleman assessors, I find the accused person guilty of the offence in Count II and I convict him accordingly.

[32] In all, therefore, the accused person has been found guilty of the offences in both counts and is accordingly convicted. It is so ordered.

Dated at Soroti this 19th day of May, 2025.

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Boniface Wamala JUDGE13

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