

UGANDA / JUDGMENT

Uganda v Tabu (Criminal Session 131 of 2019) [2022] UGHCCRD 12 (12 March 2022)

[2022] UGHCCRD 12

COURT

HC: Criminal Division (Uganda)

BEFORE

Nakachwa, J

CASE / FILE NUMBER

Criminal Session 131 of 2019

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT FORT PORTAL CRIMINAL SESSION NO. 131 OF 2019

UGANDA

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PROSECUTOR

VERSUS

TABU RICHARD

ACCUSED

BEFORE: HON. LADY JUSTICE FLORENCE NAKACHWA

JUDGMENT

1. The accused was indicted for rape contrary to sections 123 and 124 of the Penal Code Act, Cap 120. Section 123 states the definition of rape as follows: "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 case of a married woman by personating her husband, commits the felony termed rape.

Section 124 gives the punishment for rape. It states "A person convicted of rape is liable to suffer death."

2. It was the prosecution's case that on 29th August 2018 at Mirambi village, Nyabuga Parish in Kyenjojo District, the accused had carnal knowledge of Akampulira Desire (herein after referred to as "the victim") without her consent.
- 3. The prosecution called two witnesses to prove its case. Mulungi Edward, the then husband of the victim testified as PW1 and PW2 was No. 45182 Detective Corporal Monday Franco, the Investigating Officer in this case. As agreed documents Police Forms 3A and 24A were admitted in evidence as PE1 and PE2, respectively. The photos taken of the accused when he was arrested were admitted in evidence as PE3 and PE4. The exhibit slip describing the cap was tendered in evidence as PE5
- 4. The accused denied the indictment against him and he made an unsworn statement. He stated that on 25th August 2018, he was in the garden digging when two people came and asked him who he was working for. He replied that it was Kemigisa, and they told the accused that Kemigisa was calling him. They set off but before they reached the store, they met other people on the way including two women, and one of them was wearing something covering her face. The accused was asked whether he knew those people and he said that he did not know them. They continued walking and when they reached the store, he found his boss there and a vehicle loading. They told the accused to sit down and when he asked why, those present did not respond including his boss who had a bundle of money in her hands. At that very time, the Chairman and the Defence Secretary came, put him on a motorcycle and he was taken to Rugombe Police Station on 25th August 2018 where he stayed till the 28th August. He was later transferred to Kyenjojo District where his statement was recorded on 31st August 2018. He was brought to court on 14th September 2018 on an offence he does not know. Up to now he is still in Katojo.

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5. On 23rd February 2022, the assessors Agaba Anolyne and Kasigazi Deogracious gave a joint opinion to court. In summary, based on the evidence before court, they advised the court to convict the accused.
6. Article 28 (3) (a) of the Constitution of the Republic of Uganda, 1995 provides that every person charged with a criminal offence shall be presumed innocent until proved guilty or unless that person pleads guilty. The standard of proof is beyond reasonable doubt as discussed in the case of Miller v. Minister of Pensions (1947) 2 All E. R. 372 at 373 where Lord Denning stated as follows:

"that degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."

- 7. For the accused to be convicted of rape, the prosecution must prove each of the following essential ingredients beyond reasonable doubt that:
- (a) sexual act was performed on the victim:
- (b) it was without the victim's consent: and
- (c) it is the accused who performed the sexual act on the victim.

Issue 1: Whether there was a sexual act performed on the victim

8. In the Kenyan case of *Nakholi v Republic* [1967] E. A. 337 it was stated on page 338 that "the lack of consent is an essential ingredient in a charge of rape and this is so whether the complainant is a woman or a girl." The court then cited

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the definition of rape similar to that of Uganda's section 123 of the Penal Code Act, Cap 120 stated in paragraph 1 of this judgment. The court further stated thus:

> "the two essentials are therefore carnal knowledge of a woman or girl and lack of consent and both these essentials must be established by the prosecution and accepted by the court before a conviction for rape can be arrived at. It is a fact that age of the girl is material and that in some cases the girl may be of such tender years that mere proof of her age may be sufficient to establish the lack of consent on her part, as the girl would on account of her age be unable to understand what was happening and would not be able to consent as she would not know what she was consenting to. In such a case then, the age of the child would be evidence from which the court could arrive at the conclusion that the act was done without her consent, but the court would still have to find this as a fact before convicting of rape."

9. In *Bassita Hussein v. Uganda*, Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda held that "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."
10. The victim in this case did not testify because according to PW1, she could not be traced. Under Part (b) of PE1, the victim reported lower abdominal pain, painful vagina and a painful hand. The probable cause of the painful vagina is stated as "painful vagina due to forced virginal intercourse during rape." Because this conclusion was reached after PW1 was checked by a medical personnel, it is reliable evidence to prove that a sexual act was performed on the victim.

Issue 2: Whether the sexual intercourse was without the victim's consent

- 11. in DPP v. Morgan & 3 others (1976) A. C. 182, Lord Hailsham held that "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....." (This case was followed in Uganda v Otim James, See Criminal Session No. 9 of 2015)
- 12. PW1 testified that the victim was his wife at that time and he had known the accused for two months as a person burning charcoal in Mirambi Village but he did not know his name by then. On 29th August 2018, PW1 and the victim went to the garden and when it reached 1p.m., the victim left him in the garden and went home to do some domestic work. He continued working till 6 p.m. and when he reached home, he found the victim in a lot of worries and she was not happy as usual. When he asked her what happened, the victim kept crying but when he insisted, she told him that on her way to the well, she found the accused sitting at the road side. She greeted him but the accused

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started following her. At first she thought the accused had left his jerry can at the well but when they reached the well, the accused gave the victim Ug.shs. 20,000/= (Uganda Shillings Twenty Thousand) and asked her to have sex with him.

- 13. The victim refused and that is when the accused caught her and raped her. She tried to rescue herself but the accused overpowered her. After raping her, the victim carried the jerry can empty because her right hand had been twisted and she was in pain.
- 14. Under Part (b) of PE1, the victim reported lower abdominal pain, painful vagina and a painful hand. The probable cause of the painful vagina is stated as "painful vagina due to forced virginal intercourse during rape." PW1 testified that the victim's right hand was injured during the rape and she went home with an empty jerry can. In PE1, the victim complained of a painful hand. PW1 also testified that when he returned from the garden, he found the victim crying and after the incident, she was depressed, hated herself and eventually left their home. The behavioral change in the victim after she reported rape is a likely occurrence after someone has been raped. This is all evidence which proves that a sexual act was performed on the victim without her consent

Issue 3: Whether it was the accused who performed the sexual intercourse without the victim's consent

- 15. When PW1 asked his wife who had raped her. She tried to describe the man because he was new in the area and she did not know his name. She described him as "a man having a U-shaped beard with a black and white

cap." PW1 first thought that the victim had described another man called Kaleju. Together with the victim, they went to the LC1 Chairman and his Defence to go and search for Kaleju. When they saw Kaleju, the victim said that he was not the one who had raped her.

- 16. PW1 then asked the victim who has raped her. The victim described the man who had raped her as the one who used to stay at the bar. Whenever she would go to buy salt, she would find him there. She insisted that the man had a U-shaped beard and always wore a white and black cap. That is when they realized that it was the accused. Together with the Chairman, they went to Kyangingo to look for the accused and they found him there. When he saw them, he ran away but they ran after him and they caught him. The victim confirmed that the accused was the one who had raped her. The Chairperson then explained to the accused the offence he had committed which he denied committing. After that, they took him to police. After that incident, the victim went into depression, hated herself and kept crying. PW1 tried comforting her as his wife but he failed and the victim left his home and went to Bushenyi. When he went there looking for her, he did not find her and although he tried calling her number, he was not able to see her again. In cross examination, PW1 testified that when they found the accused, he was wearing the cap the victim had described.
- 17. PW2 testified that in 2018, he was attached to Rugongo Police Station. On 30th August 2018 at around noon, he received a group of people coming from Mirambi Village in Rugombe Town Council who had arrested the accused because he raped the victim. The victim made a statement and told him that the on 29th August 2018 at around 5p.m., as she was going to fetch water,

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the accused persuaded her for sex by showing her a note of Ug.shs. 20,000/=. When she refused, the accused raped her and only jumped away when he heard children below five years banging jerry cans to fetch water. The victim did not know the children because she was new in that area. She described the accused by how he had shaved his beard and that he was putting on a white and black cap. At the time of arrest, the accused was putting on that very cap.

- 18. PW2 photographed the accused and filed the photos as evidence. He marked the photo CRB No. 039/2018 and also exhibited the cap he was wearing. The cap exhibited was black, white and red. PW2 was tasked by court to produce the cap described. When the PW2 returned to court on 11th February 2022, he informed court that while he had recovered the cap and exhibited it at Bigombe Police Post, the cap, the file and the suspect were sent to Kyenjojo Police Station and received by AIP Kiiza as the new Investigating Officer. In cross examination, it was PW2's evidence that when the accused was brought to him, he was wearing a cap which was black. white and red in colour but in the pictures submitted to court, the accused was not wearing the cap. In re-examination, PW2 clarified that he did not take photos of the cap because it was there physically and also because he wanted to capture the way the accused had shaved his hair. When asked to describe how the

accused had shaved. PW2 said that "he had shaved his hair and left two lines connecting the hair on the head and the beard."

- 19. Both PW1 and PW2 told court that the victim informed them that it was the accused who raped her. In *Uganda v. Maliya Yassin* (supra) the court held that

"I have considered the decision in *Mayombwe Patrick v. Uganda C. A. Crim. Appeal No.17 of 2002* where it was held that a report made to a third party by a victim in a sexual offence where she identifies her assailant to a third party is admissible in evidence. Although the court decided that such evidence is admissible, it did not hold that on its own, it is evidence capable of sustaining a conviction. It is my considered opinion that such evidence can only corroborate other credible evidence"

It follows therefore that what the victim told both witnesses requires corroboration for the accused to be convicted.

- 20. The victim described the man who raped her as having a U-shaped beard and always wearing a black and white cap. PE3 and PE4, the photos taken of the accused by PW2 show him having a U-shaped beard. In fact PW2 said that he took these photos to capture the hair of the accused which he had shaved and left two lines connecting the hair on the head and the beard. These lines of hair are visible in the photos taken of the accused.
- 21. In *Mumbere Julius v. Uganda*, SCCA No. 15 of 2014, it was held that "for clarity, we wish to observe that exhibits in criminal trial fall into two broad categories. The first category are those exhibits which are not recoverable because they are either hidden or destroyed. In this case what is required of the prosecution is to adduce evidence giving a description of the items which was the case in the case of *Mutesasira Musoke vs Uganda* (Supreme Court Criminal Appeal No. 17 of 2009). In this case, the weapons used in the case of Aggravated

Robbery were not recovered but Court held that the description of the weapons and the injuries found on the victims were sufficient proof that objects described by the witnesses as pangas or knives had been used. The second category are those exhibits which were recovered but the prosecution chose not to tender it as an exhibit. For example, in this case the motorcycle which was allegedly used by the deceased and the appellant before deceased was killed. We note that motorcycle was adequately described by its Registration Number but most importantly, we do not think that its physical production was relevant in light of the evidence available to Court concerning the circumstances under which the appellant carried the deceased on the motorcycle and how he returned riding it. In both categories the overriding principle is whether the non-production of an exhibit was fatal to the prosecution case and in the instant case we think it was not."

- 22. When tasked by court to produce the cap referred to by the prosecution witnesses. PW2 failed to retrieve it from the police stores at Kyenjojo Police Station. He also failed to retrieve the torn knickers he recovered from the victim. It was PW2's evidence that when he went to Kyenjojo Police Station stores to look for these exhibit, they were not there. However, in the

stores, there were signs of termites and things that were eaten by termites so PW2 was not sure whether the exhibits was also eaten by termites. He also did not confirm with the store keeper if the exhibits had been submitted to the store because there was no clear record of that exhibits. AIP Kiiza is now attached to Bunyangabo Police Station and when he was contacted by phone, he remembered receiving the exhibit from PW2 and insisted that he had taken it

to the store. PW2 also recalled receiving a torn pink knicker from the victim which he also exhibited and sent to Kyenjojo Police Station and it had been signed for by AIP Kiiza but was also not found in the stores.

- 23. Relying on the authority of Mumbere Julius (supra), failure by the prosecution to produce the exhibit of the cap was not fatal in the circumstances of this case because it was described by both prosecution witnesses and its exhibit slip describing it was admitted in evidence as PE5. As such, the court can safely rely on this evidence. However, only PW2 testified about the torn pick knickers and there is no other record showing its existence. It can't therefore be relied upon as prosecution evidence.
- 24. Both PW1 and PW2 gave evidence that when he was arrested, the accused was wearing the cap described by the victim. PW2 added that the cap was white, black and red in colour and he never took photos of it because it was physically there. PE5, the exhibit slip describes the cap exhibited as "one cap/head dress white, black and red colours." Although PW2 failed to retrieve this cap from Kyenjojo Police Station, I am convinced that the witnesses are describing the same cap which the accused was wearing when he was arrested.
- 25. Except for the victim telling the prosecution witnesses that it was the accused who raped her, the rest of the evidence in this case is circumstantial evidence. In *Simoni Musoke v. R* [1958] E. A 715, it was held that

"in a case depending exclusively upon circumstantial evidence, the Court must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and

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incapable of explanation upon any other reasonable hypothesis than that of guilt. That the circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. That it is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would destroy the inference."

- 26. When the victim first described the man who raped her. PW1 first thought that it was Kaleju but upon going to Kaleju together with the victim, she cleared him and said that he was not the one who raped her. This ruled out any chances of Kaleju being responsible for the rape but also proves that the victim knew and was sure of the person who raped her. She was not on a fishing expedition for a person to hold responsible for the rape.
- 27. Thereafter, PW1 asked the victim to describe the man who had raped her again and upon the second description. PW1 thought of the accused. It is important to note that the victim gave the same description of the person who raped her except for adding that she usually saw that person at the bar whenever she went to but salt. When they met the accused together with the victim and the area Chairman, the victim confirmed that indeed it was the accused who raped her. It has been clearly made out that neither the victim nor PW1 knew the accused's name at the time of the incident because he was new in Mirambi Village and had been there for only two months. However, they had both seen the accused before. In addition to that, there was sufficient time for the victim to properly identify the accused because according to PW2, the rape occurred at around 5 p.m. By 5 p.m, there is enough light that can support identification. There was also close proximity

between the victim and the accused because she first greeted the accused on her way to the well, the accused engaged her for sex which she declined. after which he grabbed her and raped her. This provides enough time and proximity for proper identification and to rule out mistaken identity.

- 28. In addition to that, the victim described the man who raped her as having shaved a U-shaped beard and always wore a black and white cap. PE3 and PE4, the photos taken of the accused at the time of his arrest show him with a U-shaped beard. At the time of his arrest, the accused was found to be wearing a cap with same colours as described in PE5.
- 29. PW1 testified that when the accused saw them, he ran but they ran after him and caught him. In *Uganda v. Yowana Baptist Kabandize* [1982] HCB 93. the court held that the "conduct of the accused immediately after the death of the deceased of running away from the scene of crime and of being in a restless mood in the swamp clearly showed a guilty mind."

Further in *Remigious Kiwanuka v. Uganda*, S. C. Crim. Appeal No. 41 of 1995 (Unreported), the Supreme Court held that "the disappearance of an accused person from the area of a crime soon after the incident may provide corroboration to other evidence that he has committed the offence. This is because such sudden disappearance from the area is incompatible with innocent conduct of such a person." Similarly, the conduct of the accused of running away after seeing the Chairperson, PW2 and the victim points to him having raped the victim. This is because if he was innocent, he would have no reason to run upon seeing them approaching.

- 30. All this is circumstantial evidence which is incompatible with the innocence of the accused and incapable of explaining any other inference other than his guilt. I am mindful of the fact that this court ought to warn itself of the dangers of convicting the accused on uncorroborated circumstantial evidence. This court holds that the circumstantial evidence

before court is corroborated by the victim's statement and confirmation when they saw the accused that he was the one who raped her. The statement of the accused does not disapprove the evidence before court proving his guilt. The prosecution has proved beyond reasonable doubt that it was the accused who raped the victim

- 31. For the above reasons, in agreement with the assessors, the accused is hereby convicted of rape. I so rule.

12th day of March, 2022. This judgment is delivered this.

FLORENCE NAKACHWA JUDGE

In the presence of:

- (1) Ms Harriet Adubango, Chief State Attorney for the Prosecution;
- (2) Ms Ruth Ongom, Defence Counsel on State Brief;
- (3) Mr. Tabu Richard, the Accused;
- (4) Mr. Birungi Boniface, Court Clerk.

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