

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT FORTPORTAL  
CRIMINAL SESSION NO. 131 OF 2019**

<b>UGANDA</b>	.....	<b>PROSECUTOR</b>
	<b>VERSUS</b>	
<b>TABU RICHARD</b>	.....	<b>ACCUSED</b>

**BEFORE: HON. LADY JUSTICE FLORENCE NAKACHWA**

**RULING**

1. This ruling is on whether the accused has a case to answer. The accused was indicted for rape contrary to sections 123 and 124 of the Penal Code Act, Cap 120. It was the prosecution's case that on 29<sup>th</sup> August 2018 at Mirambi village, Nyabuga Parish in Kyenjojo District, the accused had carnal knowledge of Akampulira Desire (herein after called "the victim") without her consent. The accused pleaded not guilty.
2. To prove its case the prosecution called two witnesses. 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 Form 3A showing the findings from the examination of the victim and Police Form 24A showing findings from the examination of the accused 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 was tendered in evidence as PE5.



3. At the close of the prosecution case, section 73 of The Trial on Indictments Act, requires this court to determine whether or not the evidence adduced has established a *prima facie* case against the accused. It is only if a *prima facie* case has been made out against the accused that he should be put to his defence (see section 73 (2) of The Trial on Indictments Act). Where at the close of the prosecution case a *prima facie* case has not been made out, the accused would be entitled to an acquittal (See **Wabiro alias Musa v R [1960] E.A. 184** and **Kadiri Kyanju and Others v. Uganda [1974] HCB 215**).
4. In **Uganda v. Maliya Yassin, Criminal Case No. 0143 of 2012**, court held "that a *prima facie* case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, would convict the accused person if no evidence or explanation was set up by the defence (See **Rananlal T. Bhatt v R. [1957] EA 332**). The evidence adduced at this stage, should be sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. It is the reason why in that case it was decided by the Eastern Africa Court of Appeal that a *prima facie* case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution though at this stage is not required to have proved the case beyond reasonable doubt since such a determination can only be made after hearing both the prosecution and the defence."
5. The court further held that "there are mainly two considerations justifying a finding that there is no *prima facie* case made out as stated in the Practice



Note of Lord Parker which was published and reported in [1962] ALL E.R 448 and also applied in **Uganda v. Alfred Ateu [1974] HCB 179**, as follows:-

- i. When there has been no evidence to prove an essential ingredient in the alleged offence, or
- ii. When the evidence adduced by prosecution has been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it.

6. For the accused to be convicted of rape, the prosecution must prove each of the following essential ingredients:

- (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.

7. PW1 testified that the victim was his wife at that time and he had known accused for two months as a person burning charcoal in Mirambi Village but he did not know his name by then. On 29<sup>th</sup> August 2018, PW1 and the victim went to the garden and when it reached 1pm, the victim left him in the garden and went home to do some domestic work. He continued working till 6pm 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 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.



8. 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. 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.

9. 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.



10. In cross examination, PW1 testified that the accused was working with someone whose name he does not remember. When they found the accused, he was wearing the cap the victim had described.
11. PW2 testified that in 2018, he was attached to Rugongo Police Station. On 30<sup>th</sup> 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 she on 29<sup>th</sup> August 2018 at around 5pm, as she was going to fetch water, 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 jerrycans 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.
12. 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 11<sup>th</sup> 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. When he went to Kyenjojo Police Station stores to look for this exhibit, it was not there. However, there were signs of termites and things that were eaten by termites so PW2 was not sure whether the exhibit



was also eaten by termites. He also did not confirm with the store keeper if the exhibit had been submitted to the store because there was no clear record of that exhibit. 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 torn pink knickers from the victim which he also exhibited and sent to Kyenjojo Police Station. It had been signed for by AIP Kiiza but was also not found in the stores.

13. 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."

14. 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.

15. 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."

16. 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. PW2 also testified that he exhibited a pink torn knickers from the victim. This is all evidence which proves that a sexual act was performed on the victim and it was without her consent.

17. 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.
18. Both PW1 and PW2 both 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 there physically. 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.
19. 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; Supreme Court Criminal 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.

20. Although PW1 first suspected Kaleju when the victim first described the man that raped her, he was cleared by the victim who confirmed that he was not the one who raped her. Because the accused had been in Mirambi Village for only two months, it is understandable in the circumstances of this case why both the victim and the PW1 did not know his name at the time.

21. Based on all the above, the circumstantial evidence corroborates what the victim told PW1 and PW2 that the accused raped her. All the ingredients of rape have been proved and the prosecution has established a prima facie case against the accused. I so rule.

This ruling is made this 17<sup>th</sup> day of February, 2022.



**FLORENCE NAKACHWA**  
**JUDGE**