Chapter 3

Rape

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Kenya

Esther Nangwanaa Nandi v Jones Chewe Bobo [2006] HC

Principle or Rule Established by the Court's Decision

Non-consensual sex amounts to cruelty and a ground for divorce.

Judge: Kalpana Rawal | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Marriage dissolved; non-consensual marital sex amounts to cruelty	High Court, Nairobi (Kenya)	Judgement delivered on 10 November 2006; Divorce Cause 84 of 2005	Rape

Case Summary

A wife sought dissolution of her marriage on the grounds of cruelty and adultery. Her husband had severely assaulted her. He had also locked her out of their matrimonial home and forced her to have sex with him while he was drunk.

The High Court found that the husband's behaviour constituted cruelty of a serious nature that endangered her life and health. These acts of cruelty could not be accepted as the usual "wear and tear of married life" and of living together in a troubled marriage. The judge found the respondent guilty of acts of cruelty and adultery and ordered the dissolution of the marriage.

Points to Note

- This decision confirms that sexual violence is unacceptable even when committed at home and perpetrated by a spouse. This elevated the protection of the rights of women and girls against violence in the private domain. It is also one of the most vibrant and creative interpretations of the Constitution 2010, which outlaws violence in all its forms.

- This was a progressive precedent and a step in the right direction in the protecting of women from sexual abuse by their husband, albeit through a limited remedy.
- Protection orders can now be sought under the Protection against Domestic Violence Act. Unfortunately, there is a dearth of case law on this very useful statute.
- The Court did not go as far as saying that marital rape is an offence. It should be noted that this was a civil case (divorce) rather than a criminal case. Therefore, the Court was not called upon to decide upon the criminality of the husband's violent actions.

Tanzania

Diha Matofali v Republic [2015] CA

Principle or Rule Established by the Court's Decision

- A person under the age of 18 years has no capacity to consent to sexual intercourse, unless in relation to their spouse.
- The best witness evidence in a case of rape is that of the victim.

Judges: Kimaro, Mugasha and Mziray | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal/ Appellate (Tanzania)	Criminal Appeal No. 245 of 2015 (unreported)	Rape

Case Summary

The appellant was charged with rape of a 15-year-old girl, contrary to Sections 130(1) and (2)(e) and 131(1) of the Penal Code. On 4 April 2012, the victim and the appellant's wife went to a spring or river to fetch water. The appellant was in the vicinity, holding a machete and a catapult in his hands. He went to the victim and forcefully grabbed her by the mouth, dragged her into a bush, undressed her and raped her.

Subsequently, he continued to rape her on a daily basis. First, he took the victim to his father's house, then he took her to his sister's house at Mashete. Third, he took the victim to his sister's house in Paramawe village. The appellant then moved the victim again and placed her under strict guard. She

managed to escape at night by hiding in a bush and spent the night in the wilderness. A woman found her the following day and took her to the village chairman and later to her relatives. The victim's father then reported to the police.

On being questioned, the appellant, supported by his wife, stated that the victim was his wife. It was alleged that the appellant had paid bride-wealth to her parents, who had consented to the marriage. The victim's father and the victim refuted this claim and the appellant was arrested. The appellant was convicted and sentenced to imprisonment for six years and to twelve strokes of the cane.

Upon appeal, the appellant contended, among other things, that:

i. A medical report was improperly relied on because the appellant was not informed of his right to summon the maker for cross-examination (Section 240(3) of the Criminal Procedure Act).
ii. The Court had erred in its evaluation of the evidence.

In dismissing the appeal, the Court of Appeal held that:

i. The appellant had not been informed of his right to summon the maker of the medical report for cross-examination. Accordingly, the medical report had to be expunged from the record because it had not been properly admitted into evidence.

ii. Even in the absence of the medical report, the Court's evaluation of the evidence could not be faulted. "*The best witness*" is the victim because, "*She is the one to express her sufferings during sexual intercourse.*" Her evidence was credible and corroborated. As to the defence of consent by virtue of marriage, the accused's contention that he had married the victim was not substantiated.

Points to Note

- The case involved sexual abuse of a girl below the age of 18 years and reiterated the legal position that a girl under the age of 18 cannot consent to sexual intercourse unless she is married.

- The Court of Appeal addressed the issue of non-application by trial courts of Section 240(3) of the Criminal Procedure Act. The duty of trial courts to inform an accused person of his/her rights to request the court to summon the maker of a medical report for cross-examination was reiterated. This is very important because, in many cases, non-compliance with this provision has led to acquittal of those accused of sexual offences.

- This case highlights the importance of judicial pro-activeness in the administration of justice and emphasises the need for courts to go beyond the technicalities and address substantive issues. The offence of rape is not proved merely by medical evidence. Credible evidence of a victim is often the best evidence in proving charges against an accused.

DPP v Jamal Waziri [2001] HC

Principle or Rule Established by the Court's Decision

A girl aged between 15 and 18 years of age does not have capacity to consent to sexual intercourse, save where she is consenting to sexual intercourse with her spouse.

Judge: Munuo | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction for rape, sentence of 30 years' imprisonment and ordered to pay compensation of TSh 1,500,000	High Court/ Appellate (Tanzania)	TLR 324, delivered on 21 September 2001	Rape

Case Summary

This case involved an appeal against an acquittal. The respondent, Jamal Waziri, was a religious instructor whose pupils included the complainant. While doing some cleaning at the respondent's house, the respondent took advantage of the complainant. He gagged her and raped her then warned her not to tell anyone. The respondent also promised to marry the complainant and asked her not to disclose the relationship. "*Not realizing that the respondent was out to sexually exploit her, the complainant minor gave up her educational pursuits as a secondary and Madras pupil and went along with the respondent.*" The complainant did not reveal the relationship until a neighbour alerted the complainant's mother. By this point, the complainant was pregnant and the respondent had not married the complainant as he had promised. Instead, he married another woman. The complainant reported the rape to police and subsequently the respondent was arrested and charged with the offence of rape.

The trial magistrate found that the complainant had consented to sexual intercourse and found the accused not guilty. The DPP appealed against the acquittal.

The issue for determination on appeal was whether the victim, a girl aged 15 years, could consent to sexual intercourse.

The Court held that the complainant did not have capacity to consent to sexual intercourse. Section 130(2)(e) of the Penal Code provides that a female under 18 years of age does not have capacity to consent to sexual intercourse, unless aged 15 or over and married. Section 13 of Law of Marriage Act allows girls to marry at the age of 15 with the consent of parents.

Having considered this section of the Penal Code and the evidence of the complainant as corroborated by the neighbour, the Court found the respondent guilty. The Court also noted that the respondent used his position as religious instructor to sexually exploit the complainant.

Points to Note

- The case addresses issues of sexual extortion otherwise referred to as "*sextortion*", where a person with power abuses that role. In this case, a religious instructor exploited a young girl under his care by extorting sexual favours under the pretence that he intended to marry her.
- The decision is also important because international instruments on the rights of children were referred to, in effect cementing their application in domestic courts.
- Various studies and anecdotal information reveal that this kind of abuse is prevalent in various places of education or places of learning of religious matters. As such, the case will help expose such occurrences, and actions to improve protection of children wherever they are should be taken.
- Section 130(2)(e) of the Penal Code protects the rights of the female child. These laws are arguably discriminatory and unconstitutional, because the CRC defines a child as those below the age of 18 regardless of their gender.

International decisions referred to	
Convention	*Decision/reference*
CRC	The Court noted the statutory age for children as 18 years old under Article 1 of the CRC. The Court also cited and recognised Article 19 of the CRC, which protects the rights of children against all forms of physical or mental violence, abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.

Edson Simon Mwombeki v Republic [2016] CA

Principle or Rule Established by the Court's Decision

Where age of a victim is an issue, there being no valid birth certificate, credible evidence of a parent is best placed to prove the age of a victim, then a doctor.

Judge: Rutakangwa, Massati and Mugasha | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal/ Appellate (Tanzania)	Criminal Appeal No. 94 of 2016; judgement delivered on 28 October 2016	Rape

Case Summary

The appellant, Bishop Mwombkei, was charged with rape of a girl aged 16, contrary to Sections 130(1) and (2) and 131(1) of the Penal Code.

The victim, a 16-year-old girl, had come to the attention of the appellant when she had been seen to be possessed by demons. The appellant prayed for her in his church and it was alleged she was eventually healed.

At some time in December 2013, when the victim was on school vacation, the appellant agreed that she could reside at his home in Shinyanga until the school reopened on 13 January 2014. During the said vacation, the appellant's daughter tutored the victim.

On 13 January 2014, the appellant called the victim's mother and told her he would take the victim back to school because he would also be taking his boys back to school. The appellant initially dropped the two boys at their school and promised he would to take the victim to school on the same day. However, the appellant instead took her to the Sumayi Hotel and left her there. At around 11 p.m. the appellant returned with food. The appellant went to the bathroom, which was in the same room. He came out shortly after, wearing a white singlet and yellow shorts. He proposed that he would make love to the victim, which she declined. Thereafter, the appellant forcefully undressed her. He also undressed himself and had carnal knowledge of her. The victim did not raise any alarm because the appellant had threatened to kill her. The victim and the appellant slept in the same room until the following morning, when the appellant advised her to tell her parents she had slept at Kassa Secondary School.

The victim travelled to Magu, where she told her uncle she had slept at the Sumayi Hotel, where the appellant had raped her. Her uncle directed her to go back to her mother in Shinyanga. The victim went straight to Shinyanga and narrated to her aunt the ordeal of being raped by the appellant. Later, the aunt revealed the episode to the victim's mother and the incident was reported to the police. The victim was taken to the hospital, although no medical evidence was adduced at trial.

In the trial court, the appellant denied having hired a hotel room or having committed the offence. However, the Court found him guilty, citing the

strength of the evidence of the victim. The appellant was sentenced to 30 years' imprisonment. The appellant' subsequent appeal to the High Court was dismissed entirely.

The appellant filed a second appeal at the Court of Appeal. It was contended (among other things) that:

i. There had been issues as to the credibility of the victim that the High Court had not sufficiently reappraised. In particular, the victim claimed to have bled after the rape and alleged that her clothes were stained with blood. However, there was no mention of either the uncle or the mother reporting or observing the bleeding. Furthermore, there had been a delay in reporting the incident to the police.
ii. No birth certificate had been produced. The age of the victim, as a fundamental element of the offence, had been proved.

The Court of Appeal reiterated the importance of the role of the first appellate court in re-evaluating all of the evidence, especially where there are alleged inconsistencies and contradictions in witness testimonies and the credibility of witnesses is challenged. The second appellate court should rarely interfere with the concurrent findings of the subordinate courts on the facts unless if there is misapprehension of evidence, miscarriage of justice or violation of any principle of law or procedure. The Court referred to the cases of *Salum Mhando v R., Isaya Mohamed Isack v R.* [2008] (Criminal Appeal No. 38), *DPP v Jaffar Mfaume Kawawa* [1981] (TLR 149) and *Seif Mohamad E.L. Abadan v R.* [2009] (Criminal Appeal No. 320), which all affirmed this position.

The Court of Appeal found that the credibility of the witness can be determined even by the second appellate court when examining the findings of the first appellate court, in two ways, first, when assessing the consistency of the evidence of that witness; and second, when there is contradiction of the testimony of that witness in relation to the testimonies of other witnesses. See *Shaban Daudi v R.* [2001] (Criminal Appeal No. 28).

As to her testimony generally, the victim was a credible witness. Her evidence was generally consistent with that of the other witnesses. Any inconsistencies were minor. Whether there was visible or reported bleeding went to the magnitude of the injury rather than being an essential ingredient of the offence. Furthermore, any delay in reporting the matter to the police was a delay on the part of the witnesses rather than the victim. The victim reported the rape at the earliest opportunity to her uncle. Any delay therefore did not impeach her credibility.

In the absence of a birth certificate, the age of a victim may be established on the basis of testimonial evidence. No medical evidence was given as to the

age of the victim. However, the evidence of the victim and the parents of the victim are sufficient to satisfy a court as to age beyond a reasonable doubt, and such evidence as to age is preferable to medical evidence (see *Edward Joseph v Republic* [2009] (Criminal Appeal No. 19)). In light of the findings in relation to credibility, the age of the victim was proven.

Obiter Dictum

"Since it is settled law that medical evidence does not prove rape, the medical doctor was not a material witness as in the light of credible evidence of PW1 we are satisfied that she was better placed to testify and explain how she was raped by the appellant."

Points to Note

- This is an important decision where the Court found that the evidence of a parent of a victim can override the evidence of a medical doctor in proving the age of a victim where no birth certificate has been tendered. The Court also noted that the evidence of a victim, where it is believed, can override the evidence of a medical doctor in proving there was rape against the victim. The Court was in fact reiterating the fact that medical evidence, despite the fact that it is expert evidence, is still just opinion evidence, thus reiterating an important evidence law position for application in proving cases related to GBV and VAWG.

This case has very significant implications for future handling of sexual violence cases and also highlights the prevalence of sextortion – that is, exploitation of women and girls by people who they have trusted or who are authority figures to them.

Other cases/decisions referred to	
Country/jurisdiction	*Decision*
Court of Appeal *Emmanuel Tienyi Marwa v Republic* [2005] Criminal Appeal No. 159, *Isaya Mohamed Isack v. R* [2008] Criminal Appeal No. 38, *DPP v Jaffar Mfaume Kawawa* [1981] TLR 149 and *Seif Mohamad E.L Abadan v R.* [2009] Criminal Appeal No. 320	On the fact that as a second appellate court should rarely interfere with the concurrent findings of the subordinate courts on the facts unless if there is misapprehension of evidence, miscarriage of justice or violation of principle of law or procedure.
Idd Amani v R. [2013] Criminal Appeal No.184	The age of the victim can be proved by the credible of evidence of a mother notwithstanding the availability of medical evidence of the fact.

Leonard Jonathan v Republic [2007] CA

Principle or Rule established by the Court's Decision

Marriage is a voluntary union between a man and a woman. Any custom that procures a union by force is contrary to this principle and therefore any such union cannot be recognised as a legally valid marriage.

Judge: Mroso, Kaji and Rutakangwa JJ.A

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal (Tanzania)	Criminal Appeal No 225 of 2007	Rape

Case Summary

The appellant was charged with rape, contrary to Sections 130 and 131(1) of the Penal Code. On 16 December 1999, the victim, a 23-year-old woman, was going home from church. A group of about five young men including the appellant abducted her and took her to the home of the appellant, where the appellant raped her. When the father of the woman received the news, he went to the home of the appellant to rescue his daughter. He entered the room where the appellant was with the victim but the father was hit by the third accused and dropped down unconscious. He was later admitted to hospital. The victim succeeded in escaping from the appellant's home and went to hospital; upon examination, a Police Form 3 was completed. This was produced during the trial. This form contained medical details relating to the case. The appellant was arrested and prosecuted for rape.

The appellant admitted that he had abducted the victim and that he had engaged in sexual intercourse with her. However, he contended that she was his girlfriend and they had agreed to marry. Because a church wedding was costly, he had decided to marry her in accordance with Chagga customary laws of marriage by ambush and carrying her to his house to forcefully consummate the marriage. The appellant was convicted and sentenced to 30 years' imprisonment with 10 strokes by way of corporal punishment. He appealed to the High Court.

The issues raised at the High Court were:

i. Whether there was a marriage under Chagga customary law pursuant to Section 9(1) of the Law of Marriage Act.

ii. Whether under customary law a marriage may be contracted without the consent of the bride.

iii. Whether the appellant raped the complainant within the meaning of Sections 130 and 131(1) of the Penal Code.

Dismissing the appeal, the High Court held that:

With regard to (i) and (ii), customary laws of different tribes would be acknowledged by the courts insofar as they capture the essence of, and do not contradict, the laws of the country. The Law of Marriage Act is the law that governs and directs on all matrimonial matters. Section 9 establishes that a marriage is a voluntary union between a man and a woman. Consent is therefore one of the essential ingredients of a valid marriage. There was no dispute that the appellant and his colleagues grabbed the complainant and took her violently. There was no free consent.

With regard to (iii), given that there was no dispute over the forced nature of intercourse, the complainant had been raped.

Points to Note

- The decision sends the message that courts should not tolerate a defence that emanates from an act that contravenes domestic law and the basic principles therein.
- The decision also referred to compliance with international instruments, such as Article 14(2) of the UDHR, which suggest marriages are to be entered into with the free and full consent of the intending spouse.
- The High Court decision is very progressive. While acknowledging the presence of customary laws of different tribes, it clearly states that, for such customs to be acceptable, they should capture the essence of, and not contradict, the laws of the country.
- This decision was confirmed in the Court of Appeal and it is therefore binding.

Other cases/decisions referred to	
Declarations	*Reference*
DEVAW	**Article 4** calls on states to protect and offer adequate relief to women victims of violence and to condemn violence against women and not invoke customs, tradition or religion to avoid their obligations. **Article 2** requires states to modify and abolish discriminatory laws, regulations and practices. **Article 16** protects the rights of women to freely choose a partner and to marry with their free and full consent
UDHR	The UDHR covers the rights of both men and woman to choose a spouse and to voluntarily consent to marry the spouse. **Article 14(2)** states that: *Marriage shall be entered into only with the free and full consent of the intending spouse.*

John Martin alias Marwa v Republic [2017] CA

Principle or Rule Established by the Court's Decision

- An accused person must know the nature of the case facing him and the charges must disclose the essential elements of an offence.
- It is imperative to specify the nature of the charge to be preferred and the punishment of each category of the offence.

Judges: Luanda, Mmilla and Mkuye | JJA

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal allowed; conviction quashed and sentence set aside	Court of Appeal/ Review, Tabora (Tanzania)	Criminal Application No. 20 of 2014; delivered on 18 August 2017	Rape

Case Summary

Paragraphs (a)-(e) of Sections 130(2) and 130(3) of the Penal Code stipulate different ways in which the offence of rape can be committed. In this case, the charge sheet did not specify particular subsections on which the charge was premised, merely stating that the defendant was charged with rape, contrary to Sections 130 and 131 of the Penal Code.

The defendant's appeal was predicated primarily on the procedural propriety of a charge that did not make averment to the specific subsection on which the charge was predicated.

The Court held that it is a statutory requirement that every charge should be sufficiently well particularised to giving reasonable information as to the nature of the offence charged, including the ingredients of the offence. Failure to aver the specific statutory provision under which the defendant was alleged to have committed rape breached this requirement. Accordingly, the conviction was quashed.

Points to Note

- Many convictions of rape have been quashed at the appellate stage because prosecutors were not careful when drafting charges, with charges that fail to specify the nature of the charges and the essential elements of the offence and the requisite punishment. Therefore, the decision is important as a reminder of the need for enhanced professionalism and efficiency among court stakeholders in the administration of criminal justice.
- This case is important because the Court of Appeal decision will assist in ensuring prosecutors are more careful when drafting charges, especially those related to rape or other sexual offences, and in effect when coordinating investigations.

- Adherence to the principles and observations expounded in this case will improve investigations and raise the conviction rate on charges of rape or other sexual offences.
- The language used by the Court of Appeal is very simple and expansive, emphasising the statutory requirements on charges of rape.
- The position is similar in relation to attempted rape, as discussed in *Isidore Patrice v Republic* [2007] (CACA No. 224).

Other cases/decisions referred to	
Country/case	Decision
Uganda | *Uganda vs Hadi Jamal* [1964] EA 294	It was held that a charge that did not disclose any offence in the particulars of offence was manifestly wrong and could not be cured under Section 341 of the Criminal Procedure Code (which is equivalent to Section 388 of the Criminal Procedure Act, Tanzania).

Thomas Adam v Republic [2010] CA

Principle or Rule Established by the Court's Decision

A female below the age of 18 can consent to sexual intercourse only if she is aged 15 or over and lawfully married to the male.

Judges: Kimaro, Mandia and Kaijage | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal/ Appellate, Mbeya (Tanzania)	Criminal Appeal No. 134 of 2010; delivered 27 November 2012	Rape

Case Summary

The victim, who was 13 years of age, was expelled from school because of pregnancy. The appellant, the victim's teacher, who had promised to marry her, was allegedly responsible. It was alleged that the appellant and the victim had been involved in a long affair and that sometimes the victim stayed at the appellant's house, leading to her absconding from home and school. She went to live permanently with the appellant. Her father traced her and found her at the appellant's home after three months' absence from home. The appellant did not dispute the sexual relationship with the victim, insisting she was his wife. The appellant was convicted of rape by the trial court.

On appeal, the appellant contended (among other things) that he was lawfully married to the victim and she consented to sexual intercourse.

Dismissing the appeal, the Court of Appeal held that, under Section 132(2)(e) of the Penal Code, consent could be given to sexual intercourse by women over 18 or women over 15 who are lawfully married. Section 13(1) of the Law of Marriage Actdoes not allow a girl below the age of 15 years to be married without leave of the court. In this case, no such leave was given and therefore the victim was not lawfully married to the accused.

Points to Note

- This decision addresses the age of consent for marriage of girls in Tanzania and it reveals misconceptions by males on the age of consent for girls.
- The fact that a girl below 18 who is not married to the accused cannot consent to sexual intercourse or marriage is emphasised. It can be used as an advocacy tool for sensitisation of girls and men.
- The decision emphasises the import of the requirements of the law and international instruments in the protection and fulfilment of the rights of all children.
- This decision is important because it can be used in on-going discussions on:

  i. The appropriate age for girls to marry.

  ii. Whether 18 years is the appropriate age of consent for African girls living in poverty.

  iii. Whether this age embraces the customary and some religious practices in Tanzania.

Uganda

Uganda v Balikamanya [2012] HC

Principle or Rule Established by the Court's Decision

> The identification of a defendant who was seen by a complainant for a period of 10 minutes during a sexual assault was sufficiently cogent evidence to satisfy a court beyond reasonable doubt that the defendant was the perpetrator.

Judge: Wilson Musene Masalu | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Uganda)	Criminal Case No. 25 of 2012	Rape

Case Summary

The defendant was accused of raping a woman contrary to Sections 123 and 124 of the PCA. The victim had been walking back home from a pub at 2 a.m. when the defendant approached her and dragged her to a nearby bush and without her consent had sexual intercourse with her for 10 minutes. A passer-by heard her cries for help and came to her rescue, grabbing the defendant and taking him to a police station. The defendant's trouser zip was still open.

At trial there were three issues for consideration:

i. Whether there had been sexual intercourse with the complainant.
ii. Whether the complainant did not consent to that sexual intercourse.
iii. Whether it was the accused who had the unlawful sexual intercourse with the complainant.

The defendant asserted that he had been framed by the passer-by who had taken him to the police station.

The High Court convicted the defendant and sentenced him to seven years in prison:

i. Sexual intercourse was proved. The Court accepted the victim's testimony, as well as the testimonies of the medical officer who examined her. The Court also accepted the testimony of the police of the account given by the passer-by. The passer-by had apparently found the defendant having sex with the complainant. The defendant's trouser zip was still open at the time that he was taken to the police station.
ii. As to lack of consent, the Court accepted the victim's testimony, as well as the testimonies of the medical officer who examined her. The Court found lack of consent in the fact that the victim screamed for help during the sexual intercourse.
iii. The accused was the perpetrator. He was caught by the passer-by, who immediately dragged him to the police station. The accused's zip was still undone. He was identified by the victim as the perpetrator, as she had seen him for 10 minutes during the act of sexual intercourse.

Points to Note

Although there are dangers in convictions based on identification evidence, the victim had sufficient time to identify the defendant to the satisfaction of the Court because the ordeal lasted 10 minutes.

Uganda v Kusemererwa Julius [2014] HC

Principle or Rule Established by the Court's Decision

The offence of rape may be charged only in cases where the victim is aged 18 or over. When the victim is under 18, defilement is the appropriate charge.

Judge: David Batema | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Indictment unlawful	High Court (Uganda)	Criminal Session Case No. 15/2014	Rape of girls under 18 years

Case Summary

The defendant was indicted with an offence of rape of a girl aged 16, contrary to Sections 123 and 124 of the PCA. He objected to the charge, arguing that he should have been charged with defilement contrary to Section 129(1) because the crime of rape can be committed only against women aged 18 years and above.

The High Court held that rape charges could not be brought where the victim was below the age of 18 years. Prior to the 1990 amendment to the PCA, all sexual intercourse without consent involving women and girls was termed rape. The 1990 amendment deliberately extracted offences involving girls under 18 from Section 123 (Rape) and created offences of defilement as specific protection for girls from sexual abuse. In summary, Section 129 creates offences of simple and aggravated defilement, depending primarily on whether the girl is aged over or under 14 years. Therefore, women subject to such offending are "raped" and girls are "defiled". The retention of the word "girl" in the definition of rape was a case of poor drafting or poor referencing.

The Court further held that, while consent is a complete defence to rape, it is not a defence to defilement.

The Court ordered the DPP to amend the indictment from rape to defilement, with a further order that the case should serve as a test case for all pending cases framed in a similar manner.

Other cases/decisions referred to	
Country/case	Decision
Uganda | *Ochit Labwor Patrick v Uganda* (Criminal Appeal No. 15 of 1998)	The Supreme Court held that the section on rape in the PCA does not exclude girls but opined that it was more appropriate to charge perpetrators with defilement. The High Court distinguished the case from the present case because the decision was made before the Penal Code Amendment Act 8 of 2007, which prescribed different punishments for defilement depending on the age of the victim (below 14 years, death is the maximum penalty; above 14 years, life imprisonment is the maximum penalty). Therefore, legal circumstances had changed.

Points to Note

- The Court adopted a purposive interpretation of Section 123, in light of Section 129(1) of the PCA. It found that, because Section 129(1) – which specifically targets sexual offences against girls below 18 years – was introduced in 1990, Section 123 can no longer be construed as applying to that same age group. Otherwise, the purpose of Section 129(1) would be defeated.
- The Court highlighted the history and rationale of the two legislative provisions, focusing, in that regard, on the centrality of consent as a distinguishing factor between the offences. While consent is a defence to rape, it is not a defence to defilement, thus the two offences are not mutually compatible for purposes of substituting indictments.
- This case highlights the legislative protection accorded to girls under the age of 18 years, which should not be overlooked by the prosecution and which the Court upheld in this case. The prosecution had opted for rape charges because the defendant had used extreme violence (he allegedly used a *panga* and knife to cut the victim's arm), which the prosecution hoped would be punished more severely under a rape charge. Rape carries the death penalty, whereas defilement entails a maximum sentence of life imprisonment. However, this was very risky, as there is a defence of consent to rape, whereas no such defence exists for defilement. The Court recognised this risk and emphasised the need for the prosecution to uphold the protection of the girl child by bringing the appropriate charges. Parliament had legislated specifically for that purpose.
- This precedent has the unfair consequence of diminishing the gravity of "rape" of girls aged above 14 years by calling it "defilement", which is punishable by life imprisonment. Rape of an adult woman is punishable by death.
- There is need for further clarity by the appellate courts in light of the *Ochit* precedent and the 2007 amendment to the PCA. This case shows how framing of charges has an impact on the final punishment since a court can convict for a lesser offence but cannot convict for a graver offence

Uganda v Muhwezi Lamuel [2010] HC

Principle or Rule Established by the Court's Decision

> The corollary of a delay in reporting a sexual offence is not that the report must be dismissed as a fabrication.

Judge: Wilson Kwesiga | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Uganda)	Criminal Case No. 292 of 2010	Rape

Case Summary

The defendant was accused of raping a woman contrary to Sections 123 and 124 of the PCA. The victim alleged she had been walking back home from a trading centre when the defendant intercepted her and had sexual intercourse with her, without her consent. The victim claimed that she tricked the defendant into shifting to a more covert place by the roadside where her children were not likely to find her, to which he obliged. This allowed the victim a small window of opportunity to escape. The victim reported the incident to the local authority chairman and later to the police.

The defendant denied the offence, claiming that he was at his butchery at the time. He also sought to discredit the allegation as a fabrication because the incident was reported to the police a number of days later.

The Court held that:

i. There was sexual intercourse, as evidenced by the victim's testimony and medical evidence of vaginal inflammation.

ii. There was no consent to that sexual intercourse, as evidenced through the victim's testimony and the medical evidence of bruises on her neck.

iii. The defendant committed the offence. The victim's testimony and the testimony of witnesses in the neighbourhood, who had heard the victim raising an alarm while calling out the defendant's name at the time of her escape, evidenced the identity of the offender.

The allegation was therefore not a fabrication. The Court accepted that the delay in reporting the case owed to the victim's illiteracy and the late advice of the local council chairman, who, in any event, did not have jurisdiction over the matter.

Other cases/decisions referred to	
Country/case	Decision
Uganda | *Uganda v Kyamusunga*, HC Criminal Session No. 107 of 1996	Factors to be taken into consideration when considering the correctness of the identification of a rapist are (i) the time taken in commission of the offence; (ii) the time taken while the accused was under observation; (iii) the distance between the accused and the witness; (iv) the time of day; and (v) whether there was enough light to aid identification.

Points to Note

- This case demonstrates that a delay in reporting a sexual offence may be attributable to factors other than fabrication of the allegation.
- This case highlights the complexities attached to reporting sexual offences. In the first place, it is a deeply personal decision for one to subject oneself to the indignity of public knowledge of having been raped. Second, evidence-gathering entails significant erosion of privacy, particularly with medical examinations and police interrogations. This case's undercurrent is in line with that reality and offers protection to victims who take time for personal reflection and/or require convincing to file a complaint.

Obiter Dicta

The Court criticised and, in its *obiter dicta*, gave guidance regarding preservation of evidence and speed of reporting: *"… I have considered the defence's criticism of the manner and delayed reporting to the police by the victim. As it were, each case ought to be decided on its own circumstances and facts. The offence was committed in a rural set-up, against an old illiterate woman. The victim was evidently traumatized but she delayed in the hands of the local authority LC1 Chairman who took his time over what he thought would have been settling the matter. This was a capital offence he had no jurisdiction over. He delayed the victim's access to Police and medical attention. In our underdeveloped systems where DNA tests are not yet widely available in the country it is of paramount importance that rape and defilement victims should as much as practically possible be facilitated to access medical examination immediately after the offence and to preserve the necessary evidence for purposes of corroboration. The victim's private parts should not be cleared pending medical examination because this destroys evidence such as body fluids of the suspects capable of being found in the body of the victim which would be corroborative evidence…"*

Uganda v Tumwesigye Ziraba alias Sigwa [2013] HC

Principle or Rule Established by the Court's Decision

- Identification evidence from the victim alone may be sufficient to establish the identity of the perpetrator, depending on the quality of the identification. This may require consideration of the extent of any prior contact between the perpetrator and the victim and whether established procedures for identification parades were adhered to.
- In sentencing for rape, the court may take into account that rape is a demeaning act and that the victim is likely to be traumatised for life.

Judge: Godfrey Namundi | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Uganda)	Criminal Session Case No. 92 of 2011; 3 December 2013	Rape

Case Summary

On 15 October 2010 at about midnight, the victim was asleep in her house when she was awoken by a noise. When she flashed a torch, she saw the defendant, who had forced entry in to the house. She recognised the defendant as a person she had known for three months prior to the incident. The defendant hit the victim with the torch and proceeded to have forceful sexual intercourse with her without her consent. She reported the assault in the morning. The detective sergeant, who recorded the victim's complaint, observed she was distraught. The defendant was arrested.

At trial, the defendant denied that he was the person who committed the offence, relying on an alibi that he was at home in bed with his wife.

The Court found that, although the identification was by a single witness, the conditions favoured correct identification because his face had been lit by the torchlight and the victim had known the convict for three months prior to the incident.

Identification was also corroborated by the positive identification of the defendant at an identification parade. The Court made reference to Kenya Police Order 15/26, which prescribes rules of conduct of an identification parade. These rules had been earlier adopted by the Supreme Court in *Sentale v Uganda* [1968] EA 365, meaning they are part of Ugandan jurisprudence. The police had followed these rules and so the identification parade was satisfactory.

The Court relied on evidence of broken pieces of pot, mirror and bed, which it determined was circumstantial evidence of a scuffle and therefore corroboration of forceful sex.

The defendant was therefore convicted of rape, contrary to Section 123 of the PCA. The judge observed that rape is a demeaning act and the victim is traumatised for life. The defendant was sentenced to 12 years' imprisonment.

Points to Note

- The case is a good precedent on the evaluation of all evidence in a case, including circumstantial evidence, witness testimony and the emotional state of the victim after the act.

- The judge's observations about rape being a demeaning act and the victim being traumatised for life are important, particularly coming from a male judge who understands sexual violence and its purpose and motive.

Uganda v Yiga Hamidu [2004] HC

Principle or Rule Established by the Court's Decision

Even if marriage between a victim and a defendant could be proved, the mere fact of marriage is not a defence to rape. Men and women have equal rights within marriage, include the right to human dignity. This includes a right to withhold consent to sexual intercourse.

Judge: Kibuka Musoke | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Uganda)	Criminal Session Case No. 5 of 2002; 9 February 2004	Rape | Marital Coercion

Case Summary

The accused persons were indicted and tried for rape, contrary to Section 123 of the PCA. At the end of the trial, A1 Yiga and A4 Kasiita were convicted of rape.

In August 2001, Yiga visited the victim's father and a consensus was reached between the two that Yiga would wed the victim. However, the victim learnt that Yiga's wife had died of AIDS-related complications and the wedding was called off until Yiga had undergone an HIV test. Before this could be done, Yiga demanded that the victim live with him. However, the family refused.

Yiga hired two persons to abduct the victim, which they did. They delivered her to a location where she was locked up. She was later collected and taken to Yiga's home. Once there, the victim declined sexual advances by Yiga, who then secured help from some men. He succeeded in forcefully having sexual intercourse with her as two men held the victim. Medical evidence placed her age at 18 years and noted that her hymen had been recently ruptured. She also suffered injuries in her sexual organ.

At trial, the accused raised the defence that the victim was his wife because he had paid dowry. Further, she had been brought to his home by her father and a Mwalimu/Imam had performed Islamic marriage rites.

The judge disbelieved him and stated:

> *That strange conduct, on the part of A1, renders it clear to me that A1 did not believe, deep in his heart, that the complainant was his bride. For*

> *after treating her in that savage manner, he could never hope to have any love from her. His having sex with her at such a time of the day in such a fashion, was a mere release of vengeance upon her having refused to get married to him. He did not care what would follow.*

The judge went on to find the notion that a man cannot rape his wife did not reflect the law because the Constitution prescribes equality in marriage and equal dignity of men and women and prohibits laws, customs and culture that are against or undermine the status of women. The relevant provisions were reproduced as follows:

> *31 (1) men and women of the age of eighteen years and above, have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.*
>
> *(3) Marriage shall be entered with the free consent of the man and woman intending to marry.*
>
> *33 (1) Women shall be accorded full and equal dignity of the person with men.*
>
> *(6) Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.*

Points to Note

- This decision is a good precedent on how a trial judge can proactively use the equality provision in the Constitution to navigate deeply entrenched patriarchal notions that inform the legal requirement that rape must be unlawful, in the sense that it cannot happen in marriage because sex is legalised within marriage.
- As the judge reasoned, rape or sexual violence cannot by any stretch of imagination be legalised.
- Rather than refer to it as "unlawful sex", it is better to refer to it as "non-consensual sex", which would then undermine the notion of "legal rape" in marriage. To reason otherwise would be to discriminate against married women who suffer violence physical, psychological and sexual.
- While manifestation of physical violence is adequately dealt with in the PCA, sexual violence is not.
- The Domestic Violence Act defines domestic violence to include sexual abuse. This is a positive development but it is not sufficient to deal with violent sexual abuse that is in the same category as rape because it is abusive, aggressive and motivated by a will to harm and to destroy a woman's self-esteem.

- The Domestic Violence Act is a starting point. Greater political will is needed to enforce it.

Bizimana Jean Claude v Uganda [2014] CA

Principle or Rule Established by the Court's Decision

The court may convict a person for a sexual offence even in the absence of evidence corroborating an identification where the court is satisfied that the complainant's evidence was truthful and accurate.

Judges: Kasule, Mwangusya, Egonda Ntende | JJA

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal against conviction dismissed; sentence reduced	Court of Appeal	Criminal Appeal No. 143 of 2010; 18 December 2014	Rape

Case Summary

On 2 December 2004 at 8 p.m., the victim was at home with her two children when the appellant, whom she knew, kicked open the door forcefully and entered her house. She had just bathed and was in a nightdress without underpants. The appellant proceeded to rape her while holding a knife. There was light from a *tadoba* (a paraffin-fuelled candle). When her husband returned, he found the door locked from the outside. On entering the house, she immediately reported the rape in a disturbed state while her children were crying. The husband reported the case to police. The appellant raised the defence of alibi, which the trial judge rejected. The appellant was convicted of rape contrary to Section 123 of the PCA and sentenced to 18 years' imprisonment.

On appeal, the appellant contended that the judge had erred in law and fact in finding that the prosecution had proved its case beyond a reasonable doubt. In particular, he averred that:

i. The circumstances of the alleged incident were insufficient to lead to a reliable identification. The alleged incident took place at night when the victim was bending. Furthermore, the light from the *tadoba* would have been insufficiently bright.

ii. If any intercourse took place that night with anybody, it was consensual.

He also contended that the sentence imposed was manifestly excessive.

The Court of Appeal found that the original decision as to guilt was correct:

i. The trial judge correctly warned himself about the dangers of convicting on evidence of a single identifying witness without corroboration when conditions do not favour correct identification. The victim knew the accused well and there was light from the *tadoba*. This was sufficient to identify the perpetrator.

ii. The victim's testimony of a violent attack with a knife and the evidence of her distraught condition immediately after the rape clearly suggested that any intercourse was not consensual.

However, the sentence should be reduced to 15 years in light of decisions in comparable cases, in particular *Oyeki Charles v Uganda* [1999] (Criminal Appeal No. 126 (unreported)).

Points to Note

- In upholding the conviction, the Court was clear that it is the quality and not the quantity of evidence against a perpetrator of a sexual offence that is key.
- This case brings to light the predatory nature of sexual violence. A perpetrator attacked a defenceless frail woman in the presence of her children.
- The victim was a Rwandese refugee and vulnerable.

International Decisions

Prosecutor v Jean Paul Akayesu (Judgement) [1998] ICTR

Principle or Rule Established by the Court's Decision

> Like torture, rape is a violation of personal dignity and it constitutes torture when inflicted by or at the instigation of, or with consent or acquiescence of, a public official or other persons acting in official capacity.

Judges: Laity Kama (Presiding Judge), Lennart Aspegren and Navenethem Pillay

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	International Criminal Tribunal for Rwanda (ICTR)	Case No. ICTR -94-4-T	Rape| Crimes against Humanity

Case Summary

This case took place before Trial Chamber I of the ICTR for the prosecution of persons responsible for serious violations of international humanitarian

law in Rwanda. The tribunal was established by UN Security Council Resolution 955 of 8 November 1994.

The accused was charged with several counts, but of relevance to VAWG jurisprudence is the count on crimes against humanity as stipulated in Article 7 of the statute that set up the tribunal. It defines these crimes as acts committed as part of a widespread systematic attack directed against any civilian population and includes torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity.

In defining rape, the Chamber observed there was no commonly accepted definition of rape in international law and therefore defined it as *"a physical invasion of a sexual nature, committed on a person under circumstances which are coercive"*. This act must be committed as:

i. Part of a widespread or systematic attack.
ii. On a civilian population.
iii. On certain catalogued discriminatory grounds: national, ethnic, political, racial or religious grounds.

The Chamber in its judgement considered rape to be a form of aggression and that the central elements of the crime cannot be captured in a *"mechanical description of objects and body parts"* as defined in some jurisdictions, which define it as non-consensual sexual acts encompassing the insertion of objects and/or use of bodily orifices not considered to be intrinsically sexual.

The Chamber then went on to use the analogy of the UN Convention against Torture and other cruel and degrading treatment or punishment that does not catalogue specific acts in its definition of torture but focuses on the *"conceptual framework of state sanctioned violence"*.

The Chamber reasoned that, like torture, rape is used for purposes such as:

> *… intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity and it constitutes torture when inflicted by or at the instigation of or with consent or acquiescence of a public official or other persons acting in official capacity.*

In its decision, the Chamber found that, between April and June 1994, hundreds of civilians, the majority of whom were Tutsi, sought refuge at a commune. From there they were regularly taken by armed local militia and communal police and subjected to sexual violence and/or beaten near the premises. Many were subjected to multiple acts of sexual violence by multiple assailants, accompanied with threats of death or bodily harm.

The accused was a mayor who had exclusive control over the communal police as well as any gendarmes put at the disposal of the commune. The Chamber, in its decision, found, *"beyond reasonable doubt the accused had reason to know and in fact knew that sexual violence was taking place on or near the premises of the bureau communal and that women were being taken away from the bureau communal and sexually violated"*.

With respect to admission of evidence on sexual violence, the Chamber had this to say:

> *Rule 96(i) of the Rules stipulates that no corroboration is required for sexual offences. The rule accords to the testimony of victims of sexual assault the same reliability as the testimony of victims of other crimes, something which had long been denied victims of sexual assaults in common law.*

The accused person was found guilty of crimes against humanity, including rape.

Points to Note

- The definition of sexual offence of rape and defilement represents a conceptual issue and one that needs to be further studied so that the *mens rea* is reflected in the definition, as opposed to the current strict liability approach.
- A shift to the *mens rea* will bring out the evil nature of sexual violence and lead to stigmatisation, a form of deterrence.
- A shift to conceive rape as an offence whose purpose is to punish and degrade women (a VAWG approach) is recommended as opposed to the narrow non-consensual approach, which favours the perpetrator.