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**WITHOUT THEIR CONSENT: UNRAVELING THE CONUNDRUM SURROUNDING RAPE IN  
UGANDA**

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**WITHOUT THEIR CONSENT: UNRAVELING THE CONUNDRUM  
SURROUNDING RAPE IN UGANDA**

**Dominic Adeeda**

*Always take "no" for an answer. Always stop when asked to stop. Never assume "no" means "yes." If her lips tell you "no" but there's "yes" in her eyes, keep in mind that her words, not her eyes, will appear in the court transcript<sup>1</sup>*

**Abstract**

*Sexual violence is an emergent problem in Uganda today and it leaves an enduring and devastating impact on the survivors. Rape is one of the most pressing issues under the broader genus of sexual violence. It desecrates the very core of the victim's esteem, dignity and integrity and it is mostly perpetrated by men. Although originally this type of crime was not openly discussed, research has provided a greater understanding of the offence and its devastating effects to survivors. This article therefore contributes to this scholarship by demystifying the whole notion of rape in Uganda while looking at the legal regime that governs the offence, national crime statistics and prosecution of the offence. The article thus makes an overall appeal to curb rape through a multi – disciplinary approach and undertaking necessary reforms in the law that governs the offence.*

**1.0 INTRODUCTION**

Sexual violence is a rising pervasive social problem in Uganda today. It takes various forms, from sexual assaults to despicable acts of rape and defilement. Rape is one of the most severe of all forms of sexual violence and according to the Uganda Bureau of Statistics (UBOS) statistical abstract 2018, the number of rape crimes has been increasing in the past few years.<sup>2</sup> Rape causes multiple

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<sup>1</sup> Asa Baber, The Stud Muffin Quiz, PLAYBOY, June 1992, at 36, 36. See also; Remick, Lani Anne. "Read Her Lips: An Argument for Verbal Consent Standard in Rape." University of Pennsylvania Law Review 141, no.3 (1993): 1103-151

<sup>2</sup> For instance taking a period from 2013, rape cases have increased from 1042 to 1580 by 2018 and these figures are just a tip of an ice berg for the many unreported cases.

long-term negative effects to the victim<sup>3</sup>, families and society at large. Such effects to victims include but are not limited to Post Traumatic Stress Disorder (PTSD), depression and physical health problems among other complications.<sup>4</sup> For women and girls, it can lead to both genital and non-genital physical injury such as traumatic fistulas and chronic incontinence.<sup>5</sup> The issue of sexual violence has been a polarizing one since, if not prior to, its recognition as a crime and destructive form of victimization.<sup>6</sup> Although originally this type of crime was not openly discussed, research has provided a greater understanding of the offence, its devastating effects, and the social forces that continue to create an ecosystem where it can thrive.<sup>7</sup> This ecosystem exists as a place where a considerable number of people are sexually assaulted, survivors often feel silenced, and when they do speak, their voices often fall on deaf ears. Thus the topic of rape is a difficult one for many reasons. Rape is undeniably widespread and happens in various parts of the country. It is mostly perpetrated against women and with its contemporary escalation, its ruinous effects continue to manifest in society. Rape in whatever form is a grave attack on the physical and mental integrity as well as the sexual autonomy of the survivor. It constitutes in itself a violation of a plethora of human rights and thus impedes the full enjoyment of such other human

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<sup>3</sup> The use of the term victim is problematic. Most practitioners in the area of protection and gender based violence prefer the term ‘survivor’ in order to contribute to the post act social healing. Survivor does imply a sense of empowerment and emphasizes not the Ordeal but the continuation of life, but still scripts the woman or man in terms of his or her experience. For purposes of this article, both survivor and victim shall be used interchangeably.

<sup>4</sup> Kilpatrick, D. G., & Acierno, R. (2003). Mental health needs of crime victims: Epidemiology and outcomes. *Journal of Traumatic Stress*, 16, 119–132.

<sup>5</sup> WHO (World Health Organization) 2003, *Guidelines for Medico-Legal Care for Victims of Sexual Violence*, Geneva. Pg 12; See also, Uganda Law Reform Commission, *Development of a Model Law for Accountability and Redress for Victims of Sexual Violence in Conflict in Uganda*, Draft Issues Paper November, 2014

<sup>6</sup> Kristine Kilanski, *Changing Definitions of Rape and Citizenship*, CLAYMAN INST. FOR GENDER RES. Available at: <http://gender.stanford.edu/news/2016/changing-definitions-rape-and-citizenship>

<sup>7</sup> Mary Graw Leary, *Affirmatively Replacing Rape Culture with Consent Culture*, 49 *Tex. Tech L. Rev.* 1 (2016)

rights, for instance the right to life<sup>8</sup>, physical and mental health, personal security, equality within the family<sup>9</sup> and before the law regardless of gender and gender identity<sup>10</sup>, the right to be free from discrimination and torture and other ill treatment<sup>11</sup>, amongst others.<sup>12</sup> Rape is more devastating today than ever before not only because of its prevalence but also the multiple barriers in accessing justice and redress, including harmful gender stereotypes, misconceptions of what sexual violence is, victim-blaming, credibility questioning and inadequate support, among other impediments towards survivors.

This therefore has created an urgent need to take action to prevent and protect women and girls from this emergent scourge, to re – examine our humanity and beliefs and to punish all acts of rape, as well as to provide transformative reparation to victims. Such deliberate efforts must go beyond individual victims and should instead seek to transform laws, policies and attitudes that are the root causes of sexual violence crimes.<sup>13</sup> Therefore, this article while taking cognizance of the fact that all sexual violence, regardless of the sex, gender or gender identity of the victim, is important as a human rights issue, focuses on rape in Uganda and demystifies the notion of consent as used in rape cases and goes on to make recommendations to counter this emergent scourge, so as to advance women rights since they are statistically disproportionately affected by this violation.<sup>14</sup>

## **2.0 RAPE IN UGANDA**

Rape is a major legal, social and academic concern because of how atrocious it is – an invasion of one’s bodily autonomy and an assault on their dignity. Rape

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<sup>8</sup> Article 22, 1995 Uganda Constitution

<sup>9</sup> Article 31

<sup>10</sup> Article 21

<sup>11</sup> Article 24

<sup>12</sup> All rights are not exhaustive; Article 45

<sup>13</sup> Special Rapporteur on violence against women 2010 report, UN Doc A/HRC/14/22, 23 April 2010

<sup>14</sup> Most rape victims according to the 2018 annual police crime report are women

attacks the foundations of what it is to be human, treating the individual and his or her body as mere objects. Rape is a serious criminal act that denies a woman the right to choose when, if and whom to have sex with. The Act of rape is a gross violation of a woman's body, abhorrent whomever the perpetrator and her relationship to him.<sup>15</sup> It can have an enduring impact on the lives and health of victims, their families and communities. Rape occurs in many other contexts perpetrated (mostly) by men of every socio – economic class, from the manual laborers up the top echelons of white collar executives, in villages and in cities, in the poorest of slums and the wealthiest of exclusive neighborhoods. Verily, this assertion is premised on the statistical figures which put the number of prisoners convicted for rape at 100% male.<sup>16</sup> An analysis of the statistics shows that in 2017, 1335 cases of rape were reported and only 396 were prosecuted which translates to a paltry 29.66 percent of the total number of reported crimes.<sup>17</sup> In 2018, 1580 cases of rape were reported, these are 1580 victims! Of these 644 were taken to court, 16 cases secured convictions, one case was dismissed, 620 are pending in court and 618 are under investigations.<sup>18</sup> These statistics correspond with those in the 2018 Uganda Police annual crime report. According to the police annual crime report, the crime distribution of rape stands at 811 incidences in rural areas as compared to the 730 cases in urban areas.<sup>19</sup> This clearly underscores the severity and

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<sup>15</sup> Porter, Holly (2013) After rape: justice and social harmony in northern Uganda. PhD thesis, The London School of Economics and Political Science (LSE) at pg 122, Available at; <http://etheses.lse.ac.uk/717/>

<sup>16</sup> UBOS statistical abstract, Table 2.6.17, at page 61 Available at; [https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.ubos.org/wp-content/uploads/publications/05\\_2019STATISTICAL\\_ABSTRACT\\_2018.pdf&ved=2ahUKEwi\\_o4ysxO7mAhVlmVwKHfS2Bx8QFjAAegQIBBAB&usg=AOvVaw3xCc-TekvtiaciWbFZgApd](https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.ubos.org/wp-content/uploads/publications/05_2019STATISTICAL_ABSTRACT_2018.pdf&ved=2ahUKEwi_o4ysxO7mAhVlmVwKHfS2Bx8QFjAAegQIBBAB&usg=AOvVaw3xCc-TekvtiaciWbFZgApd)

<sup>17</sup> Ibid, at pg 193

<sup>18</sup> Uganda police annual crime report 2018 at Pg 37 Available at; [https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.upf.go.ug/wp-content/uploads/2019/05/annual-crime-report-2018..pdf&ved=2ahUKEWjJ4s62\\_OrmAhUyQEEAHU8kBaEQFjAAegQIBRAB&usg=AOvVaw2ap7u6Tff7YURveDufjeiR](https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.upf.go.ug/wp-content/uploads/2019/05/annual-crime-report-2018..pdf&ved=2ahUKEWjJ4s62_OrmAhUyQEEAHU8kBaEQFjAAegQIBRAB&usg=AOvVaw2ap7u6Tff7YURveDufjeiR)

<sup>19</sup> Ibid

escalation of acts of rape today. A summary of these statistics of the cases reported in contrast with those prosecuted across various years is illustrated below.

**Figure 1:**

**Table showing rape statistics from the year 2014 to 2018**

<b>YEAR</b>	<b>CASES OF RAPE</b>	<b>PROSECUTED</b>
2018	1,580	644
2017	1,335	396
2016	1,454	614
2015	1,099	564
2014	1,042	676

Source: Uganda Police Force and UBOS

## **2.1 DEFINITION OF RAPE**

The term rape is imbued with diverse legal meanings and there are also varying interpretations of what should be classified as an act of forced or coercive carnal knowledge. Historically, ‘*raptus*’ the generic term of rape was to imply ‘violent theft’, applied to both property and person in Roman culture.<sup>20</sup> This etymology comes as no surprise to the adoption of a force based definition of rape by most penal statutes, because of the element of force or violence that is usually expended in the commission of the offence.

By definition, rape, under international criminal law regime, refers to the non-consensual [invasion of] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.<sup>21</sup> In ***The prosecutor v John***

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<sup>20</sup> Jiloha R C. From rape to sexual assault: Legal provisions and mental health implications. Indian J Soc Psychiatry 2015 [accessed on January 20 2020];31:9-18. Available at: <http://www.indjsp.org/text.asp?2015/31/1/9/161992>

<sup>21</sup> Article 7(1)-(g)1(1): International Criminal Court, Elements of Crimes, PCNICC/2000/1/Add.2 (2000). The International Criminal Court’s Elements of Crimes further refer to such an invasion having been “committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking

**Paul Akayesu**<sup>22</sup>, rape was defined widely as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. This definition did not just limit rape to just penile-vaginal penetration and is broad enough to cover penetration by foreign objects.

Under common law, in **DPP V Morgan**, Lord Hailsham defined rape as;

*“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 as a result of which her will is over borne.”*<sup>23</sup>

According to Ugandan penal law, rape is embodied in the Penal Code Act<sup>24</sup> under crimes against morality. The Penal Code Act, hereinafter referred to as the PCA, defines rape as;

*‘Any person who has unlawful carnal knowledge of a woman or girl, without her consent or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the Act, or in the case of married woman, by personating her husband commits the felony termed rape.’*<sup>25</sup>

This definition of rape under the PCA comes short in so far as not including penetration by foreign objects when a strict application of the section is taken and further uses less gender neutral language “...carnal knowledge of a woman or girl...” oblivious of the fact that men/boys too can be raped, albeit in rare circumstances. The section also does not provide for marital rape as it only

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advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.” (Article 7(1)-(g)1(2))

<sup>22</sup> The Prosecutor v. Jean-Paul Akayesu (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998

<sup>23</sup> DPP v Morgan & 3 Ors (1976) AC 182; Cited in Uganda v Kahooza Julius HCT – 01 – CR – CS – 020 – 2013

<sup>24</sup> Cap 120 Laws of Uganda 2000

<sup>25</sup> PCA, Chapter XIV, Section 123

makes mention of a person “...personating the husband...” but not the spouse. Notwithstanding the above shortcoming, it flows from the above definition that consent lies central to the offence of rape. This notion of consent will be substantively dealt with in the subsequent section. Nonetheless, it is worth observing beforehand that the rationale for consent lies in the fact that women have full rights to their bodies and have the choice as to when and with whom they may want to have sexual intercourse.<sup>26</sup> Courts in Uganda have on various instances weighed in on this subject of rape in regards to it being an encroachment on women rights. In **Uganda v Lomoe Nakoupuet**<sup>27</sup>, Court decried the continued treatment of women and girls as mere sex commodities or possessions, associated stereotypes as well as the practice of not treating women and girls as full human beings. Court observed that rape is a brutal and backward culture promoting violence against women. It [court] asserted that rape is a form of torture, a cruel, inhuman and degrading treatment which is outlawed by our Constitution.<sup>28</sup> Under the constitution, the prohibition of any form of torture or cruel, inhuman and degrading treatment or punishment is sacrosanct and needs no expounding. This prohibition is further made non – derogable under Article 44 of the Constitution. Besides, Clause (2) of article 32 of the Constitution is equally instructive in regards to cultural rape and is directly against any form of sexual violence propped by customs and traditions. It provides:-

*“Laws, cultures or traditions which are against the dignity, welfare or interest of women or any marginalized group.... or which undermine their status, are prohibited by this Constitution”*

This article therefore postulates that the continued infraction of these constitutional rights cannot be condoned and as such rape must be fought from all fronts. Rape threatens a woman's physical safety and denies her

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<sup>26</sup> Uganda v Byarugaba Erikando Kabigabwa, Criminal Session Case No.361 of 2013

<sup>27</sup> High court Criminal Case No. 109 of 2016

<sup>28</sup> Article 24, 1995 Uganda Constitution



freedom of sexual choice and, at the same time, weakens the security and morality of society.<sup>29</sup> This ultimately calls for a more deliberate approach to make all spaces safe for the women in Uganda. A critical examination of statistics of rape indicates that the rates of reporting and prosecution of rape cases within Uganda are low.<sup>30</sup> The inability to prosecute denies women, who have experienced assault, their right to justice within the formal legal system and allows perpetrators to go unpunished.<sup>31</sup> The patriarchal society further makes it hard for the women to come out since there are stereotype connotations that surround the victims once they choose to speak up against their aggressors. Gender stereotyping, a practice of ascribing specific attributes, characteristics or roles to a man or woman by reason of her or his being a man or woman is still entrenched in society and this is not making matters any easier.

### **3.0 CONSENT IN RAPE CASES**

Sexual violence too often occurs when someone's ability to express unwillingness is impaired, whether by fright, intimidation, alcohol, or drugs.<sup>32</sup> The debate surrounding what amounts to consent in rape cases is therefore highly charged and is further complicated by the absence of an express statutory definition of consent. The absence of consent is a pivotal ingredient in the proof of an act of rape. It is important to note that what may ordinarily pass for consent, on closer scrutiny, could have been brought about by fear or fraud and may not have been given freely or voluntarily. Thus, a question

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<sup>29</sup> Towards a consent standard in the law of rape, Available at; [https://www.google.com/url?sa=t&source=web&rct=j&url=https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi%3Farticle%3D3887%26context%3DUclrev&ved=2ahUK\\_Ewi\\_voWmwe3mAhUTolwKHdgRAGYQFjAAegQIARAB&usg=AOvVaw2QOaf1V-yMg8XvIe6UCX96H](https://www.google.com/url?sa=t&source=web&rct=j&url=https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi%3Farticle%3D3887%26context%3DUclrev&ved=2ahUK_Ewi_voWmwe3mAhUTolwKHdgRAGYQFjAAegQIARAB&usg=AOvVaw2QOaf1V-yMg8XvIe6UCX96H)

<sup>30</sup> See Figure 1, at pg 5

<sup>31</sup> Holmes, Caren, "The Justice-Seeking Power of Women who Experience Sexual Violence in Uganda" (2015) Independent Study Project (ISP) Collection 2173 [https://digitalcollections.sit.edu/isp\\_collection/2173](https://digitalcollections.sit.edu/isp_collection/2173)

<sup>32</sup> Stephen J. Schulhofer, Reforming the Law of Rape, 35 *Law & Ineq.* 335 (2017). Available at: <https://scholarship.law.umn.edu/lawineq/vol35/iss2/11>

arises as to whether the law in this respect, as contained in the Penal Code and interpreted by the courts, is sufficient, or whether a statutory definition could afford greater protection to women, particularly in cases where the threat is not of physical harm. This article suggests that a statutory definition of consent should be included in the Penal Code highlighting the key components of consent. This apparent lack of a definition of consent has aroused massive practical and scholarly convolution. This esoteric phenomenon obfuscates a rather simple matter that 'No means No'. It is worth observing that in sexual offences like rape, the absence of consent renders unlawful an otherwise lawful activity.

### **3.1 CONSENT DEFINED**

There is no statutory definition of consent in Uganda's Penal Code and as such, the meaning of what amounts to consent varies, and is subject to debate. Consent simply connotes the voluntary permission given by a competent person<sup>33</sup>, acquiescing to undertake or indulge in sexual activity. This definition however is just an attempt to simplify a relatively complex phenomenon. In order to unravel the complexity, consent must be examined in twofold; as it relates to the purpose of criminal law and secondly in context as part of a larger multidisciplinary constellation of measures to address sexual assault.<sup>34</sup> For purposes of criminal law, consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances.<sup>35</sup> It must be given as a voluntary and ongoing agreement to engage in a particular sexual activity, and can be rescinded at any time.<sup>36</sup>

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<sup>33</sup> Black's law dictionary, 8<sup>th</sup> Edn, at page 919

<sup>34</sup> Mary Graw Leary, *Supra* FN 7

<sup>35</sup> *M.C. v Bulgaria* (2003) ECHR 651, paras 163. See also *Vertido v The Philippines*, CEDAW Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), para 8.9(b)(ii). See also Istanbul Convention, art 36 (2); CEDAW Committee, General Recommendation 35, para 33; UN Handbook for Legislation on Violence against Women, 2012, p 24.

<sup>36</sup> This has been affirmed in a number of commonwealth judgments, for example, by the High Court of Justice of England and Wales in *R v DPP and "A"* [2013] EWHC 945

Developments in international criminal law have led to the recognition that consent can be given freely and genuinely only where the free will of one the consenting parties is not overpowered by coercive circumstances, and when the person is capable of consenting.<sup>37</sup> On the other hand, as a measure to address sexual assault, consent must at all times be solicited and given prior to any sexual interaction by whomever is involved. Quite many people express a level of trepidation about what amounts to consent? Questions like; Can a woman who is drunk give consent? Can a woman withdraw her consent at any time during the sexual activity? and so on, linger in the minds of many people. To clear these questions, consent can only be given freely. This means the consent must be independent of any undue influence, and must be given by a person capable of giving consent. In Uganda, the age of consent is 18 years<sup>38</sup> and sexual activity with a person below the age of 18 is defilement. Some scholars refer to it as statutory rape, essentially because it is rape save for the fact that it is meted out on a minor who is incapable of giving consent. Closely related to capacity to consent, is the notion of intoxication that incapacitates the person's cognitive faculties thus rendering them incapable of giving valid consent. It follows therefore that when anyone takes advantage of a woman in this state, the offence of rape is committed without question. This situation was seen in the case of ***Uganda v Wadri Farouk***.<sup>39</sup> In this case, alcohol was brewed at the home of the complainant until late in the evening. Some customers who came to buy the alcohol bought some for the complainant as a result of which she became intoxicated. At around 10.00 pm she retired to the veranda of her

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(Admin), available at: [www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/f-vdpp-judgment.pdf](http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/f-vdpp-judgment.pdf).

<sup>37</sup> See International Criminal Court, "Elements of Crimes" (2011), Elements 1 and 2 of the Elements of Crimes relating to the crime against humanity of rape under Article 7(1)(g)-1, p 8, and the war crime of rape in international and non-international armed conflicts under art 8(2)(b)(xxii)-1 (p 28) and article 8(2)(e)(vi)-1, pp 36-37. See also International Criminal Court, "Rules of Procedure and Evidence", UN Doc ICC-ASP/1/3 (2002), Rule 70(a), (b) and (c).

<sup>38</sup> Under Article 31(1)

<sup>39</sup> High Court Criminal Sessions Case No. 0039 of 2014

house from where she soon fell asleep. She awoke much later to find herself in a bush about forty meters away from her home with a man lying on top of her having sexual intercourse with her. Justice Stephen Mubiru found that by virtue of her intoxication, the victim was not capable of giving consent thus the act of rape had taken place.

Equally important in understanding consent is that it can be rescinded at anytime. This flows from the fact that since it is given freely, so should the person retain the right to rescind such consent. Thus, there should be no assumption in law or in practice that a victim gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether or not the perpetrator threatened to use or used physical violence.<sup>40</sup>

### **3.2 MARITAL RAPE**

Closely related to the notion of consent is marital rape. The purpose of this subsection is to discuss marital rape in terms of the traditional view that upon marriage, the woman gives her irrevocable consent to the husband to indulge her at whatever occasion for carnal pleasure.<sup>41</sup> Marital rape is often a broader pattern of spousal abuse. It is also a manifestation of sexual violence and in this context treated as a related emergent issue. It has significant public health concern worldwide that has existed for a long time and has remained mostly hidden and understudied because of the nature of the offence - it often takes place in private marital spaces.<sup>42</sup> In this article, marital rape connotes nonconsensual carnal knowledge occurring between spouses within the

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<sup>40</sup> Right to Be Free From Rape; Overview of Legislation and State of Play in Europe and International Human Rights Standards, Available at: <https://www.amnesty.org/en/documents/eur01/9452/2018/en/>

<sup>41</sup> This principle was established by Lord Chief Justice Hale in 1736 when he decided that "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract" See also; Barton JL, The story of Marital Rape. *Law Q Rev.* 1992; 108:36-7.

<sup>42</sup> Mengo, C., Okumu, M., Ombayo, B., Nahar, S., & Small, E. (2019). Marital Rape and HIV Risk in Uganda: The Impact of Women's Empowerment Factors. *Violence Against Women*, 25(15), 1783–1805. <https://doi.org/10.1177/1077801218821444>

institution of marriage.<sup>43</sup> It is a common form of sexual violence, yet underreported because of the belief that sex is a right within marriage. This contemptible practice is mostly perpetrated by men who exercise power through coercion in their marital relationships and usually consider their wives as sexual objects.<sup>44</sup> It is presumed that by virtue of marriage, they (men) have acquired rights to have sex with their wives in the guise of exercising their conjugal rights, regardless of whether they consent or not. Disclosures in this genre of rape, like most sexual offences, are hard to come by because of gender stereotypes in society among other socio-cultural issues.

Marital rape violates women's rights and has a profound effect on the overall social well-being of individual families as it corrodes the very basic unit of society – family. Previously marital rape was given little attention and in the statute books it was neither recognized nor criminalized. In fact under common law, consent was presumed to be given at marriage and as such there was no such a thing as marital rape. However this position came under scrutiny in the case of ***Uganda v Yiga Hamidu and Ors.***<sup>45</sup> Court in this case observed that existence of a valid marriage no longer constituted a good defence against a charge of rape after the promulgation of the Constitution of the Republic of Uganda, 1995. The court expounded on a number of constitutional provisions for instance Article 33.

*Article 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*

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<sup>43</sup> Ibid

<sup>44</sup> Ibid

<sup>45</sup> High Court Criminal Session Case 005 of 2002

Indeed court came to the conclusion that the presumption of consent, even where a man and woman are validly married, were wiped out by the provisions of the 1995 Constitution. Husband and wife enjoy equal rights in marriage. They enjoy equal human dignity. No activity on the party of any of the two which is affront to those rights in relation to the other, can be sustained by a court of law. It thus appears that although not expressly criminalized in penal statutes, marital rape is a crime as expounded by the learned judge in the aforesaid case.

#### **4.0 PROSECUTION OF RAPE CASES**

Rape prosecution is a complex, multistage process, and few cases make it all the way through the criminal justice system.<sup>46</sup> According to the 2018 UBOS statistical abstract, the actual number of crimes prosecuted is way lower than the number of crimes reported. This proves that fewer cases make it to court. How these [legal] system interactions unfold can have profound implications for victims' recovery. When victims reach out for help, they place a great deal of trust in the legal, medical, and mental health systems as they risk disbelief, blame, and refusals of help.<sup>47</sup> However, despite the law and policies being unequivocal on paper, the rape scourge persists. Courts have given progressive judgments to fit the contemporary situation but a lot still needs to be done. Victims often decide not to pursue legal routes as they are aware of the length of the legal process and are unwilling to put themselves through years of uncertainty and secondary traumatisation. The knowledge that one has to remember the minute details of their assault for years to come, for a day in

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<sup>46</sup> Bouffard, J. (2000). Predicting type of sexual assault case closure from victim, suspect and case characteristics. *Journal of Criminal Justice*, 28, 527–542

<sup>47</sup> Rebecca Campbell, *The Psychological Impact of Rape Victims' Experiences With the Legal, Medical, and Mental Health Systems*, Available at; [https://www.researchgate.net/publication/23478485\\_The\\_psychological\\_impact\\_of\\_rape\\_victims?enrichId=rgreq-ba48d4b4ca578494897ec21ec6ad520f-XXX&enrichSource=Y292ZXJQYWdlOzIzNDc4NDg1O0FTOjM4ODU3OTY4MMDM3NDc4NEAxNDY5NjU2MDIzMzcy&el=1\\_x\\_3&\\_esc=publicationCoverPdf](https://www.researchgate.net/publication/23478485_The_psychological_impact_of_rape_victims?enrichId=rgreq-ba48d4b4ca578494897ec21ec6ad520f-XXX&enrichSource=Y292ZXJQYWdlOzIzNDc4NDg1O0FTOjM4ODU3OTY4MMDM3NDc4NEAxNDY5NjU2MDIzMzcy&el=1_x_3&_esc=publicationCoverPdf)

court in several years' time (if they are "lucky" enough to get one at all), while trying to heal and move on, can be a significant barrier for victims.<sup>48</sup>

The main issue under prosecution of sexual violence cases in court relates to corroboration<sup>49</sup>. Corroboration is important not only to prove the act of sexual intercourse but also that the accused committed the offence. Previously, victims' testimonies were treated with suspicion and a higher need to ascertain their veracity was attached. The supreme court of Uganda in this regard has set the mark on the issue of corroboration. In ***Ntambala Fred v Uganda***<sup>50</sup>, Justice Ekirikubinza averred that a conviction can be based on the testimony of the victim of an offence even when he/she is a single witness, since the Evidence Act does not require any particular number of witnesses to prove any fact<sup>51</sup> and "what matters is the quality and not quantity of evidence." The learned judge however emphasized that this must be as true in a sexual assault prosecution as it is in other offences. The learned Judge took cognizance of the fact that historically courts were, as a matter of practice, required to warn themselves of "the danger" of acting on the uncorroborated evidence of a complainant in a sexual assault case.<sup>52</sup> If no such warning was given, the conviction would normally be set aside unless the appellate court was satisfied that there had been no failure of justice. Thus by this judgment, the matter of corroboration was clarified and hence a binding precedent set. The learned Justice reasoned that it is a statistical fact that the majority of victims of sexual assaults are women, therefore the effect of applying the

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<sup>48</sup> Right to Be Free From Rape, Op cit See FN 40

<sup>49</sup> Corroboration is defined as independent evidence which implicates a person accused of a crime by connecting him with it; evidence which confirms in some material particular not only that the crime has been committed but also that the accused committed it. See also; Osborne's Concise Law Dictionary 5<sup>th</sup> Edn at pg 90

<sup>50</sup> Supreme Court of Uganda Criminal Appeal No. 34 of 2015

<sup>51</sup> Evidence Act, Cap 6, section 133

<sup>52</sup> The reasons historically given for the need for corroboration of evidence in a sexual assault prosecution was that women are by nature peculiarly prone to malice and mendacity, and are particularly adept at concealing it. See also; Lillian Tibatemwa-Ekirikubinza, Criminal Law in Uganda: Sexual Assaults and Offences Against Morality (2005) Fountain Publishers, Kampala at pg 381

cautionary rule on corroboration in sexual offences affects way more women than it does men. The Supreme Court in this regard guided that the evidence of a victim in a sexual offence must be treated and evaluated in the same manner as the evidence of a victim of any other offence. As it is in other cases, the test to be applied to such evidence is that it must be cogent. From the above it can be deduced that the law on corroboration is now settled and this goes a long way to ensure that the survivors are not weighed down by an unnecessary burden of proving a crime that often occurs in the covers of the dark and in secluded places.

Equally intriguing is the usual need to prove force or its resistance thereof. In Uganda, from the definition of rape, it can be deduced that the PCA takes a force based definition of rape. This ingredient of force perhaps has roots in distrust of the complainant's credibility which creates an insistence on evidence of resistance.<sup>53</sup> In fact resistance also points to the non consensual nature of the sexual activity since often victims meet their aggressors with some gust of force. On this very issue, the European Court on Human Rights weighed in by establishing in its landmark ruling that lack of violence does not mean consent. It averred that the decisive factor to establish the crime of rape was the lack of consent rather than proof of force and resistance of the survivor.<sup>54</sup> It went on to give the reasoning behind this holding stating that “any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished thus jeopardizing the effective protection of the individual’s sexual autonomy”. This article agrees with this reasoning because force has many faces and rape does not at all times inherently involve aberrant physical brutality.

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<sup>53</sup> Aviva Orenstein, *Special Issues Raised by Rape Trial*, 76 *Fordham L. Rev.* 1585 (2007). Available at: <https://ir.lawnet.fordham.edu/flr/vol76/iss3/11>

<sup>54</sup> *M.C. v Bulgaria*, No. 39279/98, ECHR 2203XII



Therefore, in courts of law, for one to successfully prove the offence of rape, the following ingredients must be satisfied beyond reasonable doubt.<sup>55</sup>

- i) That there was unlawful Sexual Intercourse with the complainant. There has to be evidence of sexual intercourse between a male and female in which there is at least some slight penetration of the woman's vagina by the man's penis<sup>56</sup> and/or other object.
- ii) That the complainant did not consent to that Sexual Intercourse. Proof of lack of consent is normally established by the victim's evidence, medical evidence and any other cogent evidence
- iii) That it was the accused who had the unlawful Sexual Intercourse with the complainant. Ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime<sup>57</sup>

In conclusion about the prosecution of rape cases, court looks into the adduced evidence and the cogent testimony of the single witness tested, against the ingredients of the offence and the accused is convicted if the evidence meets the criminal standard of proof [beyond reasonable doubt] or exonerated if such evidence comes short. Thus prosecution of rape cases illustrate how criminal law interacts with particulars of the crime so as to administer much sought after justice to the victim/survivor of rape.

## **5.0 CONCLUSION AND RECOMMENDATIONS**

Criminal law should identify rape and other sexual violence as crimes against the physical and mental integrity, as well as sexual autonomy of the victim, rather than just as crimes against morality, public decency or honour.<sup>58</sup> By

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<sup>55</sup> Woolmington v DPP (1935) AC 462; Miller versus Minister of Pensions [1947] 2 All ER 372

<sup>56</sup> Uganda v Kizito Rogers High court Criminal Sessions Case No. 0092 of 2016

<sup>57</sup> Ibid

<sup>58</sup> See CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN. Doc. CEDAW/C/CG/35, 2017, para 33; See also, Handbook for Legislation on Violence against Women. United Nations Entity for Gender Equality and the Empowerment of Women; 2012, p 24,

constructing rape within the discourse of morality, the Penal Code places emphasis on a subjective ethical notion while pushing the violent aspects of the crime to the margins.<sup>59</sup> Criminal law should enable the effective prosecution of any perpetrator for acts of sexual violence, and there should be no exemptions for certain perpetrators (such as a marital rape exemption which assumes that married women automatically consent to sexual contact with their husbands at all times and under all circumstances).<sup>60</sup> Further, the definition of rape should include a broad range of coercive circumstances where consent cannot be freely given, while outside such circumstances, it should require proof by the accused, of steps taken to ascertain whether the complainant/survivor was consenting.<sup>61</sup> The existing provisions in the Penal Code fail to address many of the “grey areas” inherent in sexual relations, thereby ignoring the many complicated aspects of sex. Female and male survivors of rape should be provided with prompt, wide-ranging and confidential services, including medical and psychosocial support, legal assistance, and social reintegration and rehabilitation services, in order to enhance and speed up their recovery. In Uganda there has been some progress in efforts to support survivors; however the overall lack of comprehensive support services for victims of Sexual

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available at: [www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women](http://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women)

<sup>59</sup> Sylvia Tamale, *Women’s Sexuality as a Site of Control & Resistance: Views on the African Context*, Available at: <https://www.google.com/url?sa=t&source=web&rct=j&url=https://mifumi.org/wp-content/uploads/2017/02/MIFUMI-Bride-Price-Conference-2004-Women%25E2%2580%2599s-Sexuality-as-a-Site-of-Control-Resistance-Views-on-the-African-Context-Sylvia-Tamale.pdf&ved=2ahUKEWjUqOWiyO7mAhWSh1wKH7AvUQFjAAegQIARAB&usg=AOvVaw0mnS2aWeN5yH7KBThdFC4r>

<sup>60</sup> See *Handbook for Legislation on Violence against Women*. United Nations Entity for Gender Equality and the Empowerment of Women; 2012, p 24, available at: [www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women](http://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women); See also: *SW v United Kingdom*, Decision on merits, App No. 20166/92, A/355-B, IHR 2596 (ECHR 1995), 22 November 1995, European Court of Human Rights, para 44. See also *PACE Resolution 1691* (2009), para 5.4, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17784&lang=en>.

<sup>61</sup> *Vertido v The Philippines*, CEDAW Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), para 8.9(b)(ii)

Violence Crimes like rape remains a serious weakness, especially in rural and remote areas where most of these crimes take place.<sup>62</sup>

Awareness campaigns about this endemic crime must be intensified so as to counter and ameliorate the impact of gender stereo types and other impediments that discourage victims/survivors from coming up against their aggressors. This is so because many women fear coming forward about their experiences because sexuality is highly stigmatized within their communities. Women are taught both directly and indirectly that they should keep quiet about issues surrounding their own sexual behavior and health.<sup>63</sup> By this measure, it will go a long way to preserving family which is extremely important as it is the cornerstone for production and reproduction of society and all its norms.<sup>64</sup>

By way of conclusion, rape in Uganda is an emergent issue that needs immediate attention. Perpetrators of this crime must be brought to book and survivors should be given the necessary support. That way, this egregious attack on women and their bodies will be kept in check and all spaces will be safe for women to fully express themselves without fear of being raped or sexually assaulted.

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<sup>63</sup> Holmes, Caren, "The Justice-Seeking Power of Women who Experience Sexual Violence in Uganda" (2015).Independent Study Project (ISP) Collection. 2173. Available at: [https://digitalcollections.sit.edu/isp\\_collection/2173](https://digitalcollections.sit.edu/isp_collection/2173)

<sup>64</sup> Politics of putting asunder, The Family, Law and Divorce in Uganda (2017) Fountain Publishers, Kampala at pg 10

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