

UGANDA / JUDGMENT

Uganda v Kasibante & Another (Session Case 16 of 2022) [2023] UGHCICD 7 (20 November 2023) [2023] UGHICD 7

COURT

HC: International Crimes Division (Uganda)

BEFORE

Okalany, J

CASE / FILE NUMBER

Session Case 16 of 2022

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

INTERNATIONAL CRIMES DIVISION

HCT-00-ICD-SC-0016-2022

UGANDA :: PROSECUTOR

VERSUS

A1 KASIBANTE DAVID

A2 NAMAKULA MARIAM :: ACCUSED

BEFORE: HON JUSTICE SUSAN OKALANY

CONFIRMATION OF CHARGES RULING

BACKGROUND

1. In count 1 of the indictment, Kasibante David alias Mustafa (A1) and Namakula Mariam (A2) are jointly charged with ***Aggravated Trafficking in children contrary to Section 3(1) (a) and 5(a) of Prevention of Trafficking in Persons Act, (PTIPA) 2009*** and in count 2 of the indictment, A1 is charged with ***Aggravated Defilement contrary to Section 129(3) and 4(a) of the Penal Code Act Cap. 120 as amended.***

2. It is alleged in count 1 that between December 2018 and April 2021 at Seeta, in Mukono District and at Nanfuka Zone-Nateete, Rubaga Division in Kampala District, the accused persons recruited or transferred or harboured or received Kisakye Betty (herein after referred to as the victim), a girl aged 16 years, by means of deception or abuse of power or position of vulnerability, for the purpose of sexual exploitation. It is also alleged that A1 in the same period and places as aforementioned, performed a sexual act with the victim.
3. The summary of the evidence on record as well as the evidence disclosed by the prosecution to the accused and to this court is that A1 and A2 are residents of Nanfuka Zone-Nateete, Rubaga Division in Kampala District and Seeta in Mukono District respectively.
4. In 2017, the accused met the victim and befriended her. That same year, the victim disappeared from A2's home where she used to live and entered into a purported marriage with A1. A2, who is also her aunt, reported the victim's disappearance to the area Local Council 1 (LC1) chairperson, but never followed up the matter. The victim subsequently got pregnant but her baby died at birth.
5. A1 having observed that the victim's health was deteriorating after giving birth, called A2 who picked the victim from him and took her to her home for treatment. When the victim recovered, A1 with approval of A2, took the victim back to his home having allegedly given A2 three loaves of bread, three kilogrammes of sugar, two bars of soap and three hundred thousand shillings.
6. After a short while, the victim informed A2 that she was returning home as her intended job of being a house maid had failed. However, the victim did not return home and in April 2021, A2 learnt that she was working and living in Nateete since A1 chased her away from his home. In the same period, A1 reported a case of theft of his money totalling to 1,400,000/= by the victim. He subsequently led police to the victim's house to arrest her. When the police went to arrest the victim, they found A.2 at the same premises as she had gone to visit the victim.
7. A1 was arrested and upon interrogation, he informed police that A2 had allowed him to stay with the victim after he had given her some items and cash. A2 was also arrested and both were charged accordingly. A1 was examined on Police Form 24A and found to be an adult of normal mental status. The victim was also medically examined and it was found that she was 16 years of age with a ruptured hymen.

LIST OF EXHIBITS

1. The following documents were identified as documents that the prosecution intends to adduce in evidence:
2. PID1, which is the complainant's statement made in May 2021 by Deputy Sergeant 31833, Alikoba Sarah and which is an account of how she learnt about the case before the court;

3. PID2, which is the victim's statement made in April 2021 narrating the facts that led to this case;
4. PID3, which is the statement of the investigating officer - No. 62361 D/C Mbabazi Adrine made in May 2021 recounting how she received instructions from D/Sgt Alikoba Sarah to investigate this case and the steps she took thereafter;
5. PID4(a) and PID4(b), which are A1's plain statement and charge and caution statement made in April 2021 narrating his side of the story concerning the charges brought against him;
6. PID5, which is A2's plain statement made in April 2021 narrating what she knows about this case;
7. PID6, which is a sketch plan of the crime scene drawn in April 2021 by D/C Mbabazi Adrine, the investigating officer attached to this matter;
8. PID7, which is Police Form 3A dated 28th April 2021 prepared by Bwanika Ahmed, the medical practitioner who examined the victim; and
9. PID8, which is Police Form 24A dated 18th November 2021 prepared by the same Bwanika Ahmed, who also examined the accused.

REPRESENTATION

1. Mr. Richard Birivumbuka, Chief State Attorney was prosecution counsel, while the accused was represented by Mr. Geoffrey Turyamusiima on State Brief.

BURDEN AND STANDARD OF PROOF

1. It is trite law that the prosecution bears the burden to prove all the elements of the offence charged, except in specific offences, which are not charged in this case. As I have already opined in my previous decisions, particularly in **Uganda Vs Miria Rwigambwa HCT-00-ICD-SC-0006-2021,** and **Uganda Vs Nsungwa Rose Karamagi HCT-00-ICD-SC-0007-2021**, the standard of proof in a pre-trial hearing is not stipulated by the ICD Rules or in the High Court **(International Crimes Division) Practice Directions, 2011**, which provide for trial procedure in the ICD and which should have provided for the standard that the prosecution must meet in its evidence at the pre-trial hearing, to make the indictment confirmable.
2. I have decided in those cases that the court would in such circumstances apply the ICC standard, which is the standard of substantial grounds to believe that the accused committed the crimes charged, as provided for by the Rome Statute in Article 61(7). Uganda is a party to the Rome Statute and has undertaken considerable steps to fulfil its obligations therein, including by domesticating the Rome Statute and establishing this court to try international and other serious crimes of a national and transnational nature. The application of relevant provisions of the Rome Statute and of the ICC Rules of Procedure and Evidence *mutatis mutandis*, by this Honourable court, in order to fill procedural gaps in the laws establishing this court, is within the powers of this court, since Uganda is bound by all

its obligations under the Rome Statute.

3. The standard of substantial grounds to believe is lower than the standard of a prima facie case, used by our courts to determine whether an accused person should offer a defence to an indictment or not, when the prosecution closes its case. I think that applying the Rome Statute standard to this pre-trial will not thus prejudice the rights of the accused or the prosecution, if the charges are confirmed, as both parties will still have the chance to present their respective cases at the trial of the accused. As for the prosecution, if the charges are dismissed for failing to meet the pre-trial standard of proof, the DPP has the chance, considering that a dismissal at this stage is not an acquittal, of directing the police to conduct further investigations and may present the case again to this court for pre-trial on newly obtained evidence.
4. The concept of “substantial grounds to believe”, was defined in the judgement of the European Court of Human Rights (ECHR) of 7th July 1987 in *Soering v. United Kingdom*, Application No. 14038/88 (cited in the case of *The Prosecutor Vs Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tEN 14-05-2007 1/157 SL PT) as meaning that “substantial grounds have been shown for believing”. The joint dissenting opinion appended to the judgement in *Mamatkulov and Askarov v. Turkey*, of 4th February 2005, (Applications Nos. 46827/99 and 46951/99) by Judges Bratza, Bonello and Hedigan was quoted, in which “substantial grounds to believe” were defined as “strong grounds for believing”.
5. The ICC Pre-trial Chamber II in its decision of 9th December 2021 on the confirmation of charges against Mahamat Said Abdel Kani, ICC-01/14-01/21, under paragraph 38 held that the evidentiary standard applicable at this stage of the proceedings requires the existence of substantial grounds to believe that the person committed the crimes charged. This is a lower standard than that required at trial, and is met as soon as the prosecution offers concrete and tangible proof demonstrating a clear line of reasoning underpinning the specific allegations. [Emphasis mine]
6. Furthermore, while evaluating evidence presented before it, the role of the court was stated in the case of Mahamat Said Abdel Kani, supra, under paragraph 40, as follows: “to avoid any pre-determination of issues or pre-adjudication regarding the probative value of evidence, the decision must only address what the Chamber considers necessary and sufficient for its determination on the charges – namely, whether there is sufficient evidence to establish substantial grounds to believe that the accused committed the crimes charged and therefore that the case brought by the Prosecution warrants a trial.”
7. The Pre-trial chamber II further stated that the specific and limited function of the confirmation proceedings also calls for a style and structure of the decision under Article 61(7) of the Statute which is as simple and straightforward as possible; this also with a view to meaningfully implement the principle that the confirmation hearing is not, nor should be seen or become, a ‘mini-trial’ or ‘a trial before the trial.’ (See paragraph 42 of the Mahamat Said Abdel Kani decision).

8. Consequently, I must determine whether the evidence disclosed by the prosecution in this case is sufficiently strong to move me to confirm the charges and present the accused to the Trial Court for the hearing of the said evidence. Clearly, the standard of **substantial grounds to believe** is a lesser one than the standard of **prima facie case** that is required by courts to put an accused person to his/her defence.

FINAL SUBMISSIONS ON CONFIRMATION OF CHARGES

1. State counsel filed his submissions in support of confirmation of the charges on 19th October 2023. On 20th October 2023, defence counsel prayed for one week's adjournment to allow him submit his reply to the prosecution's submissions. Court instructed the defence to file its reply on 30th October 2023, and the prosecution to file its rejoinder if any, by 6th November 2023. Defence counsel did not file its reply. Regardless of that fact, this court will proceed to pronounce itself on the charges.

ARGUMENTS FOR THE STATE

1. Regarding the first charge, Mr. Richard Birivumbuka submitted that the elements of the offence of aggravated trafficking in persons are:
 2. The fact of transportation or transfer or harbouring, confinement or receipt of a victim
 3. The use of the means of deception or force;
 4. The fact that the purpose of the above acts was sexual exploitation;
 5. The fact that victim is a child; and
 6. The participation of the accused persons.
7. Concerning the first element of transportation or transfer or harbouring or confinement or receipt of the victim, counsel submitted that the disclosed evidence in exhibits PID1, PID2, PID3, PID4(a) and (b) and PID5 establishes the element.
8. On the ingredients of deception or use of force and the purpose of sexual exploitation, counsel submitted that the disclosed evidence in exhibits PID1, PID2, PID3, PID4(a) and (b) and PID5 adequately proves those elements to the required standard.
9. Regarding the age of the victim, Mr. Richard Birivumbuka submitted that exhibits PID1, PID2, PID3, PID7 show that the victim was a child below 18 years at the time of the alleged crimes.
10. On the element of participation of the accused, counsel submitted that proof of the same is disclosed in exhibits PID1, PID2, PID3, PID4(a) and (b) and PID5.
11. Mr. Richard Birivumbuka then submitted that substantial grounds to believe that the offence of aggravated trafficking in persons was committed by the accused persons have been established by the prosecution and he prayed that the said charge is confirmed.

12. Regarding the 2nd charge of Aggravated Defilement contrary to ***Section 129(3) and 4(a) of the Penal Code Act***, Mr. Richard Birivumbuka submitted that the following are the elements of the offence that must be established to the required standard:
13. The fact that the victim is a child below the age of 14 years;
14. The fact that a sexual act with the victim and
15. The fact that the accused participated in the commission of the sexual act.
16. On the element of age, Mr. Birivumbuka submitted that the disclosed evidence in exhibits PID1, PID2, PID3, PID5 and PID7 shows that the victim was below 18 years of age at the time of the offence.
17. In respect of the ingredient of a sexual act with the victim, Mr Birivumbuka submitted that prosecution evidence in exhibits PID1, PID2, PID3, PID4(a) and (b) and PID5 and PID7 proves satisfactorily that a sexual act was performed with the victim.
18. And for participation of the accused, state counsel submitted that disclosed evidence in exhibits PID1, PID2, PID3, PID4(a) and (b) and PID5 established the fact that the accused participated in the commission of the sexual act alleged.

DETERMINATION

COUNT 1: Aggravated Trafficking in Children Contrary to Section 3(1)(a) of the PTIPA, 2009

1. ***Section 3(1) of the PTIPA*** provides that a person commits an offence who:
2. ***“recruits, transports, transfers, harbours or receives a person, by means* of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation.”***
3. ***Section 5 (a) of the PTIPA, 2009*** which is the second provision of the law under which the accused is charged, provides that a person commits the offence of aggravated trafficking in children if he or she does any of the acts in ***Section 3*** in relation to a child.
4. ***Section 4(a) of the PTIPA, 2009*** provides that a person commits the offence of aggravated trafficking where the victim of the trafficking is a child.
5. ***Section 2 (a) of the PTIPA, 2009*** defines a child as a person below the age of 18 years.
6. In this case before me, the following elements to be established by the prosecution to prove substantial grounds to believe that the accused persons committed the crime charged are:
7. The act of recruiting, or transporting, or transporting, or transferring or harbouring or receiving the victim;

8. The means of deception or abuse of power or position of vulnerability of the victim;
9. The purpose of exploitation of the victim;
10. The aggravated factor of the victim being a child; and,
11. The participation of the accused in the commission of any of the acts or means or purpose of trafficking complained of.
12. The Court of Appeal in upholding the conviction of the accused in the case of ***Umutoni v Uganda, Criminal Appeal 855/2014 (2019) UGCA 147*** confirmed that, where the charge is aggravated trafficking in persons under ***Section 3*** and either ***Section 4 or 5, of the PTIPA,*** the offence has five major elements: the act, the means, and the purpose set out in ***Section 3***; the participation of the accused; and the relevant aggravating factor from either **Section 4** or ***Section 5 of the Act***.
13. Regarding the first element, it can be established from the victim and A1's plain and charge and caution statements that A1 received and harboured the victim. I do note that from the statement of the victim and A1's statements, the victim on her own accord left A2's home to cohabit with A1. This is however irrelevant, as ***Section 3(4) of the PTIPA*** provides that the consent of the victim of trafficking or if a child, the consent of their parents or guardians to the acts of exploitation shall not be relevant.
14. As for A2, the victim's statement and A1's plain and charge and caution statements show that A2 transferred the victim into the custody of A1. I think that this element is sufficiently established for the purpose of confirming the said the charge.
15. Concerning the second element of the means of deception or abuse of power or of position of vulnerability having been used to recruit, or transport, or transfer, or harbour or receive the victim, this court takes note of the submissions of the prosecution, but shall not delve into them because of the provisions of ***Section 3(3) of the PTIPA, 2009***, which stipulate that the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall constitute "trafficking in persons" ***even if this does not involve any of the means*** set forth in ***Section 3(1)*** of that Act. Having found that there is sufficient evidence to establish substantial grounds to believe that the victim was a child, there is no need to adduce evidence to prove the element of the means of deception or abuse of power or position of vulnerability of the victim.
16. This takes me to the element of the victim's age. In the case of ***Uganda v. Kagoro Godfrey HC Criminal Session Case No. 141 of 2002***, it was held that age can be proved by the production of one's birth certificate, testimony of the parents or the court's own observation by common sense assessment. It is also trite law that age can be proved by medical evidence. According to PID7 (Police Form 3A), the victim was 16 years old at the time when she was examined, which would ideally place her at the age of 12 years when she started living with A1 in 2017. It is my considered view therefore that the prosecution has adduced sufficient evidence to establish substantial grounds to believe that that victim was a child.

17. As for the element of the purpose of trafficking the victim, which in this case is sexual exploitation, I think that the statements adduced by the prosecution establish it to the required standard. Sexual exploitation is defined under ***Section 2(o) of the PTIPA 2009*** as:

“the use of a person in prostitution, sex tourism, pornography, the production of pornographic materials, or* *the use of a person for sexual intercourse* *or other lascivious conduct.”

1. According to the statements of the victim, A1 and A2, the victim was cohabiting with A1 and conceived a baby who died at birth. The prosecution has adduced sufficient evidence to prove this element to the required standard.
2. By virtue of my discussion above, I find that there are substantial grounds to believe that the accused persons committed the offence of aggravated trafficking in persons as they have been charged.

Count 2: Aggravated Defilement Contrary to Section 129(3) and 4(a) of the Penal Code Act, Cap 120.

1. I agree with the ingredients of this offence as listed by state counsel, which are:
2. The fact that the victim was below 14 years of age
3. The fact that there was a sexual act performed with the victim.
4. The fact that it was the accused who committed the offence.
5. The evidence on the age of the victim has already been discussed above. The same is true regarding the performance of a sexual act with the victim, which evidence I have examined in my discussion on the element of sexual exploitation under the first count. Similarly, the element of participation of the accused in the commission of aggravated defilement has been covered in my consideration of the evidence on his participation in the commission of count 1. Consequently, I find that the prosecution has adduced sufficient evidence to establish substantial grounds to believe that the accused committed the offence of aggravated defilement contrary to ***Section 129(3) and 4(a) of the Penal Code Act, Cap 120.***
6. In the result, I confirm both count 1 and count 2 of the indictment.

I so order.

Susan Okalany

JUDGE

20/11/2023

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