

UGANDA / JUDGMENT

Uganda v Orwothwun (Criminal Sessions Case No. 0052 of 2017)

[2017] UGHCCRD 416 (7 August 2017)

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COURT

HC: Criminal Division (Uganda)

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL SESSIONS CASE No. 0052 OF 2017

UGANDA PROSECUTOR

VERSUS

ORWOTHWUN MARTIN ACCUSED

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused is charged with two counts of Aggravated Trafficking in Children c/s 5 (f) of *The* *Prevention of Trafficking in Persons Act*. It is alleged that the accused on the 25th day of April 2013 at Nebbi Hill, in Nebbi District, used in Count 1; Sadeni Mungubarak, and in Count 2; Anirwoth Alice, both children, in witchcraft, rituals and related practices.

The events leading to the prosecution of the accused as narrated by the prosecution witnesses are briefly that on the fateful day at around 10.00 am, the accused together with two other adults, a male and female, was seen proceeding to Nebbi Hill in the company of two children, a girl and boy. Towards 2.00 pm, the accused was seen standing on top of one of the tallest rocks on that hill, wearing a white tunic, with his hands spread out. Members of the public became concerned as to what the accused was doing with the children and since at the time there were a number of incidents of children who had gone missing in what were suspected to be human sacrifice, they became suspicious of the activities of the accused. A mob began to assemble with the intention of

storming the hill. P. W.2. Ms. Ongiertho Gertrude, a Social worker who happened to be in the area at the time, picked her mobile phone and called P. W.3 No. 20297 Sgt. Otto Ben Francis, the then Community Liason Officer at Nebbi Police Station.

When P. W.3 arrived, he together with the mob that had gathered ascended the hill. When they got to the top, they found the girl whom they came to know as Anirwoth Alice and a woman whom they came to know as Pimer Charity outside a dark cave formed by two adjacent rocks. Anirwoth Alice was holding a shirt. They called the accused out of that dark cave from where he emerged with another man whom they came to know as Adam and a boy whom they came to know as Sadeni Mungubarak. The boy was bare chest and smeared with some white substance all over his body. They also recovered some of the paraphernalia the two adults had been using inside the cave. They took all four people to Nebbi Police Station where inquires revealed Adam was a patient of the accused and Pimer Charity had been engaged to prepare them food during the rituals. the rest were released and the accused detained. He denied the charges.

Since the accused in this case pleaded not guilty, like in all criminal cases the prosecution has the burden of proving the case against him beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See **Ssekitoileko v. Uganda [1967] EA 531**). The accused does not have any obligation to prove his innocence. By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt before it can secure his conviction. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see **Miller v. Minister of Pensions [1947] 2 ALL ER 372**).

For the accused to be convicted of Aggravated Trafficking in Children c/s 5 (f) of **The* *Prevention of Trafficking in Persons Act**, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. That the victim in each count was a child.
2. The victims were used or any of their body parts was used in witchcraft or harmful rituals and related harmful human practices.
3. That it is the accused who used the victims or any body parts of theirs in such practices.

According to section 2 (a) of **The* *Prevention of Trafficking in Persons Act**, “child” means a person below the age of 18 years. Consequently, the first ingredient of the offence requires proof of the fact that at the time of the offence, the named victims were below the age of 18 years. The most reliable way of proving the age of a child is by the production of her birth certificate, followed by the testimony of the parents. It has however been held that other ways of proving the age of a child can be equally conclusive such as the court’s own observation and common sense assessment of the age of the child (See **Uganda v. Kagoro Godfrey H. C. Crim. Session Case No.*

141 of 2002).*

In the instant case, none of the victims testified, none of their parents testified or any other person familiar with the circumstances of their birth. The prosecution instead relied on the observation and common sense assessment of their age by three witnesses; P. W.2. Ms. Ongiertho Gertrude, a Social worker in whose opinion the victim in Count 1, Sadeni Mungubarak, was a boy aged about ten years old while the victim in Count 2, Anirwoth Alice was a girl aged about 17 years old. According to P. W.3 No. 20297 Sgt. Otto Ben Francis, the victim in Count 1, Sadeni Mungubarak, was a boy aged about ten years old. He did not express an opinion about the victim in Count 2. According to P. W.4. No. 202645 D/Cpl Opor Nicholas, the victim in Count 1, Sadeni Mungubarak, was a boy aged about ten years old while the victim in Count 2, Anirwoth Alice was a girl aged about 17 years old. Counsel for the accused contested this element.

The question of age can be a matter of fact as well as a matter of opinion. Section 59 of *The evidence Act* requires that oral evidence must, in all cases whatever, be direct; that is to say if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he or she heard it; if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he or she perceived it by that sense or in that manner. If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

In the instant case, the testimony of P. W.2, P. W.3 and P. W.4 upon whose testimony the prosecution relies to prove the fact of age, is opinion evidence. As one of the exceptions to the rules against hearsay, under section 43 of *The Evidence Act*, when the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to the identity of handwriting or finger impressions, are relevant facts. Such persons are called experts. The question of age may be a matter of science depending on the method used in that age determination. In such cases, persons specially skilled in age determination may be called as experts. Expertise may be acquired by formal education or training or informally through practice and prolonged exposure.

In this case it is contended that being adults, P. W.2, P. W.3 and P. W.4 have the experience and expertise to rely on their observation and common sense assessment to form an opinion as to the age of the two victims. Whereas such opinion may, if considered alongside other evidence be sufficient to support a finding on age, in a trial requiring proof beyond reasonable doubt, I am hesitant to rely on such evidence standing alone, most especially since the grounds upon which they held that opinion were not disclosed in their testimony. Therefore in agreement with the assessors, I find that this ingredient has not been proved beyond reasonable doubt.

The second ingredient required for establishing this offence is proof that the victims were used, or any body parts of theirs were used in witchcraft, harmful rituals and related harmful human practices. According to section 1 of *The Witchcraft Act*, Cap 124, “witchcraft” does not include

bona fide spirit worship or the bona fide manufacture, supply or sale of native medicines. Article 37 of *The Constitution of the Republic of Uganda, 1995*, guarantees to every citizen, the right as applicable, to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others. On the other hand, Article 126 (1) of *The Constitution of the Republic of Uganda, 1995* requires justice to be administered in conformity with law and with the values, norms and aspirations of the people.

What is proscribed by section 5 (f) of *The* *Prevention of Trafficking in Persons Act*, is the practice of witchcraft, harmful rituals and related harmful human practices. It does not prohibit bona fide spirit worship or the bona fide manufacture, supply, sale or the practice of native medicine. The latter is protected by Article 37 of *The Constitution of the Republic of Uganda, 1995*. In the instant case, it was incumbent upon the prosecution to prove that the accused at the time of arrest, was engaged in witchcraft, harmful rituals and related harmful human practices and involved the victims or any of their body parts, in such rituals or practices.

Witchcraft is a complex concept that varies culturally and at societal level and therefore, it is difficult to define with precision. It is not defined under either *The* *Prevention of Trafficking in Persons Act* or *The Witchcraft Act* but it can be deduced from the letter and spirit of the latter Act as including threatening others, their livestock or property with death or harm by supernatural means. It entails magical beliefs, practices and the use of magical or supernatural powers obtained from an evil source and in an evil way, such as sorcery. Witchcraft is generally evil and often associated with the devil and devil worship. It is therefore distinct from bona fide spirit worship, bona fide manufacture of native medicine, supply or sale of native medicine or the practice of native medicine.

Under *The Witchcraft Act*, practicing witchcraft may be inferred from being in possession of articles which by common repute or belief are used for the purposes of witchcraft other than bona fide for scientific purposes or as a curio. According to section 5 of that Act, evidence may be adduced to show the reputation of a person as a witch or to establish that by common repute any substance, means, process or ceremony proved to have been administered, used or performed, or attempted or caused or advised to be administered, used or performed, is commonly administered, used or performed in the practice of witchcraft.

It must be proved that the child or the body parts of the child were subjected to rituals, i.e. an established or prescribed procedure or order of performing a ceremony characteristic of witchcraft or related harmful human practices. Once it is proved that what the children were engaged in was witchcraft or harmful rituals and related harmful human practices that were performed in accordance with an established or prescribed procedure characteristic of witchcraft, the consent of the victim or the consent of his or her parents or guardian to the acts is not relevant.

In the instant case, the accused denied having engaged in any witchcraft or harmful rituals and related practices. He admitted only having engaged in the practice of native medicine with a one Adam as his patient. To refute this defence, the prosecution relied on the testimony of P. W.2. Ms.

Ongiertho Gertrude, a Social worker who testified that when the accused came out of the cave, the police recovered some paraphernalia in a bucket whose contents she did not see. According to P. W.3 No. 20297 Sgt. Otto Ben Francis, when the accused emerged from the cave, he was carrying an already slaughtered white chicken while the victim in Count 1, Sadeni Mungubarak, came out of the cave bare chest and his body was smeared with a white substance. He recovered some herbs in a bucket and the tail of an animal fixed on a stick (in the form of a fly whisk "Olesu"). According to P. W.4. No. 202645 D/Cpl Opor Nicholas, when he visited the scene the following day, he recovered additional paraphernalia including; a fruit known as "Omandi," a shaker called "sashi," a skin of "Loso" (a wild cat) with two hollow pieces of wood attached to it. The two pieces of wood are known as "sibira." There were herbs in powder form in a container, there were fresh leaves, two cow tails, an empty jerrycan for fetching water, the knife which was used to slaughter the chicken, an "Ogwede" (a traditional saucer), a glass, a rosary-like item, a piece of candle, razor blade, a shell, chicken feathers, a coin and other items.

The distinction between witchcraft or the determination of common repute of a substance, means, process or ceremonies commonly administered, used or performed in the practice of witchcraft on the one hand and the practice of native medicine on the other, may be a matter of science or art. Persons specially skilled in that determination could have been called as experts. Since none was called, the evidence adduced in court on its own is devoid of proof that the items tendered in evidence are used in the practice of witchcraft. Apart from the fact that the accused emerged from the cave with an already slaughtered chicken and that Sadeni Mungubarak was bare chest and his body was smeared with a white substance, there is absolutely no evidence that those rituals are harmful or that by common repute, any of the paraphernalia recovered, or the white substance seen on Sadeni's body, is used or the slaughtered chicken is a ritual peculiarly performed, in the practice of witchcraft. Therefore in agreement with the opinion of the assessors, I find that this ingredient has not been proved beyond reasonable doubt.

Lastly, the prosecution was required to prove that it is the accused who used the victims or any body parts of theirs in such practices. This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime not as a mere spectator but as the perpetrator of the offences. The accused denied having engaged in any witchcraft or rituals and related practices. He admitted only having engaged in the practice of native medicine with a one Adam as his patient and that he did not involve any child in that practice as alleged.

To refute this defence, the prosecution relied on the testimony of P. W.2. who testified that the victim in Count 1 was found with the accused inside a dark cave at the top of the hill and he came out bare chest while his body was smeared with a white substance. The victim in Count 2 was standing outside the cave holding the shirt belonging to Sadeni Mungubarak. This is corroborated by P. W.3, who testified that when the victim in Count 1, Sadeni Mungubarak, came out of the cave, he was bare chest and his body was smeared with a white substance while the victim in Count 2 was standing outside the cave.

Although the defence of the accused against this element lacks credibility, I find that since the age of the victims has not been proved and the prosecution has failed to prove that the accused engaged in any witchcraft or harmful rituals and related practices, whether or not Sadeni Mungubarak or Anirwoth Alice were participants in whatever he was doing, becomes moot.

In the final result, I find that the prosecution has failed to prove any of essential ingredients of the offence beyond reasonable doubt and I hereby find the accused not guilty and consequently acquit him of the offence of Aggravated Trafficking in Children c/s 5 (f) of *The* *Prevention of Trafficking in Persons Act* on both counts. He should be set free forthwith unless he is being held in custody for other lawful reason.

Dated at Arua this 7th day of August, 2017.

Stephen Mubiru

Judge.

7th August 2017

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