IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY, ABUJA HOLDEN AT ABUJA

ON TUESDAY, 13TH DAY OF OCTOBER, 2020

BEFORE HON. JUSTICE SYLVANUS C. ORIJI

CHARGE NO. FCT/HC/CR/78/2018

BETWEEN

FEDERAL REPUBLIC OF NIGERIA --- COMPLAINANT

AND

IBRAHIM HARUNA --- DEFENDANT

RULING

On 6/2/2018, the defendant, Ibrahim Haruna, was arraigned on the 1-count charge filed against him on 11/2/2018. The defendant pleaded not guilty to the charge. The charge reads:

> *That you Ibrahim Haruna [M], 50 years old, of JabiMasalashi, Abuja, on or about the 25th of September, 2017 at Masalashi by Chief Palace, Opposite GidanWanka, Jabi, Abuja, within the jurisdiction of this Honourable Court, intentionally penetrated the vagina of Aisha Ibrahim [F], 9 years old, of ObafemiOwolowo [sic] Way, by Chief Palace, with your penis, by means of force and thereby committed an offence punishable under section 1 [2] of the Violence Against Persons [Prohibition] Act, 2015.*

In proof of the charge, the prosecution called 2 witnesses: Aisha Mohammed [PW1]; and Ismaila Kura [PW2].

Aisha Mohammed [the PW1] testified on 26/6/2018; she was 9 years old then. Before her testimony, I remarked *inter alia*:

> *"Pursuant to section 209 of the Evidence Act, the Court has a duty to satisfy itself that the child is possessed with sufficient intelligence to justify the reception of her evidence and understands the duty of speaking the truth."*

The Court put some questions to Aisha Mohammed, which she answered as shown in the record of proceedings. Thereafter, I stated that: *"In the light of the above questions and answers, I am satisfied that PW1, Aisha Mohammed, possesses sufficient intelligence to justify the reception of her evidence. I am also satisfied that she understands the duty of speaking the truth. She may proceed with her evidence without oath or affirmation in accordance with section 209[1] of the Evidence Act."*

The evidence of Aisha Mohammed is that she was in her house and the defendant called her to come to his shop. The name of the defendant is Tailor. At the time the defendant called her, she was on her way to her mother's shop where she [her mother] was frying *"akara"*. When she went to the shop of the defendant, he bought her tea and bread. After the tea and bread, she was in their house when the defendant called her again. When she went to the defendant's house, she met him in the house. When she left his house, the first person she met was her elder sister. There was a man who was also in

their house. She was in their house and her father came and took her to his office. From his office, he took her home. Apart from her father's office, she did not go to any other place.

In his evidence, Ismaila Kura [the PW2] stated that he works with NAPTIP [National Agency for the Prohibition of Trafficking in Persons]. His duties include investigation of human trafficking cases, child abuse and other related issues. In September 2017, a letter of complaint was written to the Agency alleging that the defendant defiled Aisha Ibrahim at Jabi, Abuja. He was assigned to investigate the matter. The defendant was arrested and the victim was rescued. According to the victim, she was outside when Yahaya saw her and requested her to help him buy *"akara"*. The victim helped Yahaya to buy *"akara"*. When she took the *"akara"* to the defendant - who has a tailoring shop - he asked her to bring the *"akara"* into the shop. Yahaya lured the victim to lie down on the bench. He started touching her breast. He removed her pant and had sex with her. When he was done with her, he used pieces of rag to clean her up.

PW2 further stated that when the victim went out of the shop, a lady known as Omo Yoruba saw her crying and limping. The victim does not understand English language while Omo Yoruba does not understand Hausa language. Omo Yoruba rushed to the parents of the victim and informed them. Later, the case was reported to the Agency. The victim was taken to the Agency's shelter for medical examination. Ismaila Kura [PW2] tendered the statement

of Aisha Ibrahim at NAPTIP dated 17/10/2017 as Exhibit 1; medical report dated 13/11/2017 issued by Gwarinpa Hospital, Abuja in respect of the victim as Exhibit 2; and the defendant's statement at NAPTIP dated 30/10/2017 as Exhibit 3.

Let me pause to remark that the statement of Aisha Ibrahim [Exhibit 1] was not written in English language. Exhibit 1 contains the following statement by YakubuAbubakar: *"I willingly help Aisha Ibrahim to write her statement due to the fact that she cannot speak or write English. I wish to be available when ever am needed."*

During cross examination of the PW2, he saidin the statement [Exhibit 3], the defendant stated that when the matter arose, he was taken to Jabi Police station. PW2 further stated that the matter was reported to NAPTIP on 27/9/2017; that was 2 weeks after the incident.

On 15/1/2020, the learned counsel for the defendant applied that the case of the prosecution be closed due to the continuous absence of the prosecuting counsel and other witnesses. The Court granted the application.

On 12/2/2020, AgboghayemehOseniEsq. filed a written submission on no case on behalf of the defendant. The prosecution was served with the written address on the same date. The prosecution did not file any response. On 16/7/2020, F. O. Johnson Esq. adopted the defendant's written address.

The law is well established that a submission that there is no case to answer may properly be made and upheld: [a] when there has been no evidence to prove an essential element of the alleged offence; and [b] when the evidence adduced by the prosecution has been so discredited as a result of cross examination or is manifestly unreliable that no reasonable tribunal could safely convict on it. See section 303[3] of the Administration of Criminal Justice Act, 2015; and **Ekpo v.The State [2001] 7 NWLR [Pt. 712] 292.**

In considering a no case submission, the credibility of witnesses and the weight to be attached to their testimonies do not arise. In **Fidelis Ubanatu v. C.O.P. [2000] 2 NWLR [Pt. 643] 115**, it was held that *prima facie* case means that there is a ground for proceeding. In other words, that something has been produced to make it worthwhile to continue with the proceedings. The evidence of the prosecution is said to disclose a *prima facie* case when it is such that if uncontradicted and if believed, it will be sufficient to prove the case against the accused person. See also the cases of **Duru v. Nwosu [1989] 1 NWLR [Pt. 113] 24** and **Ajisogun v. State [1998] 13 NWLR [Pt. 581] 236.**

Section 1[1] of the Violence against Persons [Prohibition] Act, 2015 provides:

A person commits the offence of rape if –

a) he or she intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or anything else;

b) the other person does not consent to the penetration; or

c) *the consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false or fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse.*

Learned counsel for the defendant referred to the case of**Adonikev. The State [2015] 7 NWLR [Pt. 1458] 237; [2015] LPELR-24281 [SC]**to support the submission that for the offence of defilement, which is the same as rape of a girl under the age of 11 years to succeed, the prosecution must prove: [i] that the accused person had sex with the child who was under the age of 11 years; [ii] that there was penetration into the vault of the vagina; and [iii] that the evidence of the child was corroborated.

AgboghaiyemehOseniEsq. submitted that the PW1 did not state that the defendant had sexual intercourse with her. There is no evidence that there was any penetration of the private part of PW1 by the penis of the defendant. The evidence of the PW2 is totally different from the evidence of PW1. The evidence of PW2 is at best, hearsay evidence and inadmissible. He referred to**Nwofor v. Obiefuna [2011] 1 NWLR [Pt. 1227] 205**;and submitted that the evidence of PW2 cannot be relied upon to establish criminal liability. Mr.Oseni concluded that the ingredients of the offence of rape have not been established against the defendant; and the prosecution has not established a *prima facie* case against the defendant.

From the charge against the defendant and the provisions of section 1[1] of the Violence against Persons [Prohibition] Act, the prosecution must adduce *prima facie* evidence that the defendant *"intentionally penetrated the vagina of Aisha Ibrahim"*with his penis. In **Jegede v. State [2001] 14 NWLR [Pt. 733] 264,** it was held that whether the prosecutrix is a minor or an adult, to secure a conviction for rape, there must first be proof of penetration of the vagina and the penetration must be linked with the accused person.

The Court agrees with the learned defence counsel that the PW1 did not give evidence that the defendant had sexual intercourse with her. This means that there is no evidence that the defendant penetrated the vagina of Aisha Ibrahim with his penis either by means of force or at all. It is also important to point out that the name ofthe PW1 is *"Aisha Mohammed"* contrary to the allegation in the charge that the defendant penetrated the vagina of *"Aisha Ibrahim"*. The prosecution did not lead any evidence to explain or clarify the disparity or to show that the PW1 is the same person named in the charge.

The Court also agrees with the view of Mr.Oseni that the evidence of PW1 that the defendant *"lured the victim to lie down on the bench. He started touching her breast. He removed her pant and had sex with her. When he was done with her, he used pieces of rag to clean her up"* is hearsay evidence.Besides, this evidence of PW2 is at variance with the evidence of PW1. I must also point out that the PW2 referred to the defendant as *"Yahaya";* and there is no evidence to show that the defendant's name is*"Yahaya"*.In my considered view, the evidence of

PW2 is manifestly unreliable and the Court cannot rely on it to convict the defendant. In other words, the evidence of PW2 cannot constitute *prima facie* evidence of the charge of rape against the defendant.

Finally, does the medical report [Exhibit 2] constitute *prima facie* evidence of the allegation of rape against the defendant? The medical reportdated 13/11/2017, signed by Dr.Onuigbo U. Ernest of the Federal Staff Hospital, Gwarinpa, Abuja, reads:

> *"MEDICAL REPORT*
>
> *RE: IBRAHIM AISHA, FEMALE, 9 YEARS*
>
> *I write on behalf of the above named who presented to our hospital today with complain of sexual exploitation 4days ago.*
>
> *Perineal assessment showed normal vulva, vagina and surrounding tissues. There were no areas of redness, abrasion nor bleeding and the hymen is absent.*
>
> *In view of the findings, I can confirm that the patient is no longer chaste. …"*

Learned defence counsel pointed out that the medical doctor who signed the medical report was not called as a witness and no reason was provided by the prosecution why he was not called to testify. He submitted that the medical report is hearsay as the proper person to tender it was the medical doctor. It was also submitted that the medical examination conducted 4 days after the alleged rape incident cannot be a true report of the offence of rape.

Now, the medical report [Exhibit 2] contains the opinion of Dr.Onuigbo U. Ernest [an expert] who stated that he examined Ibrahim Aisha. As I said before,Ibrahim Aisha is different from PW1 [Aisha Mohammed]. Be that as it may, the position of the law is that since the medical doctor was not called as a witness, the Court cannot attach evidential value to the medical report.

In the case of**Attorney General of the Federation v. Abubakar [2007] 10 NWLR [Pt. 1041] 1,** it was held that an expert must be called as a witness and be subjected to cross examination to enable the court determine whether his testimony is of any evidential value or worth. It is improper for a court to rely on the written opinion of an expert who was not called to testify in court because it will amount to a denial of fair hearing to the opposing party in the suit. See also **ObinnaOsuoha v. The State [2010] 16 NWLR [Pt. 1219] 364.**

It is also worthy of note that the medical report was dated 13/11/2017 and it stated that Ibrahim Aisha*"presented to our hospital today with complain of sexual exploitation 4days ago."* This means that Ibrahim Aisha went to Federal Staff Hospital, Gwarinpaon 13/11/2017 and the *"complain of sexual exploitation"* occurred 4 days before that date. On the other hand, the evidence of PW2 is that the rape incident occurred 2 weeks before 27/9/2017. I take the view that whether the alleged rape occurred 2 weeks before 27/9/2017 or 4 days before 13/11/2017, the medical reportis not evidence of rape of Aisha Mohammed [the PW1] by the defendant. In other words, the medical report does not constitute *prima facie* evidence of the charge of rape against the defendant.

CONCLUSION

In conclusion, the decision of the Court is that there is no *prima facie*evidence of the essential elements of the charge of rape against the defendant. I thereforeuphold the defendant's no case submission.The defendant, Ibrahim Haruna, is hereby discharged.

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HON. JUSTICE S. C. ORIJI
[JUDGE]

Appearance of counsel:

F. O. Johnson Esq. for the defendant.