IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL TERRITORY ABUJA IN THE ABUJA JUDICIAL DIVISION HOLDEN AT MAITAMA - ABUJA

BEFORE: HON. JUSTICE O. C. AGBAZA

COURT CLERKS: UKONU KALU & GODSPOWER EBAHOR

COURT NO: 6

SUIT NO: FCT/HC/CR/100/2018

BETWEEN:

COMMISSIONER OF POLICE……COMPLAINANT

VS

EKEMGBA CHISOM……DEFENDANT

JUDGMENT

The Defendant Ekemgba Chisom was arraigned on 15/3/2018 on a three (3) count charge which reads;

COUNT 1

That you Ekemgba Chisom, male, 25 years old of Karamajiji, Airport Road, Lugbe, Abuja that on the 9th day of November, 2017 at about 6pm at Karamajiji, Airport Road, Abuja within the jurisdiction ofthis Honourable Court committed a criminal offence to wit: Rape, in that on the said date, you forcefully and intentionally penetrated the vagina of one Miss Rabi Zakari, 9 years old, of Internally DisplacedPersons Camp (IDP) located at Karamajiji, Airport Road, Abuja against her will. You thereby committed an offence punishable under Section 1 (2) of the Violence against Persons (Prohibition) Act, 2015.

COUNT 2

That you Ekemgba Chisom, male, 25 years old of Karamajiji, Airport Road, Lugbe, Abuja that on the 9th day of November, 2017 at about 6pm at Karamajiji, Airport Road, Abuja within the jurisdiction ofthis Honourable Court committed a criminal offence to wit: Offensive Conduct, in that on the said date, you forcefully compelled one Miss Rabi Zakari, 9 years old, of Internally Displaced Persons Camp (IDP) located at Karamajiji, Airport Road, Abuja to engage in the act of sexual intercourse with you to the detriment of her psychological wellbeing as an internally displaced person, you thereby committed an offence punishable under Section 5 (1) of the Violence Against Persons (Prohibition) Act 2015.

COUNT 3

That you Ekemgba Chisom, male, 25 years old of Karamajiji, Airport Road, Lugbe, Abuja on the 9th day of November, 2017 at about 6pm at Karamajiji, Airport Road, Abuja within the jurisdiction ofthis Honourable Court committed a criminal offence to wit: Act of gross indecency, in that on the said date, you committed an act of gross indecency upon one Miss Rabi Zakari, 9 years old, of Internally Displaced Persons Camp (IDP) located at Karamajiji, Airport Road, Abuja when you used force and threat to compel her to submit to your sexual demand. You thereby committed an offence punishable under Section 285 of the Penal Code Law.

The Defendant pleaded not guilty to the three (3) count charge.

In proof of its case, the Prosecution called four (4) witnesses, Sa'adiya Ismaila (PW1); Sgt Gambo Mohammed (PW2), Rabi Zakari (PW3; Dr Dennis Richard Shettima (PW4). The Prosecution tendered one (1) Exhibit marked Exhibit "A" – Request for medical Report and medical Report.

The Defendant testified as DW1 and called one (1) witness – Williams Nnam-DW2.

It is settled law that the burden of proof lies on the prosecution, to establish its case beyond reasonable doubt, see Ukpong Vs State (2019) LPELR – 46427 (SC).In criminal trials, the Prosecution must establish its case beyond reasonable doubt. In criminal trials, the Prosecution can establish its case in three ways.

(1) By direct evidence of an eye witness.
(2) By circumstantial evidence and
(3) By confession.

In this instant case, there is no evidence of an eye witness.

PW1 – Mrs Sadiya Ismailia an elder sister to the victim, testified that on 9/11/2017 at about 6.00pm, her husband sent the victim to go and collect cap from his friend; that after 30 minutes, the victim had not returned, she became worried, just as she was about going out to look for her, she entered her house, looking uncoordinated. And on enquiry, the victim after having her dinner and on close look at the victim, noticed blood stains on her clothes, she immediately drew the attention ofher husband and after examination of the victim; the victim finally told her that a man slept with

her. The victimconfirmed knowing the Address ofthe Defendant who had a Barbing Saloon. Thereafter, herself and the husband proceeded to the house of the man and later reported to the Karamajiji Police Station and because of the victim was bleeding profusely, she was referred by the Police to National Hospital. At the National Hospital two operations were carried out before the bleeding stopped. She said the victim took them to house of the Defendant where she was raped, but met the Defendant's girlfriend in the house. That the Defendant was later arrested at Ruga by the PW1's husband and other men and handed over to the Police. That it was at the National Hospital that the victim told her that it was the Defendant that raped her.

Cross-examined, the PW1, confirmed that she has never met the Defendant before. Further that she oversees the movement of the victim every day. She confirmed that the victim was always with her and was sent on the errand at about 6.00pm and it was not dark then. She said it will take about three minutes walking from their house to where the victim went on errand. She stated that she does not know the number of barbing Saloon around the area. She confirmed that the victim told her that she only saw the Defendant on her way from the IDP school close to the Barbing Saloon; and she did not witness the rape incident, but what was told to her. Shemaintains that it was the Defendant who raped the victim, that the Defendant admitted raping the victim, when he was tortured.

PW2 – Sgt Gambo Mohammed, a Police officer attached to SCID, FCT Command, Abuja, testified that on 9/11/2017, that a case of rape was reported at Wuye Police Station by one Sadiya Ismaila against the

Defendant –Chisom Ekemgba. After preliminary investigation, he was transferred to State CID, FCT on the 28/11/2017. Immediately his Team swung into action by obtaining Statement of the Complainant and the victim voluntarily and that ofthe Defendant's Statement obtained under words of caution. That he wrote the Statement ofthe Defendant, because he claimed he was not in the mood. However, read it to the Defendant who confirmed and signed as correct and took in the said to his superior one CSP Sarah Idowu Ehindaro for endorsement after the reading the said Statement to the Defendant. He stated that the Defendant admitted in the Statement that he committed the offence. That they visited the victim at the National Hospital, took photograph of the victim. Also given a Medical Report on demand. Also confirmed that the Defendant admitted in the said Statement that he rape the victim – a 9 years old child.

Cross-examined, he confirmed that the case file was transferred from Wuye Police Division to SCID, but was not present during the preliminary investigation. He stated that contained in the case file handed over, are Statements of the parties, photographs and the Medical Report. He confirmed visit to the locus of crime. He confirmed that the I.P.O at Wuye told him that he witnessed the incident; and that his testimony is based on the report contained in the case file and not because that he witnessed the rape incident. He stated that from the content of Exhibit "A", shows that it was the Defendant that committed the offence. He stated that he did not submit samples ofthe victim's blood, pants, seminal fluid to the Doctor, because the Defendant said he did not release. He stated that the Defendant claimed that the Defendant claimed that the victim had been

visiting his Barbing Saloon. He said that the victim told him the Defendant wipe the blood with tissue and did not tell him that he met the Defendant's girlfriendin the house when she took her Aunty and Uncle to the house. That the Defendant's Statement was voluntarily taken devoid of torture.

PW3 – Rabi Zakari 9years old testifying not under Oath pursuant to Section 209 of Evidence Act, 2011, through an interpreter, stated that on 9/11/2017 she was sent on errand by his elder brother to go and collect cap from his friend, on her way she said the Defendant and who called her but she refused to heed the call, but the Defendant held and carried her on his shoulder and carried her to his room. That the Defendant after closing the door and after taking drugs made love to her, after removing her pants and when he was done, returned her pant, but noticed she was bleeding and later left for home. At home after eating and on enquiring she told her sister of the event that happened. That they went immediately looking for the Defendant, at his home they met the wife who told them that he went to Ruga.The Defendant was apprehended and was taken to the Police Station, while she was taking to the hospital in Kuje, where she was treated. She confirmed that the Defendant did put his penis in her vagina.

Cross-examined, the PW3 she confirmed meeting the Defendant on the road about 70 metres to his house, she confirmed meeting the Defendant once, on her way from the Islamic school, but refused to Answer when he called. She confirmed that their house is very far to the Defendant's house. She confirmed it was her elder brother that found the Defendant at Ruga and that her brother and sister have never met the Defendant

before. She confirmed that it was the same house that the Defendant slept with her that they went to.

PW4 – DR. Dennis Richard Shettima – A medical Doctor, with National Hospital as a Pediatrician. He admitted making the Exhibit "A". That the victim was rushed to the hospitalto the emergency children ward of the hospital at 12midnight on the 10/11/2017, by a Police officer and a relation ofthe victim that she was sent on an errand by the aunty, she resides with, at IDP Camp Durumi Area 1, and on her way back, was dragged to a secluded area by an adultmale and she was in pain with blood stain and when asked by her aunty, she narrated her ordeal in the hand of the Defendant to her. Therefore the Defendant was apprehended with assistance of the IDP leader in the camp and taken to the Police and later rushed to the hospital. At the hospital examination was conducted and discoveries made and led to operation on the victim. After treatment and upon completion of the procedure, the victim was discharged at about 2.25pm on November 17, 2017. That his findings revealed that the tear to vagina was due to a forceful object.

Cross-examined, he confirmed that he was on night duty when the victim was brought to the hospital. The victim he saw was average weight for her age, fair in complexion with. The witness confirmed that the victim was dragged to a dark area where he was raped. He confirmed his signature as the marker of the Exhibit "A".

The Defendant – Ekemgba Chisom, in his evidence stated that on 9/11/2017 he left his shop at about 4.00pm to his friend's place, William

Nnam for rehearsal. That they were into gospel music. That he left his friend's place at about 7.00pm. That on his way, he met a group of persons who accosted him with cutlass and he asked what was the matter, but they failed totell him and was later taken to the Police Station, where he was questioned on the case of rape. He said that the persons who accosted him were co-barbers in the area, who out of jealousy wanted him out of the area. He stated that they were Four (4) in numbers and were not called by the Prosecution as witnesses. He confirmed that he told the Police of his movement on the said date, that he was not around the place of the incident. He said he did not make any Statement to that effect and also was not examined medically, neither was any semen's or fluid taken from him. He stated that his friends place is at Ruga close to karamajiji.

Cross-examined, he stated that his shop to the I.D.P. Camp is about 15 kilometers away. He admitted that he has been to the I.D.P. Camp and his house close to his shop. He confirmed that there are many barbing saloon in the area. He confirmed that he is an upcoming musician. He stated he has never rendered assistance to the victim before and never quarreled with the PW2. He said that he was not arrested in Ruga, rather a place close to China Company on the road leading to Ruga. He admitted that he lives with his financee – Chibuzor Amadi and that she was in the house when he left for his friend's place.

DW2 – Williams Nnam stated that he lives in Ruga, close to Karamajiji and that the Defendant is his close friend for more than 10 years. He confirmed knowing the offence against the Defendant. That on 9/11/2017, the Defendant came to his house for their usual rehearsal practice once a

week. That they are into Gospel music and the Defendant came in about 4.00pm and left about 7.00pm. He stated that he was informed of the arrest of the Defendant by one of his friend –Chinedu and went to the Karamajiji Police Station to see the Defendant. That he saw the Defendant on the floor with blood stains and injuries on his head. He was however, prevented from making inquiries as the Police man around threatened to deal with him, hence he left and did not see the Defendant before being taken to prison custody. He confirms knowing the Defendant to be a God-fearing man and doubt the allegation brought against the Defendant.

Cross-examined, confirmed that though he is into shoe business, but still into music, but yet to produce any album. He confirmed that he did not visit the Defendant again because he was scared with the police threat. He stated that he does not know the victim before and maintained that the Defendant owned a barbing saloon at Karamajiji. He confirmed that he knows the Defendant very well.

At the close of evidence, both the Prosecution and defence counsel filed and adopted their Final Address on 8/12/2021.

In the Final Written Address of the Prosecution, filed on 6/12/2021 and settled by Donatus Friday Abah Esq, only one (1) issue was formulated for determination, which is;

> "Whether the Prosecution has proved beyond reasonable doubt all the three (3) counts of charge against the Defendant".

In the Defendant final Written Address, filed on 9/11/2021, settled by Adeolu Salako, two (2) issues were formulated for determination, namely'

(a) Considering the totality of evidence placed before this Honourable Court vis-à-vis voice of the witnesses and documentary evidence tendered and admitted at trial, whether the Prosecution established beyond reasonable doubt that the Prosecutrix was raped and that it was in fact the Defendant that raped her, as required by law.

(b) Whether from the evidence adduced in defence by the Defendant before this Honourable Court, the Defendant has established any good defence in his favour.

Having giving insightful consideration to the evidence of the both parties, Exhibit, submission of both counsel and the judicial authorities cited, the court finds that only one (1) issue calls for determination;

"Whether the prosecution has proved a case of rape against the Defendant as prescribed by the law based on the evidence before the court".

The Defendant was arraigned on three count charge of rape, offensive conduct punishable under Section 1 (2); Section 5 (1) ofthe Violence against Persons (Prohibition) Act, 2015 and Act of Gross indecency punishable under Section 285 of the Penal Code law. It is settled law that the Prosecution in proof of the case of rape under the violence against persons Act, beyond reasonable doubt, must establish the basic ingredient.

The Section 1 (1) ofthe Violence against Persons (Prohibition) (VAP) Act, 2015 provides the ingridence of the offence, whilst Section 1(2) ofthe VAP, provides for the punishment. In respect of count 3, Section 285 of the Penal Code provides the punishment and the ingridence of the offence.

The basic ingredient under the VAP are follows:-

(a) That there was intentional penetration in the anus, vagina or mouth of the victim through any part of the body or anything else.

(b) That the person does not consent to the penetration.

(c) That the consent was obtained by force, threat, fraudulent misrepresentation, the use of additive substance or impersonating a spouse . See POSU Vs State (2011) 2 NWLR (PT. 1234) 393 @ 416.

And the basic ingredient for the offence of gross indecency are as follows:-

(a) That the accused committed an act of gross indecency upon the persons of another;

(b) That person did not consent to the Act; or

(c) That he compelled that person by the use of force or threat to join in the commission of the grossly indecent act.

In this instant case, there is no evidence of an eye witness. The evidence in support ofthe Prosecution case isthat of PW1 – elder sister to the victim. PW2 – the investigating Police Officer, PW3 – the victim and PW4 – The

Medical Doctor. A clear perusal ofthe evidence of the Prosecution'switnesses shows that they gave account ofthe incident they did not witness; and notable contradiction in their respective evidence, which I shall highlight in course of this Judgment. Also of note, in an offence of rape, where is a denial by the Defendant, there is the need for corroborativeevidence, and this fact has judicial approval. See case of Lucky Vs State 92014) LPELR – 24441 (CA), also Upahur & Or Vs State 92002) – LPELR – 5937 (CA). Also of note, is the fact that in a case such as this, the Prosecution failed to tender relevant documents stated in proof of evidence these include, the voluntary Statement of the victim, cautionary Statements of the Defendant, the alleged blood stained clothes of the victim. Also the failure to react and/or investigate the defence of Alibi raised by the Defendant during his interrogation by the Police. And worst still, the manifest evidence of hearsay of all the witnesses of the Prosecution.

Now, I shall proceed to touch on all the issues noted by this court, as it will assist the court to determine whether or not the Prosecution has proved his case. It must be restated that the prosecution has the burden duty to establish the case against the Defendant.

Firstly, on notable contradiction on the evidence of the Prosecution witness. The PW1, PW2 and PW4 gave different and contradictory account of the place the incident occurred; the PW1 told the court that the rape took place at the house of the Defendant in Karamajiji; the PW4, on the other hand told the court that the rape took place at a nearby bush. On the place ofthe crime, both the PW1 and PW4 gave contradicting evidence,

while PW1 told court the incident occurred in Karamajiji, the PW4 told the court that it occurred in Durumi Area 1. Also, the PW3 told the court that after the incident, the case was reported to the Wuye Police Station, whilst the PW1 stated that the case was reported to the Karamajiji Police and the fact was supported by the DW1 in his evidence that he was arrested and taken to Karamajiji Police Station to see the Defendant – DW1. These clearly are manifest contradiction which in our evidence law is fatal to the case of the Prosecution and should enure in favour of a Defendant. See case s State Vs Hanahabo (2019) 14 NWLR (PT. 1093) 522 @ 545. In all, there was no explanation from the prosecution over these obvious material contradictions. This is where the dictum of My Lord Eko JCA (JSC) in Ipalibo Vs State (2014) LPELR – 22678 (CA) becomes relevant and instructive.

Secondly, on the issue of corroborating evidence. It is trite law that a person cannot be convicted of rape of a girl under 14 years upon the uncorroborated evidence. In this instant case, the court finds from the evidence adduced by the Prosecution through PW1, PW2, PW4 are all tainted with doubt and material contradictions not sufficient to corroborate the evidence of the PW3. Also the failure to tender material evidence as blood stained cloth is a crucial error on the part ofthe Prosecution.

On the issue of hearsay evidence, by the Provision of Section 38 of Evidence Act, which provides, states;

> "Hearsay evidence is not admissible except as provided in this part or by any other Provision of this or any other act"

The evidence of PW1 – elder sister of the PW3, on careful perusal, is evidence of what was told her by the PW3, a minor and with no corroborated evidence to support. The evidence of PW2 and PW4 also gave evidence of what was told to them by PW1 worst till in a distorted form.

On the issue of the failure to tender the cautionary Statement of the Defendant. It is fundamental in criminal trial that important documents such as this, ought to be tendered in evidence, moreso in this instant, the said voluntary Statement is a confessional Statement, which has high prohibitive value and once proved can be sufficient to ground a conviction. See F.R.N. Vs Barminas (2017) 15 NWLR (PT.1588) 177 @ 199.

In this instant it is the evidence of PW2, that he obtained a voluntary confessional Statement from the Defendant and was endorsed by his superior officer, yet failed to tender this relevant piece of document. It callsfor questioning why this failure to tender in a case of this nature.

Further, in proof of their case, the PW2, PW4 gave evidence of blood stain clothes, yet the PW2 – the I.P.O. failed to tender any of these items, this leaves much to be desired of Police Officer diligent in his duties of investigation. In all of these, it is suggestive that if these documents were tendered it would not be favourable to the Prosecution's case. See Section 167 (d) of the Evidence Act provides.

> "Evidence which could be and is not produced would, if produced be unfavourable to the person who withholds".

To that extent that failure enures in favour of the Defendant.

On the medical Report – Exhibit "A". It is a document, which by its nature should be corrobative evidence to the evidence of the PW1, PW2, PW3, but on a careful perusal of the said Exhibit "A", is full of contradiction and inconsistency, to the extent that the question that begs for askingis, can this Exhibit "A" be relied upon as a corroborative evidence, sufficient to sustain a conviction on the offence under reference. My Answer is No.

On the evidence of the DW1, the DW1 testify stating the account of event leading to this charge, in particular denied committing the offence, raising the plea of Alibi, "I was not at the scene of the alleged offence" and which was confirmed in the evidence of DW2. There is evidence of the DW1 that he told the Police ofthese facts; the Police rather did notact on it. It is trite that a plea of Alibi must be raised timeously. In this instant the Defendant in his evidence stated this fact at the station, but the Police did not react and was confirmed by the PW2 doing cross-examination. See Ikaria Vs State (2014)1 NWLR (PT.1389) 639 @ 657. In all the Prosecution failed to controvert this fact.

In all of these, the court having carefully considered the evidence of the Prosecution witnesses and the Defendants, I came to the irresistible conclusion that the Prosecution has failed to establish the case against the Defendant. Accordingly, and on the basis of all of the above, I hereby order that the Defendant – Ekemgba Chisom be and is hereby discharged and acquitted of the three (3) count charge.

This is the Judgment of the court. The Prosecution has right of Appeal against the Judgment of the court.

HON. JUSTICE O. C. AGBAZA
Presiding Judge
3/3/2022

APPEARANCE:

DONATUS FRIDAY ABAH ESQ FOR THE PROSECUTION

ADEOLU SALAKO ESQ FOR THE DEFENDANT