

IN THE CIRCUIT COURT HELD AT TECHIMAN ON WEDNESDAY 26TH DAY OF JULY, 2023 BEFORE H/H S. D. KOTEY ESQ SITTING AS CIRCUIT COURT JUDGE

CC NO. 522/2020

THE REPUBLIC

VRS.

RAZAK KUMBILI

JUDGMENT

The accused person has been charged with the offence of defilement of a child contrary to section 101 of the Criminal Offences Act, 1960 (Act 29). He pleaded not guilty to the charge aforementioned when he was arraigned before the court and invited to plead to the charge against him. This was a case which was first filed in this court on 15th June, 2020. It has been three years since the accused person was arraigned before this court on this charge. The reason for the delay in the trial was largely due to the absence of the accused person from the trial at some point in the trial. It took the directive of His Honour Malcolm Bedrah to the sureties to produce the accused person on pain of estreating the bail bond before the accused was produced in court. When the sureties produced the accused person, they withdrew from bail bond as sureties for the accused person. At some point in the trial, the court even had to revoke the bail for the accused and remanded him. The conduct of the accused person himself accounted for the delay in his trial. If the accused person had submitted himself to the processes in court, this case would have been tried long ago. Be that as it may, today, the curtains are being drawn on the case.

In this judgment, the duty of this court is to consider, assess and evaluate the evidence of the prosecution as presented and the defence put up by the accused with the view to determining whether or not the guilt of the accused person has been established beyond reasonable doubt. The law is that prosecution must prove the guilt of the accused at the end of trial beyond reasonable doubt if it is to secure conviction against

the accused. See the case of TSATSU TSIKATA VRS. THE REPUBLIC [2003-2004] SCGLR 1068. Section 13(1) of the Evidence Act, 1975 (NRCD 323) is also an authority for the above proposition.

The case of the prosecution against the accused person

The prosecution invited two witnesses; the investigator on the case and the medical officer who endorsed the police medical form which was issued to the complainant in the case. I dare say that the evidence of the investigator was only relevant for the investigation cautioned statement and charged cautioned statement of the accused which he tendered in evidence. His evidence did not present the outcome of any independent investigation conducted by him into the alleged case when it was assigned to him.

In the evidence of the medical officer, the alleged victim was presented to him four days after the alleged sexual assault incident. He testified that when he examined the child, she had a healthy vulva and vagina with a torn hymen which he attributed to alleged sexual assault. In his testimony, when the alleged survivor was presented to him, she did not have any complaints. He tendered the medical report of the alleged victim in evidence as exhibit C. According to the report, the alleged survivor tested negative for HIV, Hepatitis B among others.

The investigator was next to testify. He told the court that both the accused and the alleged survivor reside in the same community. He testified that the accused took the alleged survivor on his motorbike under the pretext of going to give her something to bring to her aunt and midway into the journey, on reaching a bush, he lured the alleged survivor into the bush and had sexual intercourse with the alleged survivor. He then tendered the two statements which the accused volunteered to the police on his arrest. Both the alleged survivor and her mother and aunt were not in court to testify.

Evidence of accused person

The evidence of the accused person is that the aunt of the alleged survivor made sexual advances at him a week prior to the date of the alleged incident. He told the court that the aunt had invited him into her room and after seeing a movie together,

she slept on the bed in a provocative manner so he left her in the room without touching her so she took offence to his conduct. He testified that the following day when he greeted the alleged survivor's aunt, she refused to respond and then subsequently, she made the case of alleged defilement against him.

The ingredients of the offence accused has been charged with requires that it is shown that the accused person had carnal knowledge of the alleged survivor and that the alleged survivor is less than 16 years of age. In the case of *GLIGAH ATISO V THE REPUBLIC*, carnal knowledge for purposes of sexual offences such as rape or defilement was defined as the penetration of a woman's vagina by a man's penis no matter how deep or however little the penis went into the vagina.

The prosecution did not invite the alleged survivor who was alleged to have been defiled by the accused person. No reason was offered for the absence of the alleged survivor from the trial. The aunt who is said to have reported the case to the alleged survivor's mother was also absent from the trial. Again no explanation was offered for that. In the case of *REPUBLIC V YEBOAH* [1968] GLR 248, it was held that evidence of sexual offence must be corroborated. The court held as follows:

"[The] prudent rule of practice is to look for corroboration from some extraneous evidence which confirm [the evidence of the victim] in some material particular implicating the accused." In this case before me, the alleged survivor did not testify so the evidence offered by the prosecution was standing alone without the requisite foundation evidence on which they were building their case. The absence of the evidence of the alleged survivor at the trial was fatal to the case of the prosecution especially when no explanation was offered for her absence and also since the medical report on the alleged survivor did not present sufficient evidence from which carnal knowledge could be inferred beyond the diagnosis that the hymen was torn.

So, the question is whether the court is convinced by the evidence before it that the accused person did commit the offence of defilement. The answer I give is a big and

emphatic no. The medical report is the only evidence from the prosecution which comes close to establishing a case against the accused person. The medical report notes that the alleged survivor did not present any complaint to hospital four days after the alleged incident. She had a healthy vulva and vagina. The only thing that could point to sexual assault is the torn hymen. The tearing of the hymen may be the result of sexual activity or through some other activity. If the alleged sexual activity of the accused with the victim ever took place that was the reason for the torn hymen, then there would have been signs of abrasion or some other happenings to the vulva or vagina that would have given support to the torn hymen. This was why the testimony of the alleged survivor was necessary. She may have told us what really the accused person allegedly did to her. It may have been the case that the accused person did not penetrate the alleged victim's vagina with his penis. It may have been the case that the accused person entered the vagina of the alleged survivor with his finger or some other part of his body or object. That then may have contributed to the torn hymen. Even so, there would have been some signs with the vulva or vagina that would have confirmed penetration of the said vagina by an erect penis. For certainly, the erect penis of the accused no matter how small would have caused some abrasions in the vaginal walls of the alleged survivor's vagina. Although the alleged survivor was presented to the facility four days after the alleged incident, there would still have been signs of forcible entry into the vagina by an erect penis or if not an erect penis, some other object. The evidence presented by the prosecution fails to establish its case against the accuse person beyond reasonable doubts. The doubts in my mind about the case of the prosecution right from the onset were never cleared and has remained until this time of the judgment. I cannot convict the accused person on the basis of this evidence presented. In the circumstance, I find the accused person not guilty of the offence as charged and proceed hereby to acquit him. Accused person is hereby acquitted and discharged

SGD

HH S.D. KOTEY