THE HIGH COURT OF JUSTICE, HELD IN SOGAKOPE ON THURSDAY THE 1ST DAY OF DECEMBER, 2022 BEFORE HER LADYSHIP JUSTICE DOREEN G. BOAKYE-AGYEI (MRS.) JUSTICE OF THE HIGH COURT

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SUIT NO: F22/09/2022

THE REPUBLIC
-VRS-
BRIGHT AGUADE --- APPELLANT

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PARTIES:

APPELLANT IN LAWFUL CUSTODY

COUNSEL:
MS. DZIFA AMEFENU, ESQ (ASSISTANT STATE ATTORNEY)
COUNSEL FOR REPUBLIC - PRESENT

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JUDGMENT

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INTRODUCTION:

This is an Appeal from the decision of the Circuit Court, Sogakope, presided over by His Honour Isaac Addo. The Petition of Appeal is found at pages 66 - 67 of the Record of Appeal and the grounds of Appeal are stated thus in paragraph 3 of the Petition of Appeal.

a) The judgment is not supported by the evidence on record.
b) The sentence of 10 years in jail IHL is harsh and excessive, taking into consideration the circumstances of the case.

The relief sought can be found at paragraph 3 of the Petition of Appeal, namely an order setting aside both the conviction and sentence.

Brief Facts:

The facts as narrated by the Investigator is as follows:

Mawufemor Nyaletashie and Morfor Christine are both 13 years of age and attend Monome D/A Basic School in class four and six respectively. They are intimate friends at home and in school and lived in the same community. The Accused person is a lotto writer and a farmer. He befriended 1st victims elder sister, a witness in this case now 18 years and has a two year old son with her. In the vacation period of December, 2020 victims visited Accused in the house to watch television. Accused led victims into a sitting room for them to watch television. He left the sitting room to the "next room" which is a bedroom and called the 1st victim, Mawufemor who is a younger sister to his wife. 1st victim responded to his call. Subsequently he asked her to invite the 2nd victim to join them in the room.

The Accused person switched on his touch phone for them to continue watching the movie on it. When Accused saw that victims were focused on watching the movie, he went to lock the door, removed the key and told the victims categorically that he was going to have sexual intercourse with them which they refused.

The accused person held the 1st victim and pushed her on a mattress and removed her pants leaving it to hang on one leg. Accused also removed his jersey pair of shorts he was wearing and forcibly inserted his penis into her vagina and had sexual intercourse with her resulting in the victim having a whitish fluid and blood oozing from her vagina. The Accused person called the 2nd victim to come but she refused and he held and pushed her onto the mattress. Accused removed her pants and had sexual intercourse with her.

The accused person warned the victims herein not to disclose the secret sex to anybody else he would kill them. The 2nd victim says anytime she spotted the accused person, she became offended. In May 2021 she revealed the secret to 1st victim's sister who is the mother of Accused's son when they resumed school. Victim's sister informed their

mother and she confronted them. The victims confessed and told her what the Accused did to them when they visited him.

Their mother immediately reported the matter to her elder daughter working in Accra and she came down and led the victims to Akatsi Police Station, made a report to the Police and the Accused was arrested.

The Police medical forms were issued to each of the victims to be sent to hospital for examination and treatment. The Medical forms duly endorsed by the Medical Officer was submitted.

Caution statement was taken from the Accused. After investigation he was charged with the offences and put before Court.

The charges against the Appellant herein

The charges that were preferred against the Appellant herein were:

STATEMENT OF OFFENCE

DEFILEMENT OF FEMALE UNDER SIXTEEN YEARS OF AGE: CONTRARY TO SECTON 101(2) OF CRIMINAL OFFENCES ACT 1960 (ACT 29) AS AMENDED BY SECTION 11 OF CRIMINAL CODE (AMENDMENT) ACT OF 1998 (ACT 554).

PARTICULARS OF OFFENCE

BRIGHT AGUADZE (A.K.A) POOZO - LOTTO WRITER/FARMER, AGE 23 YRS:-for that you during December, 2020 vacation period during the day at Monome - Ativiakope near Akatsi in the Volta Circuit and within the jurisdiction of this court, did unlawfully carnally know Mawufemor Nyaletashie female of age thirteen (13) years.

COUNT TWO

STATEMENT OF OFFENCE

DEFILEMENT OF FEMALE UNDER SIXTEEN YEARS OF AGE: CONTRARY TO SECTION 101 (2) OF CRIMINAL OFFENCES ACT 1960 (ACT 29) AS AMENDED BY SECTION 11 OF CRIMINAL CODE (AMENDMENT) ACT OF 1998 (ACT 554)

PARTICULARS OF OFFENCE

BRIGHT AGUADZE (A.K.A) POOZO - LOTTO WRITER/FARMER, AGE 23 YRS:- for that during December, 2020 vacation period during the day at Monome - Ativiakope near Akatsi in the Volta Circuit and within the jurisdiction of this court, did unlawfully carnally know Christine Morfor female of age thirteen (13) years.

The Plea

On the 19th day of July, 2022, the Accused person herein pleaded Not Guilty to both counts, as found at page 25 of the Record of Appeal.

The Prosecution's Case

The prosecution relied on six (6) witnesses. The evidence by all the above witnesses essentially is to the effect that the victims were defiled by the Accused herein, and that both victims were 13 years each at the time of the offence.

The Case of the Accused Herein

The Accused person has denied the offences against him throughout the trial, and thus had maintained his innocence of the allegations against him.

Judgment of the Trial Circuit Court

On the 22/04/2022 the trial Circuit Court Judge convicted the Accused person herein and sentenced him to serve a prison term of ten (10) years IHL on each of the two counts, to run concurrently.

Grounds of Appeal

Aggrieved by the conviction and sentence by the Circuit Court, Sogakope presided over by H/H ISAAC ADDO ESQ the Appellant herein filed the Petition of Appeal and prays for an order setting aside both the conviction and sentence on the following grounds, that:

a) **The judgment is not supported by the evidence on record.**
b) **The sentence of 10 years in jail IHL is harsh and excessive, taking into consideration the circumstances of the case.**

Appeal is by way of rehearing therefore the Court proceeds to examine the record before it. The Court notes that Appellant had a two year old child with 1st Victims 18 year old sister presupposing that he got her pregnant when she was below 16 years which itself is a crime. The first ground of this appeal is that **the judgment is not supported by the evidence on record.**

In a decided case of **ROBERT GYAMFI VRS. THE REPUBLIC [2019] 142 G.M.J 178 CA.** at page 187, **DZAMEFE, JA** delivering on the presumption of the law when there is an omnibus ground of appeal before a court and the duty on an appellant alleging the omnibus ground held thus:

"The law is settled that where an appellant complains that a judgment is against the weight of evidence as in a civil case or **the judgment cannot be supported having regard to the evidence on the record as in criminal cases** such appellant is complaining that there were certain pieces of evidence on record which if applied in his favour, could have changed the decision in his favour or certain pieces of evidence have been wrongly applied against him. The onus is therefore on such an appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against". **[P. 164] lines 25 – 35**

Then on the duty on an appellate court when hearing an appeal, **Dzamefe, J.A** held that:

"Appeals are by way of rehearing and this principle of rehearing means the appellate court has the mandate to consider the appeal in its entirety and to make such orders as it sees fit. The appellate court such as this, must evaluate the case in its entirety as presented by both the prosecution and the defence and to make a determination as to guilt or innocence of the appellant." **[P.165] lines 10 - 15.**

On the circumstance in which an appellate court can depart or set aside findings of fact made by the trial court, **Dzamefe, J. A. opined that**

"The only time an appellate court can depart or set aside findings of fact by the trial court is when the evidence is **perverse, unwarranted and unsupported.** See **GEORGINA AMARTEY V. WINIFRED IDDRISU, CIVIL APPEAL NO. JA 26/07 OF 29TH APRIL 2009** per Jones Dotse JSC who opined that despite this caution to us ...weighing and considering it and not shirking from overruling it if on full consideration we come to the conclusion that the judgment was wrong". **[P. 172] lines 5 - 15.**

Elements of the charge of Defilement

In the decided Case of **ERIC ASANTE VRS. THE REPUBLIC CASE NO: J3 /7/2013 as delivered on 26th January 2017, ANIN YEBOAH, JSC (as he then was) stated** thus at page 7: "In this wise it is relevant to state the ingredients of the offence of defilement which are as follows:

1. The victim is under the age of 16 years (as provided for in Act 554).
2. Someone had sexual intercourse with her; and
3. That person is the accused.

See the case of **REPUBLIC V. YEBOAH [1968] GLR 248.**

Continuing on the same page the Lord Justice said: "It is also useful to remind ourselves of some fundamental legal principles pertaining to criminal trials in Ghana. **Article 19(2) (c) of the 1992 Constitution** provides that; "A person charged with a criminal offence shall be presumed innocent until he is proved or has pleaded guilty."

He went on to say on pages 7 to 8 as follows: "Our law is that when a person is charged with a criminal offence it shall be the duty of the prosecution to prove his guilt beyond reasonable doubt, meaning the prosecution has the burden to lead sufficient admissible evidence such that on an assessment of the totality of the evidence adduced in court, including that led by the accused person, the court would belief beyond reasonable doubt that the offence has been committed and that it is the accused who committed it. Apart from specific cases of strict liability offences, the general rule is that throughout a criminal trial the burden of proving the guilt of the accused person remains with the prosecution. Therefore, though the accused person may testify and call witnesses to explain his side of the case where at the close of the case of the prosecution a prima facie case is made against him, he is generally not required by the law to prove anything. He is only to raise a reasonable doubt in the mind of the court as to the commission of the offence and his complicity in it except where he relies on a statutory or special defence. See **Sections 11 (2) and 13 (1), of the Evidence Act, 1975 (NRCD 323) and COP V ANTWI [1961] GLR 408.**

In **OTENG V. THE STATE [1966] GLR 352,** the principle was that beyond reasonable doubt does not mean beyond a shadow of doubt. The guilt of an accused person is sufficiently proved if the tribunal of fact is convinced that he committed the offence though there remains a lingering possibility that he is not guilty.

At page 20, the Lord Justice said: "However, in **KYIAFI V. WON [1967] GLR 463 AT 467 C.A** the court per Ollennu J.A. said as follows: "It must be observed that the questions of impressiveness or convincingness are products of credibility and veracity; a court becomes convinced or unconvinced, impressed or unimpressed with oral evidence according to the opinion it forms of the veracity of witnesses."

At page 21 it was said thus "A court has to test its impression as to the veracity or truthfulness of oral testimony of a witness against the whole of the evidence of that witness and other evidence on record. See **ACKOM V. REPUBLIC [1975] GLR 419".**

At page 22 it was said thus; "Our advice is that where the liberty of the individual is concerned, prosecutors, defence counsel and judges should keep an open mind and strictly abide by the time-tested rule that the accused person is innocent until proven guilty beyond reasonable doubt. In this case the appellant maintained his innocence right from the first day he was accused in his room, to the police station and throughout the trial."

Burden Of Proof

It is trite that criminal allegations are required to be proven beyond reasonable doubt. This principle has been recently emphasized in the decided case of **PROMISE EMEKA V THE REPUBLIC [2020] 159 GMJ 112 CA at 116-117** as follows: "Proof beyond reasonable doubt

Certainly, a prosecutor is required to prove its case beyond reasonable doubt in criminal matters. But then, this does not mean that it shall be "proof beyond every shadow of doubt". In the case of **ABDULAI FUSENI V. THE REPUBLIC CRIMINAL APPEAL (2018) 122 GMJ S.C,** the dictum of Denning J in the case of **Miller v. Minister of Pensions 1947 2 All ER. 372** at 374 refers to this principle in the following manner: *"It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond shadow of doubt".* **In reality, what 'proof beyond reasonable doubt means is proof of the essential ingredients of the offence charged and not mathematical proof".**

In the case of **FRIMPONG (ALIAS IBOMAN) V THE REPUBLIC (2012) 45 GM 1** the Supreme Court gives credence to this position.

Also, in the case of **OTENG V. THE STATE [1966] GLR 352** at 355, the Supreme Court stated as follows: *"One significant respect in which our criminal law differs from civil is that while in civil law, a plaintiff may win on a balance of probabilities,* ***in a criminal case the prosecution cannot obtain conviction upon mere probabilities".*** Still in the Oteng case supra, Ollenu JSC added that: "The citizen too is entitled to protection against the State

and that our Law is that, a person accused of a crime is presumed to be innocent until his guilt is proved beyond reasonable doubt as distinct from fanciful doubt".

In addition the Evidence Act 1975 (NRCD) 323 at section 13 (2) stipulates that:
"In criminal cases, the accused person has no obligation to prove anything but is only required to raise a reasonable doubt thus, except as provided in section 15 (c), in a criminal action, the burden of persuasion when it is on the accused as to a fact, the converse of which is essential to guilt requires only that the accused raises a reasonable doubt".

In assessing the evidence in a criminal case, the Court would have to apply what is known as the three-tier test to each of the elements of a crime. In the case of **THE REPUBLIC V. FRANCIS IKE UYANWUNE [2013] 58 GMJ 162, C.A**, it was held per **Dennis Adjei J.A** that; ***"The law is that the prosecution must prove all the ingredients of the offence charged in accordance with the standard burden of proof; that is to say the prosecution must establish a prima facie case and the burden of proof would be shifted to the accused person to open his defence and in so doing, he may run the risk of non- production of evidence and or non-persuasion to the required degree of belief else he may be convicted of the offence. The accused must give evidence if a prima facie case is established else he may be convicted and, if he opens his defence:***

1. ***the court is required to satisfy itself that the explanation of the accused is either acceptable or not. If it is acceptable, the accused should be acquitted, and if it is not acceptable;***
2. ***the court should probe further to see if it is reasonably probable. If it is reasonably probable, the accused should be acquitted;***
3. ***but if it is not, and the court is satisfied that in considering the entire evidence on record the accused is guilty of the offence, the court must convict him.***

This test is usually referred to as the three- tier test".

Defilement and its requisite elements

In the ROBERT GYAMFI case supra and on the definition of defilement and the requisite ingredients to establish a case of same, Dzamefe JA stated as follows:

"Defilement is defined as the natural or unnatural carnal knowledge of a child **under sixteen years of age** with or without the child's consent. A person under sixteen years of age lacks capacity to give consent with respect to carnal or unnatural carnal knowledge and any such consent given by a child is void. The ingredients of the defilement are:-

1. The alleged victim is less than sixteen years of age
2. That a person has had natural or unnatural carnal knowledge of the victim.
3. That person is the appellant." **[P. 165] lines 35**

Legal issue for determination at the trial at the Circuit court

The issue for determination at the lower court was:

Whether the evidence led by Prosecution in proof of the charge of defilement against the Accused person herein is sufficient to ground a conviction.

For the prosecution to prove their case against the accused person herein to ground conviction, the prosecution is required to prove the elements of the charge preferred against the accused person. These elements are:

1. That the alleged victim is less than sixteen years of age.

The first element of the offence of defilement is that **the alleged victim is less than sixteen years of age.** From the brief facts in support of the charges against the appellant herein, ages of the victims were each 13 years old.

Appellant per his Counsel submit that theses ages were fixed without any basis and subsequently purportedly proved by the Prosecution, relying on National Health

Insurance Cards, and which cards was procured from the **Akatsi Office of the National Health Insurance Authority** (NHIA) only after the said ages were categorically stated to the Police.

Per the NHIA Cards obtained from NHIA Office Akatsi, the NHIA card for Mawufemor Nyaletashie is found on page 14 of the Record of Appeal (ROA), and that of Morfor Christine is found on page 15 of the ROA. The NHIA cards for the victims were prepared and issued on the 29/06/2021, which date was after the complaint of the defilement was lodged to the Police on the 14/06/2021.

The Accused gave his Investigation and Charge Statements to the Police on the 15th and 16th June 2021 respectively.

Presumption and determination of age

The law is that:

1) Where a person, whether charged with an offence or not, is brought before a Court otherwise than for the purpose of giving evidence and it appears to the Court it shall make enquiry as to the age of that person.
2) In the absence of a birth certificate or a baptismal certificate, a certificate signed by a medical officer as to the age of a person below eighteen years of age is evidence of that age before a Court without proof of signature unless the Court directs otherwise.

Section 19(2) of the Juvenile Justice Act 2003 (Act 653) gives a court the discretion to accept another form of certification aside those three specifically mentioned therein. In the decided case of Robert Gyamfi case supra, per Dzamefe, JA, the Court of Appeal held thus: "Going back to section 19 (2) of the Juvenile Justice Act 2003 (Act 653), the very last line states "**unless the court directs otherwise**".

The said provision is as follows:

"In the absence of a birth certificate, or a baptismal certificate, a certificate signed by a medical officer as to the age of a person below eighteen (18) years of age shall be evidence of that age before a court without proof of signature unless the court directs otherwise." **This section pertains to an accused person however the Appellant is applying it to the victim.**

In the view of the Appellant, the above provision of the law, means that the Court ought to expressly indicate that it was accepting another mode of establishing the ages of the victims which was not the case in this case. It is their case that at the trial the National Health Insurance Card was relied on by the Prosecution as the basis for determining the ages of the alleged victims herein. That the Trial Judge admitted the said cards as the means of ascertaining the ages of the alleged victims when he had not directed otherwise, and contrary to the Act of Parliament. They submit that as the alleged victims are allegedly pupils, their school records could have been resorted to in the absence of the Birth certificates and or Baptismal cards. Appellant submits that the prosecution has woefully failed to prove that the ages of the alleged victims herein is below 16 years, as the prosecution cannot rely on the National Health Insurance Card of the alleged victims, even if they were prepared previously and or valid for a long period before the alleged defilement by the Appellant. The case they make is that the cards having been prepared rather during investigations and or the trial, the Statutes are clearly breached, and same cannot ground the conviction at all.

Counsel then submits that they are not totally against the use of the NHIA Card long before an allegation of defilement is made, to ascertain the age of any victim of alleged defilement. According to Appellant's Counsel, even in that case, the law provides that the Trial Judge was required by law to express his desire to rely on the NHIA cards, in the absence of the modes emphasized by both the laws of Ghana and the decided case of

Robert Gyamfi supra. That in the circumstances where it is not possible to rely on the "**normal way**" of determining the age, that is, by Birth Certificate, Medical Certificate, or Baptismal Certificate the Judge was required to have directed otherwise expressly as the trial judge is required, by the decided cases to uphold Statutes e g., section 19 (2) of the Juvenile Justice Act 2003 (Act 653). This section though is applicable to a young person who has a brush with the law as an accused person and not necessarily to a young victim. They urge the Honourable Court to hold that the ages of the alleged victims were not proven and thus the first leg/element of the offence of defilement has not been proven by the prosecution beyond reasonable doubt at all.

They also submit that the National Health Insurance Card is a document and ought to be disclosed therefore the newly prepared or issued National Health Insurance Cards the Prosecution intended to rely on in proving the ages of the alleged victims, were filed as disclosed. Appellant submit also that **the use of the National Health Insurance Card as proof of age has not been provided for in the National Health Insurance Law, Act 852.** It rather provided in section 95 as follows:

"Despite any other provision of this section, the Board may accept the use of an Identity Card authorized under an enactment to be used for all purposes of identification in this country."

They urge the Court to set aside the conviction and sentence against the Appellant herein.

Section 19 (2) of the Juvenile Justice Act 2003 (Act 653) that Appellant's Counsel relies on heavily though is applicable to a young person who has a brush with the law as an accused person and not necessarily to a young victim.

In the instant case, the Court notes that the Prosecution also tendered the Medical Report of victims Mawufemor Nyaletashie and Christine Enyonam Merfor which were signed by Dr. Duke Boye Micah, a Medical Officer at Akatsi District Hospital on 17th June 2021

which stated the ages of the victims as 13 years and this is at pages 12 and 21 of the Record of Appeal. This means the Prosecution provided a document that is recognized by the Juvenile Justice Act as a document that can be used to ascertain the age of a person when the age is in dispute, therefore Appellant's assertion that the Prosecution provided only the NHIA card as proof of the victims age is not tenable.

On whether there be other means of identifying one's age in Ghanaian jurisdiction, the **Robert Gyamfi case supra** provided the law**. Dzamefe, JA** speaking for the Court of Appeal said: "Counsel for the Appellant in disagreement with the alleged age of the victim submits that the trial court failed to make any inquiries as to the right age of the victim. He referred this court to Section 19 (2) of the Juvenile Justice Act, 2003 (Act 653) which states:- 19 (2) -

"**In the absence of a birth certificate, or a baptismal certificate, a certificate signed by a medical officer as to the age of a person below eighteen years of age shall be the evidence of that age before a court without proof of signature unless the court directs otherwise". Yes, I know the statute is specific for children below eighteen years. The class or school register is also one of such official records accepted as indicating the identity and age of school children. [Pp. 166 - 267] lines 20 – 10.**

Section 6(1) of Evidence Act, 1975, NRCD 323 provides that "In an action, and at every stage of the action, an objection to the admissibility of evidence by a party affected by that evidence shall be made at the time the evidence is offered".

Section 5(1) of the Evidence Act, 1975, NRCD 323 provides that "A finding, verdict, judgment or decision shall not be set aside, altered or reversed on appeal or review because of the erroneous admission of evidence unless the erroneous admission of evidence resulted in a substantial miscarriage of justice".

Section 8 of NRCD 323 provides "Evidence that would be inadmissible if objected to by a party may be excluded by the court on its own motion".

In this instant case, the Appellant did not object to the tendering of the NHIS card as evidence during the trial which is espoused at page 42 lines 18 and 19 of the Record of Appeal, therefore Appellant does not have the right to object to the NHIS card during appeal and this is affirmed by sections 6(1) and 5(1) of Evidence Act, 1975, NRCD 323.

Also section 5(2) (e) of NRCD 323 provides that "In determining whether an erroneous admission of evidence resulted in a substantial miscarriage of justice, the court shall consider whether the decision would have been otherwise but for the erroneous admission of evidence".

The Court will disagree with the submissions of Appellant Counsel that the trial Judge not having expressly indicated that the Court intended to rely on the NHIA cards as means of establishing the ages of the victims, that fell foul of the law or was in breach of the Statute. The Court notes that the Court of Appeal in the above case supra, did not close the list of documents that can be used as an age identifier. In any case, since the Medical Report by Dr. Duke Boye Micah indicated the age of the victims, the decision of the trial court would not have been different even if the NHIS card had not been tendered in evidence in the candid and considered opinion of this Court.

In the book titled the **Modern Law of Evidence 7th edition 2008** by Adrain Keane, Oxford University press, at page 50, he wrote under the heading Age as follows:
"2. Age

The date of a person's birth being contained in his or her birth certificate, the normal way of proving a person's age is by;

a) Producing to the Court a certified copy of an entry in the register of births, which, as we have seen, is admissible as evidence of the truth of its contents.
b) Adducing some evidence identifying the person whose age is in question with the person named in the birth certificate.

That definition on its own is restrictive and would not apply wholesale to the situation in Ghana where in some areas not in cities, birth or baptismal certificate may not be prevalent.

Counsel for Appellant cites the decided case of **JOHN AGYEKUM & 6 ORS V NANA AMOATENG II & 6 ORS AND ANITA OWUSU BOATENG & ANR V NANA KWASI AMOATENG II & STATE HOUSING CO LTD [2019] 145 GMJ 84 CA** where Mariama Owusu JA., (as she then was) at page 99 said:

"Besides, judges and or the courts had consistently insisted that it was their duty to observe and enforce Statutes of the land. Consequently the courts have been bound to hold that the Courts' own law, the Common Law, as defined in Article 11(2) of the 1992 Constitution, must give way to Statute..." See the case of **Republic v High Court (Fast track Division) Accra, Ex Parte National Lottery Authority (Ghana Lotto Operators Association Operators and Others Interested Parties) [2019] SCGLR 390, 392.** In the words of Dr. Date-Bah JSC: "The learned judge acted in obvious excess of his jurisdiction. **No judge has authority to grant immunity to a party from the consequences of breaching an Act of parliament.**"

In another decided case **CIVIL APPEAL NO. J4/47/2017 13TH JUNE, 2018 NANA AMPAA-ANDOH VIII (SUBSTITUTED BY ALBERT KOBINA KOOMSON) VRS**

1. **PARAMOUNT STOOL OF BREMAN ESSIAM (SUBSTITUTED BY NANA EFUWA ESIWA II)**
2. **KOBINA MENSAH (SUBSTITUTED BY NANA ATTA KWAW IV)**

NANA OGUAMON ATWERE II (SUBSTITUTED BY EBUSUAPANYIN KWAME DOM) (SUBSTITUTED BY NICHOLAS SAM)

AND

1. **ENYAN DENYIRA SOOL)**
2. **BREMAN ESSIAM STOOL)**
3. **EJUMAKO STOOL)**

It was held thus: "Where statute has provided for a procedure for the determination of a dispute that procedure ought to be strictly adhered to because parties appearing in court have a right to have their dispute determined in accordance with laid down procedure. NRCD 172 and Act 587 are substantive statutes and a court of law is not entitled to set aside the provisions of a statute that prescribes the manner it is required to exercise jurisdiction in matters regulated by the statute."

That being noted, the Court does not find that by not stating expressly that the Lower Court will rely on the NHIA Cards as a determinant of the ages of the victims but going ahead to rely on same, the Court breached Statute.

Disclosures

Disclosures are part and parcel of the criminal procedures in the criminal jurisprudence in Ghana. By the practice direction of the Chief justice of Ghana, the prosecution is mandatorily required to disclose to the Defence Counsel or the Accused as the case may be all materials including documentary evidence the prosecution intends to rely on.

Appellant asserts at paragraph 32 of his Written Submission that the National Health Insurance Cards of the victims were not disclosed by the Prosecution. At page 9 line 5 of the Record of Appeal, the Prosecution disclosed the National Health Insurance Cards of

victims Mawufermor Nyaletashie and Christine Eyonam Morfor and the photographs of the NHIS cards are at the pages 14 and 15 of the Record of Appeal therefore Appellant's assertion that these document were not disclosed is not tenable.

Evidence of the Accused person/Appellant

The statements by the Appellant herein to the Police upon his arrest may be found on pages 10, 11, 19 and 20 of the ROA. The Appellant had denied the allegation of defilement against him and maintained his innocence through the trial. He claims he had also not provided any witnesses in support of his case. Counsel submits that having not provided any witnesses is not a proper basis to ground the allegation of defilement against the Appellant herein.

Appellant challenged the victims and their witnesses at the trial as he maintained his denial and innocence. At paragraph 34 line 10 and 11 of the Appellant's Written Submission, Appellant stated that he was convicted because he did not call any witnesses during the trial. However, on page 48 line 5 to page 50 line 2 of the Record of Appeal, Bertha Logoh (DW1) testified in favour of the Appellant hence this Court is satisfied that the trial Judge did not convict the Appellant because he did not provide any witnesses but he convicted him because after a careful evaluation of the evidence before him, he was satisfied of the guilt of the Accused as stated at page 63 paragraph 4 lines 1 to 4 of the Record of Appeal thus" Upon a careful evaluation of the entirety of the evidence adduced at the trial, I am fully satisfied of the guilt of the Accused person as I find that the prosecution has been able to prove its case against the Accused person beyond reasonable doubt".

In the case of **DOGBEY VRS. THE REPUBLIC [1975] 1 GLR 118-126;** It was held that the identity of the accused as a person who committed the crime might be proved either by

direct testimony or by circumstantial evidence of other relevant facts from which it might be inferred by the court.

Also in the case of **ADU BOAHENE Vrs THE REPUBLIC [1972] 1 GLR 70 - 78;** The Court of Appeal unanimously speaking through Azu Crabbe JSC put it succinctly thus: "where the identity of an accused person is in issue, there can be no better proof of his identity than the evidence of a witness who swears to have seen the accused committing the offence charged".

Since the victims pointed out the Appellant as the one who had sexual intercourse with them, the Appellant cannot deny having sexual intercourse with the victims just because DNA test was not conducted on the semen. Also from the record, the sexual intercourse occurred in December 2020 and the Appellant warned the victims not to disclose it to anyone else he will kill them. The victims disclosed the sexual intercourse in May 2021 and the Medical Examination was conducted on 17th June 2021 therefore there were no traces of semen in the vagina of victims, however, the Medical Officer Dr. Duke Boye Micah stated that there was vagina penetration after examining the victims. This corroborates the victims assertion that Accused person had sexual intercourse with them in December 2020.

As in the case of **ADU BOAHENE VRS. THE REPUBLIC (1972) 1 GLR 70 @75,** the victims identified the appellant as the one who had sexual intercourse with them therefore the identity of the Appellant is not in issue. Hence Appellant's assertion that he is not the one who had sexual intercourse with the victims because the semen was not tested is not tenable. Regarding the issue of DNA as raised by the Appellant, it is imperative to note that in situations where medical examinations prove inconclusive to

determining the issue of sexual offences, surrounding circumstances or evidence is what the Court resorts to and the Prosecution undoubtedly proved a good case of identity at the trial court. From the above, it's obvious that the trial Court's judgment is supported by the evidence on record therefore Appellant's appeal would not succeed.

On whether or not the quality of evidence is about the number of witnesses called at a trial, Dzamefe JA, held in the **Robert Gyamfi** case supra, as follows:
"The grandmother testified in the trial. The prosecution failed to call the headmistress and the proprietress. It was desirable they did even though evidence is not about number of witnesses called but the quality. This failure is however not fatal to prosecution's case since they would have repeated what the other witnesses to act said. See **Akrofi v. Oteng & Anor [1989 - 90] 2 GLR 244** Supreme Court. Proof was no more than credible evidence of a fact in issue. It did not matter that the evidence was given by one or several witnesses, the important thing was the quality of the evidence" **[Pp. 169 - 170] lines 35 - 5.**

The law on the presumption of admission where an Accused does not challenge or controvert evidence against him was espoused in the ROBERT GYAMFI case supra, when Dzamefe, JA again held that: "The High Court Judge held the law is that if accused does not challenge nor controvert the evidence, it means the testimony or the assertion is true or has been admitted by him. He cited the following case to support his assertion:

i. **ESHUN V. THE REPUBLIC [2009] 22 WLRG 187 CA**
ii. **PRAH V. THE REPUBLIC [1976] 2 GLR 279 [P. 170] lines 20 – 25**

In YANKEY V THE STATE (1968) C.C 115 it was stated; *The judge should put the case of the defence fairly by making a complete analysis of the facts of the case so as to highlight the crux of the case for the benefit of the jury. The onus is on the prosecution at all times to prove their case*

beyond reasonable doubt. So that if there is evidence emanating from the prosecution itself which raises doubt upon their case, the judge is under a duty to draw the attention of the jury to it and to direct them to acquit"

The two (2) other elements of the defilement offence, is namely;
That a person has had natural or unnatural carnal knowledge of the victim; and that the person is the appellant."

The Medical Report on the examination of the victim Morfor Christine Enyonam appears on pages 12 and 13 and that of Nyaletashie Mawufemor may be found on pages 21 and 22 of the ROA. The Medical Officer concluded that "**vagina penetration likely and alleged sexual assault",**

The Appellant's case is that he had not had sex with the alleged victims, hence the denial throughout the trial. These two Reports according to Appellant and his Counsel are essentially the same and the Medical Officer had not applied himself to conduct any test particularly DNA test on the sperm probably deposited in the vagina of the alleged victims. They submit that the Medical Officer probably relied on the absence of the Hymen in both alleged victims to conclude that "**vagina penetration likely and alleged sexual assault",** without establishing who might have assaulted them and to have penetrated the vagina and by what means. At paragraph 38 of Appellants Written Submission, Appellant asserts that he did not have sexual intercourse with the victims because there was no DNA test conducted on the sperm from the victims.

In the opinion of the Court, the full trial was conducted by the Court and each side had an opportunity to present its case and cross-examine the opponent. The Court evaluated the evidence on record including the said Medical Reports and this Court finds that the

evaluation carried out was done in accordance with the law and proper conclusions were drawn which does not require this Court to interfere with same.

Ground two of the instant appeal is that **the sentence of 10 years in jail IHL is harsh and excessive, taking into consideration the circumstances of the case.**

On sentencing as a discretionary duty on a judge and the meaning of the words "discretion" -Dzamefe JA said in the ROBERT GYAMFl case supra thus: "Sentencing is a discretionary duty of the trial judge; **HARUNA V. THE REPUBLIC [1980] 1 GLR 189.**

Lord Halsbury defined "discretion" when he said:

"Discretion means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion... according to law, and not humour. It is to be man competent to the discharge of his office ought to confine himself". [P. 173] lines 5 – 15

On the duty of fairness on a person in possession of discretionary power and the factors the trial judge should consider in passing sentence on an accused person, Dzamefe, JA said:

"It is trite learning that a person in possession of a discretionary power has the duty to be fair and candid. In exercise of that power, the holder of the discretion must not be arbitrary, capricious or prejudiced in any manner. That power is not absolute but must be exercised within its well-defined parameters. - Article 296 of the 1992 Constitution. This court in the case of **KWASHIE V. THE REPUBLIC [1971] 1 GLR 488** listed some very important factors the trial Judge should consider in passing sentence.

i. The intrinsic seriousness of the offence;
ii. The degree of revulsion felt by law-abiding citizens of the society for the particular crime;

iii. The premeditation with which the criminal plan was executed;
iv. The prevalence of the crime within the particular locality where the offence took place, or in the country generally;
v. The sudden increase in the incidence of the particular crime; and
vi. Mitigating or aggravating circumstances such as extreme youth, good character and the violent manner in which the offence was committed".

On the general principle of sentencing and the factors the trial judge should take into consideration when imposing a deterrent sentence - Dzamefe, JA also held that:
"The general principle on sentencing is that where the court finds an offence to be very grave, it must not only impose a punitive sentence, but also a deterrent or exemplary one so as to indicate the disapproval of society of that offence. The trial judge must take into consideration the prevailing wave of the particular crime in the country before imposing such deterrent sentence" [P. 174] lines 5 – 10.

Appellant and his Counsel have left it at large that the sentence of 10 years in jail IHL is harsh and excessive, taking into consideration the circumstances of the case. They have not made any submissions or shown why when he was found guilty on two counts of defilement of minors, 10 years IHL to run concurrently is harsh or excessive. The sentencing regime was not referred to and no mitigating factors were also put before the Court for consideration.
The Criminal Offences Act, 1960 (Act 29) in section 101 provides as follows;

a) For the purposes of this Act defilement is the natural or unnatural carnal knowledge of any child under sixteen years of age.
b) A person who naturally or unnaturally knows a child under sixteen years of age, whether with or without the consent of the child, commits a criminal offence and

is liable on summary conviction to a term of imprisonment of not less than seven years and not more than twenty-five years.

The sentence imposed was in the opinion of the Court on the lower end of the spectrum of 7 to 25. Also in the case of **Kwashie and Another vrs The Republic,** Azu Crabbe JA held that:

(1) When a trial judge is imposing a sentence on a convicted person there is no obligation on him to give reasons for the sentence that he passes.

(2) Since the offence was of a very grave nature, the sentence must not only have been punitive but it must also have been a deterrent or exemplary in order to mark the disapproval of society of such conduct. When a court decides to impose a deterrent sentence, the good record of the accused becomes irrelevant.

(3) In determining a sentence it is proper for a court to consider on the one hand, the social or official position of the offender, and on the other, that the offence may be aggravated by reason of such position. The trial judge was justified in taking the official position of the first appellant into consideration in passing an exemplary sentence.

From the record, the trial Judge considered the above factors and stated at page 63 paragraph 4 lines 8 to 10 of the Record of Appeal that "However, as the offence is of a very serious nature, passing a deterrent sentence on the Accused person will be appropriate".

At page 12 of the Ghana Sentencing Guidelines, the Appellant falls under the following aggravating factors: younger aged victims, vulnerable victims, excessive violence, greater injury (both physical and psychological), and violation of safe place, large age difference, family and position of trust. The only mitigating factor that the Appellant falls under is short duration.

At the same page of the Ghana Sentencing Guidelines, at Step 2 - The Fix Sentence Level, Appellant falls under Level D and E which gives a minimum sentence of 12 years and a maximum sentence of 25 years.

Therefore, the Trial Court's 10 year prison sentence imposed on the Appellant is very lenient in the opinion of this Court.

Section 302 (b) of The Criminal and Other Offences (Procedure) Act, 1960, (Act 30) provides that "where a person by one act assaults, harms, or kills several persons, or in any manner causes injury to several persons or things, that person is punishable only in respect of one of the persons so assaulted, harmed or killed, or of the persons or things to which injury is so caused, but in awarding punishment the Court may take into consideration all of the intended or probable consequences of the criminal offence".

Therefore in the candid and considered opinion of this Court, the trial Judge erred when he stated that the 10 year prison sentences should run consecutively which is at page 64 of the Record of Appeal, looking at the repulsive nature of the offence and the degree of revulsion felt by law-abiding citizens of the society. The trial Judge at page 64 paragraph 1 line 4 of the Record of Appeal stated that "Accused person herein to serve a prison term of Ten years IHL on each count to run consecutively".

The Appellate Court under Section 30 (a) (ii) of the Courts Act, 1993, (Act 459), can increase the sentence of the Appellant to 20 years on each count to run concurrently in order to reflect the true intention of the trial Court because Appellant's conduct in his instant appeal before this Honourable Court proves that he is not remorseful after the psychological trauma caused to these victims.

During the trial, the Appellant vehemently denied having sex with the victims even though there was overwhelming evidence against him. He is currently appealing against the lenient sentence imposed on him by the trial Court. In fact, he is still denying the offence and praying that the conviction be set aside. It is obvious that the Appellant premeditated his act and carried it out without being remorseful. This is an indication that he is still not remorseful for the offence he has committed.

Per Section 30 as above referred to, a 20 year prison sentence imposed on the Appellant which is in line with the Ghana Sentencing Guideline will serve as deterrent to like-minded persons.

The Appeal on all three grounds is refused and same dismissed accordingly. The Court will however set aside the lower sentence imposed and sentence Appellant to a higher sentence of 20 years IHL starting from the date of the initial sentence.

[SGD]
H/L JUSTICE DOREEN G. BOAKYE-AGYEI MRS. ESQ.
JUSTICE OF THE HIGH COURT

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