

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
INTERNATIONAL CRIMES DIVISION
HCT-00-ICD-SC-0007-2021

UGANDA:..... PROSECUTOR
VERSUS

NSUNGWA ROSE KARAMAGI:..... ACCUSED

BEFORE: HON JUSTICE SUSAN OKALANY

CONFIRMATION OF CHARGES RULING

BACKGROUND

[1] Nsungwa Rose Karamagi is the accused indicted by the Director of Public Prosecutions with the charge of *Aggravated Trafficking in children contrary to Section 3(1) (a) and 5(a) of Prevention of Trafficking in Persons Act, 2009*.

[2] It is alleged that the accused on the 12th day of March 2021 at Kololo in Kampala District, transported Kobusingye a child aged 15 years old, by means of deception or abuse of power or position of vulnerability, for the purpose of sexual exploitation.

[3] The summary of the case on record as well as the evidence disclosed by the prosecution to the accused and to this court, Kobusingye (herein after referred to as the victim), a girl aged 15 years, was staying with her grandmother Basemera at Kololo – Makenzie Valley, since 31st December 2014. She was attending Victory Primary Boarding School.

[4] In December 2019, the victim’s grandmother hired the accused as a housemaid in her residence. In January 2020, the accused introduced the victim to her brother a one, Tom on phone. She informed the victim of her desire for the latter to develop a love relationship with the said Tom. The victim and Tom started communicating frequently using the accused’s phone. The accused subsequently organised for the victim to travel to Fort portal to meet Tom. Tom sent the transport fare of sixty thousand shillings (60,000/=) via the accused’s phone using mobile money. The accused handed the said money to the victim.

[5] On 12th March 2021, the victim and the accused waited for her grandmother to leave home for work. The accused handed the victim one of her phones, which the victim would subsequently use to communicate with the accused. The victim proceeded to

travel by bus to Fort Portal. Upon her arrival, Tom picked up the victim from the bus park and took her home. He stayed with her for four days and had sexual intercourse with her without protection.

- [6] The victim's grandmother reported the victim's disappearance from home to the police. The accused informed Tom that the police were searching for the victim. Tom asked the victim to leave his home, claiming that he was travelling to Mbarara District to supervise the construction of his unfinished house. He then handed the victim thirty thousand shillings (30,000/=) and disappeared from her.
- [7] The victim was stranded in Fort Portal town with nowhere to stay. She tried to communicate to the accused in vain as the accused's phone was not available. She informed a certain lady she met about her ordeal and the said lady who knew her father called the victim's father who went to the victim's aid. The victim narrated her ordeal to him. He assigned his brother to travel with the victim to Kampala to assist the police in their investigations.
- [8] The victim's grandmother caused the arrest of the accused after hearing the victim's story. On 24th March 2021, the victim was examined on Police Form 3A by a Medical Clinical Officer of Praise Medical Clinic and was found to have sustained a ruptured hymen, a mild bruise wound in her genitals, consistent with recent sexual intercourse.
- [9] The accused person was also medically examined on 23rd March 2021 at Praise Medical Clinic on Police Form 24 and found to be 42 years old and mentally sound.

LIST OF EXHIBITS

- [10] The following documents were identified as documents that the prosecution intends to adduce in evidence:
- 1) PTID1(Police Form 3A), which is a medical report dated 24th March 2021, made by Mr. Kizito Grick - a Medical Clinical Officer of Praise Medical Clinic, showing that; the victim's hymen was ruptured, the victim had recently had sexual intercourse and had a whitish discharge in her genitals, which was seven (7) days old;
 - 2) PTID2, which is a birth notification record of the victim, dated 13th December 2019 and issued by the National Identification and Registration Authority (NIRA), showing that the victim was born on 19th February 2006;
 - 3) PTID3 (Police Form 24), which is a medical examination report of the accused dated 23rd March 2021, made by Mr. Kizito Grick - a Medical Clinical Officer

at Praise Medical Clinic showing that the accused is an adult of sound mind;
and

- 4) PTID4(a) and PTID4(b), which are two pages of photographs of the victim containing an announcement that the victim was missing and asking the public to call the listed telephone numbers in case she was seen.

REPRESENTATION

- [11] Mr. Joseph Kyomuhendo Chief State Attorney was prosecution counsel, while the accused was represented by Mr. Geoffrey Boris Anyuru and Mr. Senkeezi Ssali on State Brief.

BURDEN AND STANDARD OF PROOF

- [12] Pre-Trial proceedings are provided for under the International Crimes hearing envisaged under the International Crimes Division (ICD) Rules, SI 40/2016. The said trial does not entail hearing of witnesses as can be deciphered from the Rules. A Pre-Trial court, in addition to considering the facts and making necessary orders and directions for ensuring that the case is ready for trial, and that the main trial will proceed in an orderly and efficient manner, is expected to examine the charges basing on the Summary of the Case and the evidence disclosed to the court by the prosecution and decide on the sufficiency of evidence available before confirming the charges preferred. (See Rules 6-23).

- [13] Pre-Trial hearings have only recently been introduced to our jurisprudence by the ICD Rules. The ICD Rules are silent on the standard of proof that the prosecution must meet in its evidence, in order to make the case trial ready.

- [14] It is noteworthy that the ICD was initially established in 2008 as a War Crimes Division to fulfil the Government of Uganda's commitment to the actualization of *Juba Agreement on Accountability and Reconciliation*. The subsequent domestication of the *Rome Statute* by Uganda in 2010 when it enacted the *ICC Act*, resulted in the implementation of the complementarity principle stipulated in the preamble and Article 1 of the *Rome Statute* and also reinforced Uganda's commitment to fight impunity in respect of international crimes and crimes of a transnational nature.

- [15] The parties in their final Pre-Trial submissions did not express any opinions on the standard of proof that must be met by the prosecution in Pre-Trial hearings. The issue was left to this court to decide.

[16] Nonetheless, *directive 8(2) of the High Court (International Crimes Division) Practice Directions, 2011*, provides that if there is no express provision made under any written law, the court shall adopt such other procedure as it considers to be justifiable and appropriate in all the circumstances, taking into account the provisions of *Section 141 of the Trial on Indictments Act, Cap 23 and Section 39 of the Judicature Act, Cap 13*, and having regard to the rights and views of the parties.

[17] Given the fact that no standard of proof is stipulated in our criminal laws as applying to a confirmation of charges decision following Pre-Trial proceedings by this court, and since Uganda is a party to the *Rome Statute*, and has taken considerable steps to fulfil its obligations therein, including the establishment of this court, I think that the application of specific relevant provisions of the *Rome Statute* and the *ICC Rules of Procedure and Evidence* mutatis mutandis, by this honourable court, in order to fill procedural gaps in laws establishing this court is within the powers of this court.

[18] I will therefore resort to the provisions of *Article 61(7), of the Rome Statute*, to define the standard of proof for confirmation of charges in this Pre-Trial proceeding. The said article *inter alia* stipulates as follows:

*“The Pre-Trial Chamber shall, on the basis of the hearing, **determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.** Based on its determination, the Pre-Trial Chamber shall:*

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence...”

[19] To define the concept of “substantial grounds to believe”, this court, having considered the absence of local authorities, is persuaded to rely on the decisions of the International Criminal Court (ICC) and internationally recognised human rights jurisprudence. The judgement of the European Court of Human Rights (ECHR) of 7th July 1987 in *Soering v. United Kingdom, Application No. 14038/88* was cited with approval in the case of *The Prosecutor Vs Thomas Lubanga Dyilo, ICC-01/04-01/06-803-tEN 14-05-2007 1/157 SL PT* by the Pre-Trial Chamber, when it defined this standard to mean that: **“substantial grounds have been shown for believing.”**

The Chamber also cited the joint dissenting opinion appended to the judgement in *Mamatkulov and Askarov v. Turkey*, of 4th February 2005, (*Applications Nos. 46827/99 and 46951/99*) by Judges Bratza, Bonello and Hedigan in which “**substantial grounds to believe**” were defined as “**strong grounds for believing**”.

[20] Consequently, I must determine whether the evidence disclosed by the prosecution in this case is sufficiently strong to move me to confirm the charges and present the accused to the Trial Court for the hearing of the said evidence. Notably, the standard of **substantial grounds to believe** is a lesser one than the standard of **prima facie case** that is required by courts to put an accused person to his/her defence.

FINAL SUBMISSIONS ON CONFIRMATION OF CHARGES

[21] This court directed that state counsel files his submissions in support of the charges by 31st December 2021, while the defence counsel was to file the defence’s reply by 14th January 2022. The defence did not file its submissions. This court will proceed to pronounce itself on the charges regardless of that fact.

ARGUMENTS FOR THE STATE

[22] Regarding Count 1, Mr. Joseph Kyomuhendo submitted that the state had to establish that the accused fulfilled the following ingredients when she committed the offense of aggravated trafficking in persons:

1. The fact of transportation of the victim;
2. The fact that victim was a child;
3. The fact of abuse of power or position of vulnerability;
4. The fact of exploitation; and
5. The participation of the accused.

[23] Concerning the ingredient of transportation of the victim, counsel cited the case of *Uganda versus Naturinda Faith, HCT CR CASE No. 001/2012*, where the court held that the act of the accused paying for the victims’ travel documents amounted to transportation. He submitted that the prosecution will adduce evidence through the victim to show that the accused facilitated her to leave home by giving her 60,000/=, which enabled her to travel to Fort Portal, where she met the accused’s brother Tom. He submitted that the accused’s act of giving the victim 60,000/= to travel to Fort portal amounted to transportation.

[24] Regarding the age of the victim, Mr. Kyomuhendo submitted that the prosecution relies on the police statements of the victim and her grandmother to prove that the victim was fifteen (15) years of age when the accused transported her from her home to Fort Portal. He submitted that the above mentioned evidence is corroborated by PTID1 (PF3 dated 24th March 2021), which confirms that the victim was a minor and PTID2, the Birth Notification Record, which indicates that the victim was born on 19th February 2006.

[25] As for the ingredient of abuse of power or position of vulnerability, Mr. Kyomuhendo submitted that the prosecution shall through the testimony of the medical officer who examined the accused on PTID3 (PF24), prove that the accused was forty-two (42) years old. He stated that the prosecution shall further adduce evidence through the victim and her grandmother to establish that the accused had control and power over the victim. He averred that the accused, being an adult who was much older than the victim, had power over the child and therefore took advantage of her vulnerability.

[26] About the elements for the purpose and participation of the accused, counsel submitted that the witness statements of the victim and her grandmother show that the accused was known to both of them because she was employed as a house keeper in the home of the victim's grandmother at Kololo. He further submitted that the victim's testimony will prove that she started communicating with the accused's brother whom she fell in love and later met with assistance from the accused. He additionally submitted that the prosecution would also rely on PTID1(PF3 dated 24th March 2021), which shows that the victim sustained mild bruises in her genitals, thus proving that she had recently had sexual intercourse. He cited Section 2(j) of the *Prevention of Trafficking in Persons Act, 2009* for the definition of sexual exploitation.

[27] Mr. Kyomuhendo submitted that the police statements of the victim and her grandmother establish that it is the accused who convinced her to meet with Tom and further facilitated her transportation to Fort Portal, where she was sexually exploited by the said Tom. He prayed that this court confirms the charges.

RESOLUTION

[28] *Section 2 (a) of the Prevention of Trafficking in Persons Act, 2009* defines a child as a person below the age of 18 years.

[29] Section 3(1) of the Act under which the accused is charged provides that a person commits an offence who:

- a) *“recruits, transports, transfers, harbours or receives a person, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation.*

[30] Also, Section 4(a) of the Prevention of Trafficking in Persons Act, 2009 provides that a person commits the offence of aggravated trafficking where the victim of the trafficking is a child.

[31] Section 5 (a) of the Prevention of Trafficking in Persons Act, 2009 which is the second provision of the law under which the accused is charged, provides that a person commits the offence of aggravated trafficking in children if he or she does any of the acts in Section 3 in relation to a child.

[32] From the indictment, the offence of trafficking for which the accused is charged is aggravated by the fact that the victim was child when it was committed. In addition, the prosecution submitted that the accused abused her power or of superiority over the victim when she transported the victim to Fort Portal to be sexually exploited by her brother. The fact of abuse of power also aggravates the offence of trafficking in persons.

[33] To establish the crime of aggravated trafficking charged in this case, the following elements have to be proved:

- a) The ACT of recruiting, or harbouring, or transporting, of the victim who is a child, by the accused;
- b) The performance of the above acts by MEANS of deception and abuse of position of power of the accused and/or of vulnerability of the victim;
- c) For the PURPOSE of sexual exploitation of the victim for which she was recruited and transported by the accused.

[34] I have examined the police statements of the victim, her grandmother, and of two other witnesses. There is no doubt in my mind that the victim was recruited by the accused and transported to Fort Portal with the accused's active participation.

[35] Concerning the second element, which is the means by which the victim was recruited and harboured, the proposed evidence of the prosecution witnesses

establishes to the required standard that the accused abused her position of authority over the victim who was child under her care, being a mature house keeper of the victim's granny to lure her to leave home without the knowledge of her grandmother. PTID3 (Police Form 24) which is the accused's medical examination form shows that she was aged 42 years and was mentally sound at the time.

[36] Concerning the last element of the purpose for which she was recruited and transported to Fort Portal, The police statements of the victim and her report to her father and grandmother show that the purpose for with she was recruited and transported by the accused and Tom was sexual exploitation.

[37] Sexual exploitation is defined under Section 2(o) of the Prevention of Trafficking in Persons Act as:

*the use of a person in prostitution, sex tourism, pornography, the production of pornographic materials, or **the use of a person for sexual intercourse or other lascivious conduct.***

[38] PTID1 (Police Form 3A) showing that the victim had fresh injuries in her genitals, supports the police statement of the victim.

[39] I find that the prosecution has established the charge of aggravated trafficking in persons brought against the accused to the required standard for purposes for confirmation of charges against the accused.

[40] In the result, Nsungwa Rose Karamagi is committed to the Trial Court on the confirmed charge.

Susan Okalany

JUDGE

4/5/2022