

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[INTERNATIONAL CRIMES DIVISION]
HCT-00-ICD-SC-0018-2022

UGANDA :: PROSECUTION

VERSUS

AGABA ALEX :: ACCUSED

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

RULING.

20 *The Law.*

This ruling is pursuant to Article 61 (5) of the Rome Statute of the International Crimes Court (ICC). It is required thereunder that the prosecution shall support each charge with sufficient evidence to establish *substantial grounds to believe* that the person committed the crime(s) charged. Article 61 (7) (supra) provides 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;



(c)Adjourn the hearing and request the Prosecutor to consider:

(i)Providing further evidence or conducting further

investigation with respect to a particular charge; or

(ii) Amending a charge because the evidence submitted

appears to establish a different crime within the

jurisdiction of the Court." [underlined for emphasis].

The prosecution has the latitude to rely on documentary or summary of evidence to establish *substantial grounds to believe*, and need not to call the witnesses who are expected to testify at the trial. It remains for the court to interrogate the evidence disclosed by the prosecution to determine whether it establishes substantial grounds to believe that the person committed the crime charged, before the accused can be put on trial. Thus whereas the standard of proof ordinarily required of the prosecution is "beyond reasonable doubt", in case at pretrial before confirmation of charges standard is "*sufficient evidence to establish substantial grounds to believe*". This standard is elucidated in ***Uganda vs. Miria Rwigambwa HCT-00-ICD-SC-006/2021*** and ***Prosecutor vs. Katanga & Ngudjolo Case No. ICC.01/04.04/07/717*** (decision, 26th November 2008).

The expression "*substantial grounds to believe*" means strong grounds for believing. This position was taken in the cases of ***Mamatklov and Askariv vs. Turkey, of 4th February 2005 (Application Nos. 46 and 27/99 and 46951/99); Soering vs. United Kingdom, Application No. 14038/88; The Prosecutor vs. Tomas Lubanga Dyilo, ICC-01/04/06-TEN14-05-2007 1/157;*** and ***The Prosecutor vs. Bosco Ntaganda ICC-01/04/02/06 at P.5.*** These principles shall form the basis for evaluation of the evidence disclosed by the prosecution in the instant case for the purpose of confirmation of the charges against the accused.

At the pre-trial hearing, the accused was represented by the firm of M/s. Wameli & Co Advocates. The prosecution was represented by Mr. Joseph Kyomuhendo

10 Chief State Attorney in the Office of the Director of Public Prosecutions. Both counsel argued the matter by filing written submissions which court has read and appreciated, and taken into account in arriving at a decision herein.

The indictment.

Agaba Alex (*the "accused"*) is indicted in one count of *Aggravated Trafficking in Children* contrary to *Section 3(a) and 5(a) of the Prevention of Trafficking in Persons Act, 2009*. The particulars of the offence are that Agaba Alex on the 15th January 2022, at around 1600 hours in Zzana Makindye Ssabagabo in the Wakiso District received or harbored Atuhairu Ruth (*the "victim"*) by means of deception or abuse of power or position of vulnerability, to his premises for
20 purposes of sexual exploitation. The prosecution alleges that the accused, on 15th January 2022, in Zzana at around 16:00 hours, received and harbored the victim at his premises promising to employ her in a bar he was to open up, but that the same had not yet started operating. That instead, the accused used the victim for purposes of sexual exploitation contrary to *Section 3(a) and 5 (a) of the Prevention of Trafficking in Persons Act, 2009*. The prosecution based its case on the testimony of four witnesses whose statements are on record and were duly disclosed to the accused. The said witnesses will testify to prove the charges of trafficking the victim by the accused for the purposes of sexual exploitation.

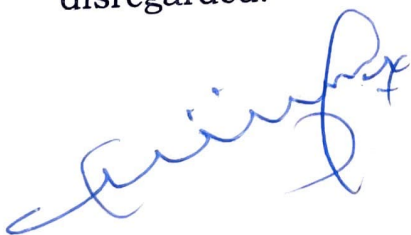
In a charge of *Aggravated Trafficking Children*, contrary to *Section 3(a) and 5 (a)*
30 *of the Prevention of Trafficking in Persons Act, 2009*, prosecution is required to support the charges with sufficient evidence to establish the following essential ingredients;

1. *The accused received and harbored the victim.*
2. *The victim was a child.*
3. *Deception or abuse of power and or abuse of position of vulnerability of the victim.*
4. *For the purposes of sexual exploitation.*
5. *The accused person participated.*

10 **Preliminary objection.**

Counsel for the accused raised objections essentially on the legality of the offence the accused is charged with. The basis of the objection is that the offence the prosecution is relying on to charge and prosecute the accused is nonexistent in law to wit; Aggravated Trafficking in Children, C/S 3(A) and 5(A) of the *Prevention of Trafficking in Persons Act, 2009*, which does not exist in law and has never been. Counsel submitted that the indictment is thus incurably defective under the law, and as such its null and void *abinitio*, and ought to be struck out and the accused be discharged, as it would otherwise occasion a miscarriage of justice to the accused. Counsel cited cases to support that view. See: **Uganda vs. Kadogo Moses Criminal Session Case No.443 of 2015 [2019] UGHCCRD** and **Muhizi Godfrey vs. Uganda (Cr. Appeal No.11 of 2013) [2014] UGHCCRD.**

In reply Mr. Kyomuhendo Joseph, for the prosecution, submitted that the charges were read and explained to the accused in the Magistrate's Court upon which he was committed to the High Court. That the charges are premised on an existing law which is clearly spelt under Section 3(a) and 5(a) of the Prevention in Trafficking of Persons Act, 2009. That it was a miss of the draftsman to have framed the charges as they appear in the indictment, with capital letter (A) and (B) instead of small letter (a) and (b) of the particular sections of the law, but that the mistake is not fatal as it can be cured by an amendment. To support his argument, he cited the case of **Kalungi Robert vs. Uganda, HTC-00-AC – CN - 0041-2014**, which cited **Uganda vs. Mpaji 1975 [HCB] 245** and **Sosi Pater Opare vs. R 1962 EA 661**, for the proposition that a conviction cannot be quashed upon mere technicality which has caused no embarrassment or prejudice to the accused person. Mr. Kyomuhendo prayed that the objection be disregarded.



10 **Opinion on the objection.**

Article 28(3) of the Constitution of the Republic of Uganda 1995, in the relevant part provides that;

“(3) Every person who is charged with a criminal offence shall-

(b) be informed immediately, in a language that the person understands, of the nature of the offence;”

From the record of proceedings, it is shown that the indictment was read and charges explained to the accused in a language he understands. The record also shows that the accused acknowledged that he understood. Clearly, there was no miscarriage of justice which would only be occasioned if the charges were not
20 read and explained to the accused as for him not to know or understand why he was being arrested or arraigned in court. What is crucial is that the charge should give reasonable information as to the nature of the offence one is charged with. Given that the accused clearly indicated to court that he understood the charges being read to him, the mere failure or omission to cite the section of the law with a small letter instead a capital letter, would not invalidate or be fatal as to render the charges a nullity. As already observed, the essence of the charge is to give information to the accused person of the nature of the offence he/she has been arrested for. Having done so, the requirements as to a fair trial envisaged under Article 28 of the Constitution were duly met in this case.

30 It follows that the failure/omission to use a small letter of the same capital letter is a mere irregularity which does not render the proceedings a nullity. In any case, there is no suggestion by the defense as to how this omission affected the accused person. Adopting the same reasoning and principle in **Kalungi Robert vs. Uganda** case (supra) the indictment cannot be struck out upon a mere technicality which has caused no embarrassment or prejudice to the accused person. This court finds that the particulars of the offence in the indictment brought out sufficient information that disclosed fully the charges faced by the accused. Within the parameters of Article 126(2)(e) of the Constitution, the

10 oversight by the draftsman of the indictment to include capital letters instead of small letters in the relevant sections of the law is a mere technicality which does not render the indictment incurably defective. It is a mere oversight that can be cured by an amendment under Article 126(2)(e) of the Constitution. The objection lacks merit and it is overruled.

Aggravated trafficking of children contrary to Sections 3(a) and 5 (a) of the Prevention of Trafficking of Persons Act, 20091.

20 The prosecution alleges that the accused was staying in Zzana, and he was connected to the victim by one Suzan - a sister to the victim. That the accused received and harbored the victim for purposes of sexual exploitation. In her recorded statement, the victim stated that during the Covid-19 pandemic lockdown which found her in primary six, her friend Brenda connected her to one Doreen's husband in Kibuli to work in a shop because the victim was tired and bored of being in the village. That she escaped from her parents' home in Ntugamo and upon reaching Kibuli, she found that the place where she had been promised work was not a shop but a bar. Further, that Doreen's husband made sexual advances to her and upon learning of the matter, Doreen chased the victim out of her home.

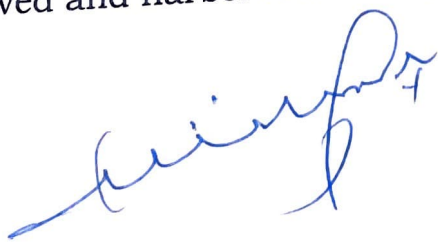
30 The victim stated that she got another job as a mobile money attendant which lasted for only a week, and she was left on her own on the streets with no job and nowhere to stay. That she was subsequently hired by at nearby bar owned by one "Senga" where she worked for six days, and was soon back to the streets because one of Senga's workers stole money. It was then that she ended up in a home of one Ainembabazi in early January, 2022.

The victim got another yet job as a bar attendant in Namuwongo while sharing a room with three other ladies. That she failed to raise money for rent and she was left with nowhere to stay and she went back to the streets. That she contacted her sister Suzan who was staying in Zzana, who connected her to the accused, who Suzan said was expected to soon open up a bar and employ the

10 victim. In the meantime, the accused accommodated the victim at his would- be place of business. The accused told her to stay around, which she did, but the following morning the accused took her to where he sleeps on a pretext that she was going to help him with some house work at around 1300 hours. To the victim's surprise, upon reaching his home the accused instead requested her to have sexual intercourse with him upon which the victim states she declined. That the accused beat her up, squeezed her mouth and had forced sexual intercourse with her on his bed. That she went back to the place where the accused was to open up a bar, but that the same trend continued in that every morning the accused would call her to his house and forcefully have sexual
20 intercourse with her until the 19th January 2022, when the victim developed pain in her stomach. That when she complained to the accused to take her to hospital, he refused and said the victim's sister Suzan would instead take her. Although Suzan came, she was not helpful as she told the victim to look for other means of help. The victim also stated that the boys whom she only knows by face found her mopping the house and took her to the area Chairman LC1, who also called the Woman Councilor. Both the victim and accused were taken to police.

The prosecution intends to use the statement of the Chairperson LC1 who stated that a Youth Committee member reported to him that a girl was being mistreated and locked up in a house without food. That he sent for the victim and called the
30 Woman Councilor and that the victim narrated the ordeal of how the accused continuously defiled her. The Chairperson LC1 also stated that the accused was the person whom he had earlier arrested for the same crime.

In his *charge and caution* statement recorded on 27th January 2020 (PEXH7) the accused stated that he one day gave the victim a key to his house because she was having stomachache, and that he then left for work to Kyanja. The prosecution intends to bring evidence through the victim that the accused received and harbored her for purposes of sexual exploitation.



10 **To “receive or harbor a child”.**

The above essential ingredient(s) of the offence under *Section 3(a) and 5 (a) of the Prevention of Trafficking in Persons Act 2009*, is complete where it is established by the prosecution that the accused allowed or tolerated the presence in his dwelling of a minor to facilitate his unlawful intention with the minors. See: ***The State vs. Bertus Koch (CC 20/2017) (2018) NAHCMD290*** which was relied on in ***Uganda vs. Mpagi Didas HTC-00-ICD-004-2020***.

20 In the instant case, the accused received the victim from her sister one Suzan as narrated by both the victim in her statement (PEXH.2) and the accused himself in his statement (PEXH.5). In their respective statements, both confirm that the accused kept the victim at his place of business that he was to open up and then to employ her. It is also confirmed that the accused gave the victim the key to the place where he slept. The accused, therefore, tolerated the victim at his premises of work and as well as his home, while he accommodated her in the false hope of employing her as a bar maid in a bar business he was about to open. This evidence substantially establishes the essential ingredient that the accused allowed or tolerated the presence in his dwelling of a minor to facilitate his unlawful intention.

The age of the victim.

30 A child is defined under *Section 2(a) of the Prevention in Trafficking of Persons Act 2009*, to mean a person below the age of 18 years. As such, for the purposes of *Section 3 (a) of the Prevention in Trafficking of Persons Act, 2009*, where the person trafficked is a child, proof of the means employed by the accused on the victim are not required. In the instant case, the medical report adduced by the prosecution in the evidence (PEXH.11) shows that the victim had 28 teeth. It was thus medically concluded that she was 15 years old at the time the offence was committed and hence she was a child within the legal definition.

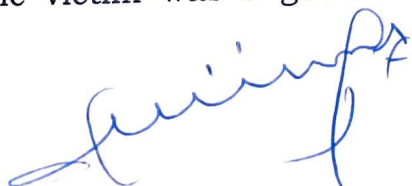
By means of fraud or deception or abuse of power or position of vulnerability.



10 **Oxford Academic Dictionary**, defines deception to mean; "...roughly as intentionally causing someone to have false beliefs". As stated above, the accused accommodated the victim on the promise that he would give her a job as a bar attendant and that while there, the victim was hopeful that she would get the job at the bar; which never came to be. It would seem clearly that this was a bait by the accused to raise hopes of the victim that he would give her a job while the accused very well knew that it was not true. The victim was a vulnerable child of tender age who had escaped from her parents at home in the village in Ntungamo in the hope of getting a job in Kampala city. She was thrown from place to place and on the streets to fend for herself. The accused took advantage of her by giving
20 her a false hope that he will employ her in a bar. This evidence also duly establishes the essential ingredient of fraud and deception employed by the accused to lure the victim, as required under the law.

The victim further intends to give evidence to prove that she was in a vulnerable state. As already stated above this is depicted by the fact of a girl who had run away from village life in Ntungamo after having been stopped in her studies due to the outbreak of the Covid-19 pandemic. She stated that she had tried to get a job in vain, and that she was always dismissed from one small job to another just hardly after a week of work. She ended up with nowhere to go or stay. Her testimony clearly shows a young girl who was desperate for shelter and a job.

30 When the accused offered her the would-be bar job and accommodation, the victim could hardly resist. Her narration further demonstrates that she had trusted the accused and even told him of her stomach pain; to which the accused gave her a key to his house to sleep in. This depicts a clear notion that victim became dependent on the accused for support at the time she was accommodated at his place which she desperately needed. Thus the accused was in the position as a person taking care of the victim and also giving her accommodation at the time when she was desperate and had nowhere to stay. The victim was a girl in dire need of a job from the accused who already



10 accommodated her and she had no alternative but to yield in to the accused against her will.

The prosecution has therefore provided sufficient evidence to support the fact that the victim was in a vulnerable state having been handed over by her sister to the accused. The accused had full control over her and was in a superior power status to the victim, taking into consideration that he had promised to give her a job; which she never received by the time the accused was arrested.

For purpose of sexual exploitation.

To establish this ingredient, the prosecution intends to bring evidence of the victim that the accused received her at his house where he was staying and he
20 requested for sexual intercourse with her. The victim further stated that she refused and the accused beat her up before forcefully having sexual intercourse with her, and that and this continued for a number of times. To further establish this fact, the prosecution intends to rely on PF3A (PEXH6) a medical report in respect of the victim, which shows that the victim had an old ruptured hymen with bloody labia that was folded.

Section 129(7) (a) of the Penal Code Act, defines a "sexual act" to mean penetration of the vagina or anus by a sexual organ which includes a penis. The Court of Appeal in ***Remigious Kiwanuka vs. Uganda, Criminal Appeal No.41 of 1998***, held, inter alia, that in sexual offences penetration is proved by the
30 victim's evidence, medical evidence, and any other evidence. That court only needs corroboration of the victim's evidence if the testimony is lacking or unreliable. Also, in sexual offences the trial judge has to warn himself or herself of the danger of acting on the uncorroborated evidence of the victim. See: ***Kibale vs. Uganda (1999)1 E.A 148***. Furthermore, under Section 133 of the *Evidence Act*, it is provided that there is no particular number of witnesses required to prove a fact in issue in a case.

In the instant case, the victim knew the accused very well. She was handed over by her sister to the accused on a promise that he would give her a job. The

10 accused in his statement stated that he handed his keys of his house to her when she had stomach pain. The victim further stated that the accused called her always for the time she was there to help him at his home, but instead pushed her on his bed forcefully and had sexual intercourse with her. These circumstances show that the victim knew the accused, and based on her evidence, the prosecution has shown sufficiently shown that the victim was sexually exploited by the accused person.

Accused participated.

On the basis of the totality of the evidence on the record, the prosecution has sufficiently established substantial grounds to believe that the accused, Agaba
20 Alex, committed the crime he is charged with. The charges are accordingly confirmed. The accused shall stand trial before a single Judge of the Division.


BASHAIJA K. ANDREW

Pretrial Judge.

08/12/2023