

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**INTERNATIONAL CRIMES DIVISION**  
**HCT-00-ICD-SC-0003-2021**  
**(ARISING FROM MAK/00/AA/127/2020)**

**UGANDA ::: PROSECUTOR**

**VERSUS**

**MALIKI JUNIOR ::: ACCUSED**

**BEFORE: HON JUSTICE SUSAN OKALANY**

**CONFIRMATION OF CHARGES RULING**

**BACKGROUND**

- [1] The Director of Public Prosecutions has indicted Maliki Junior (the accused) with *Aggravated Trafficking in children contrary to Section 5(a) and 3(1)(a) of Prevention of Trafficking in Persons Act, 2009* in count 1 of the indictment. It is alleged that during the year 2019 at Kisasizi Zone, Makindye Division in Kampala District, he received and harboured Nakayima F, a child aged 17 years, by means of deception, or abuse of power or position of vulnerability, for the purpose of sexual exploitation. In count 2 of the indictment, the accused is charged with *Defilement contrary to Section 129 (1) of the Penal Code Act, Cap 120*. It is alleged that between the month of September 2019 and November 2020 at Kisasizi Zone, Makindye Division, in Kampala District, the accused performed a sexual act with Nakayima F, a girl aged 17 years.
- [2] The facts of the prosecution’s case are that Nakayima F, (herein after referred to as the victim) had a disagreement with her mother H. Mwanarushi over the identity of the victim’s father and was chased away from home in Lububa Zone, Kusuli Parish, Makindye Division in Kampala District by her said mother in 2019.
- [3] While seeking for a place of refuge, the victim met the accused person who proposed love to her. She accepted his proposal and went to live with him at his residence in Kibuli.
- [4] The accused and the victim were engaged in regular unprotected sexual intercourse, which resulted in the victim’s pregnancy in August 2020. When the victim discovered that she was pregnant, she informed the accused about her condition. He demanded

that she has an abortion, which demand the victim declined to implement. As a result, the accused got angry with the victim and chased her out of his house. She reported the matter to police, from where she was sent for medical examination on Police Form 3A. The said examination confirmed the fact that she was pregnant. The accused was arrested and also subjected to a medical examination on Police Form 24. He was found to be a 26-year-old adult of sound mind.

### **LIST OF EXHIBITS**

[5] The following documents were identified as documents that the prosecution intends to adduce in evidence:

1. PTID1(Police Form 3A) is a medical examination report of the victim, dated 23<sup>rd</sup> November 2020, made by Dr Paul Kirumira of St. Francis Hospital Nsambya;
2. PTID1(a) is a forensic HIV and HCG laboratory test result slip of the victim, dated 23<sup>rd</sup> November 2020, issued by the Uganda Police Health Services;
3. PTID2 (Police Form 3A) is a medical examination report of the victim, dated 2<sup>nd</sup> December 2020, made by Dr Jackson Kakemba of Muyenga Dispensary Laboratory, which confirms that the victim's hymen was ruptured and that she was pregnant;
4. PTID2(a), is a laboratory request form of Muyenga Dispensary Laboratory, dated 2<sup>nd</sup> December 2020, issued to establish the HIV, TPHA and HCG status of the victim;
5. PTID3 (Police Form 24A) is a medical examination report of the accused, dated 23<sup>rd</sup> November 2020, made by Mr. Kizza Emmanuel who is a Police Clinical Officer, showing that the accused is an adult of sound mind and;
6. PTID3(a), is a forensic laboratory test result slip dated 23<sup>rd</sup> November 2020, issued by the Uganda Police Health Services, containing the HIV results of the accused.

### **REPRESENTATION**

[6] Mr. Joseph Kyomuhendo Chief State Attorney represented the State, while Mr. Geoffrey Boris Anyuru and Mr. Senkeezi Ssali represented the accused on State Brief.

[7] At the close of the Pre-Trial hearing, the parties were given a schedule to file their written submissions in support of their respective cases. The defence counsel did not file its submissions.

## **BURDEN AND STANDARD OF PROOF**

[8] It is trite law that the prosecution bears the burden to prove all the elements of the offence charged, except in specific offences, which are not charged in this case. Concerning the standard of proof that the prosecution must meet in its evidence in Pre-Trial matters, to make the case ready for transmission to a Trial Panel, I have already noted in my previous decisions, including in the cases of ***Uganda Vs Miria Rwigambwa HCT-00-ICD-SC-0006-2021***, ***Uganda Vs Nsungwa Rose Karamagi HCT-00-ICD-SC-0007-2021*** that the standard of proof in a Pre-Trial hearing is not stipulated by the ICD Rules, which provide for procedure in ICD matters. I determined in the said cases that a Pre-Trial court would in such cases apply the ICC standard of proof, which is the standard of *substantial grounds to believe* that the accused committed each of the crimes charged as provided for by the *Rome Statute in Article 61(7)*. In the case of ***Uganda Vs Nsungwa Rose Karamagi*** Supra, I opined that Uganda being a party to the Rome Statute, which has undertaken considerable measures to fulfil its obligations therein, (when it domesticated the Rome Statute and established this court to try international and other serious crimes of a national and transnational nature), the application of specific applicable provisions of the Rome Statute and the ICC Rules of Procedure and Evidence *mutatis mutandis*, by the court, in order to fill the procedural gaps in the ICC Act and the ICD Rules, was within the powers of this court, Uganda being bound by its obligations under the Rome Statute.

[9] The standard of *substantial grounds to believe* is lower than the *prima facie case* standard used by courts to determine whether an accused person should offer a defence to the indictment, after the prosecution has closed its case.

[10] Applying the said standard to this Pre-Trial cases will not prejudice the rights of an accused or of the prosecution since both parties still have the chance to present their respective witnesses at the trial of the accused.

[11] The concept of “*substantial grounds to believe*”, was defined in the judgement of the European Court of Human Rights (ECHR) of 7<sup>th</sup> July 1987 in ***Soering v. United Kingdom, Application No. 14038/88*** (cited in the case of ***The Prosecutor Vs Thomas Lubanga Dyilo, ICC-01/04-01/06-803-tEN 14-05-2007 1/157***

*SL PT*). It defined this standard as meaning that “**substantial grounds have been shown for believing.**” the Pre-Trial Chamber in *Thomas Lubanga’s* case also cited with approval the joint dissenting opinion appended to the judgement in the case of *Mamatkulov and Askarov v. Turkey*, of 4<sup>th</sup> February 2005, (*Applications Nos. 46827/99 and 46951/99*) by Judges Nicholas Bratza, G. Bonello and J. Hedigan in which “**substantial grounds to believe**” were defined as “**strong grounds for believing**”.

[12] The purpose of the Pre-Trial hearing generally speaking is to prepare the case for trial by: examining the facts of the case; marking exhibits and evidence of the parties for identification; considering any waiver of objections to admissibility of evidence; settlement of some or all of the issues between the parties; determining the status of victims and witnesses and any special needs of the witnesses, the accused person and the defence witnesses, if any; making of necessary orders and directions to ensure that the case is ready for trial and that the trial proceeds in an orderly and efficient manner; modifying the pre-trial order if the accused admits the charge but interposes a lawful defence; and considering any other matters that will promote a fair and expeditious trial of the case. (See **Rule 6 of the ICD Rules**).

[13] The Pre-Trial hearing does not entail hearing of witnesses under the ICD Rules. (See **Rule 12 (10) of SI 40/2016**). Apart from the Summary of the Case, the court is expected to rely on the evidence disclosed to the court under Rule, 21(1) of the ICD Rules. It must decide on the sufficiency of the evidence available before confirming or dismissing the charges preferred. For the prosecution to meet the burden of proof above mentioned, it must offer concrete proof demonstrating its specific allegations and the court must assess as a whole the evidence presented to it for purposes of the Pre-Trial hearing.

## **DETERMINATION**

### ***Aggravated Trafficking in children contrary to Section 3(1) (a) and 5(a) of Prevention of Trafficking in Persons Act, 2009.***

[14] The offence of Trafficking in persons is defined in **Section 2(r) of the Prevention of Trafficking in Persons Act, 2009** as follows:

“*trafficking in persons*” means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force

*or other forms of coercion, of abduction, 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.”*

[15] The accused is charged under **Section 3 (1) (a) and 5(a) of the Prevention of Trafficking in Persons Act, 2009, Section 3(1)(a)** provides as follows:

*A person who 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 commits an offence and is liable to imprisonment for fifteen years.*

[16] **Section 5 (a) of the Prevention of Trafficking in Persons Act, 2009** provides:

*A person who does any act referred to under Section 3 in relation to a child commits an offence of aggravated trafficking in children and may be liable to suffer death.*

[17] Considering the provisions of **Section 3(1)(a), and 5(a) of the Trafficking in Person’s Act**, the following elements must be established by the prosecution to prove the offence of aggravated trafficking in children in this case:

1. The **ACT** of recruiting, harboring, transporting, the victim by the accused;
2. Performance of the above acts by **MEANS** of deception and abuse of position of vulnerability of the child victim;
3. For the **PURPOSE** of exploitation of the victim by the accused.

## **THE ACT OF RECRUITING, HARBORING, TRANSPORTING OF THE VICTIM BY THE ACCUSED**

[18] From the indictment, the acts of trafficking complained of are that the accused received and harboured the victim in his home when he lived with her as man and woman. Mr. Kyomuhendo submitted that the statements of the victim together with the charge and caution statement of the accused show that the accused welcomed the victim to live in his house.

[19] The victim in her police statement states she met the accused after being chased away from home by her mother, following a conflict about the identity of her

father. The accused proposed love to her and when she agreed, took her to his home where they lived together, having unprotected sexual intercourse. Her statement is partly corroborated by her mother who states that when the victim left home, she later found out that she was living with the accused. Strangely, according to the victim's mother, she was delighted when she found out that the accused was cohabiting with her child which action meant that the victim was settled since she had before leaving home, stopped going to school and become a prostitute.

[20] Also, the accused's own charge and caution statement further corroborates the statements of the victim and her mother in respect of the fact that he was living with the victim, when he states that he met the victim at Kisazizi Zone in Kibuli and she informed him that she was mature enough to have a relationship with him, that would lead to their marriage and that he subsequently stayed with her until she abandoned their home and took away his property.

[21] It is thus clear to me from the aforementioned statements that the accused received and lived with the victim as man and woman, which evidence shows that he harboured her. It is my esteemed view that the evidence that the prosecution intends to rely on establishes the first element of Count 1 of the indictment to the required standard.

#### **THE MEANS OF DECEPTION OR ABUSE OF POWER OR POSITION OF VULNERABILITY OF A CHILD VICTIM**

[22] According to the indictment, the means by which the accused obtained the victim's consent to be in a relationship with him and to cohabit with him was through deception or abuse by the accused of the position of vulnerability of the victim. Mr. Kyomuhendo submitted that both statements of the victim and her mother, together with PTID1, prove that the victim was a child aged 15 years at the time the alleged crime was committed against her. He further submitted that since the accused was a twenty-six (26) year old adult, he influenced the victim and took advantage of her vulnerability when he lied to her that he would marry her.

[23] The victim in her statement states that the accused became her lover and that they cohabited as man and woman until she got pregnant and informed him about it. When she rejected his suggestion to abort the pregnancy, he chased her away. She resorted to sharing accommodation with her friend, while washing clothes for people

to earn a living. The accused does not deny cohabiting with the victim in his charge and caution statement.

[24] It is noteworthy that there is no need to prove the element of MEANS where the victim is a child. **Section 3(3) of the Prevention of Trafficking in Persons Act** provides:

***“The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall constitute “trafficking in persons” even if this does not involve any of the means set forth in subsection (1) of this Section”.***

[25] The consent of the victim in this case and of her own mother when she discovered that the victim and the accused were cohabiting is irrelevant. **Section 3(4)** of the said Act provides:

***“The consent of the victim of trafficking or if a child, the consent of his or her parents or guardian to the acts of exploitation shall not be relevant.”***

[26] This takes me to the issue of the victim’s age. **Section 2 (a) of the Prevention of Trafficking in Persons Act, 2009** defines a child as a person below the age of 18 years.

[27] It is trite that the most reliable way of proving the age of a child is by the production of her birth certificate, followed by the testimony of the parents. Other ways of proving the age of the child including a medical examination, school records and the court’s own observation and common sense assessment of the age of the child can be equally conclusive.

[28] The prosecution alleges in the indictment that the victim was aged 17 years. In her police statement dated 21<sup>st</sup> November 2020, the victim stated that she was born on 25<sup>th</sup> December 2005 and was making 15 years at the time she reported the matter to the police.

[29] However, the victim’s mother in her statement recorded on 27<sup>th</sup> November 2020 states that the victim was born on 5<sup>th</sup> May 2002. That makes the victim 17 years of age (according to her mother’s statement) at the time of the offence in 2019.

[30] The accused, in his charge and caution statement stated that he met the victim on 27<sup>th</sup> December 2018, which contradicts his plain previous statement in which he states that he met the victim in the year 2019.

[31] Nonetheless, it is clear to me that regardless of the year in which the accused and the victim met and the contradiction between the statement of the victim and her mother regarding the victim's age, the victim was still a child at the time of the offence, as deduced from her mother's statement.

[32] PTIDI is the medical report prepared by Dr. Kirumira who first examined the victim on 23<sup>rd</sup> November 2020. It shows that the victim was 15 years old at the time, based on her own narration. Unfortunately, the medical officer did not make his own independent assessment and findings regarding the victim's age. On the other hand, Dr Kakembo who examined the victim on 2<sup>nd</sup> December 2020 and made PTID2, states that the victim was nineteen (19) years old at the time of his medical examination of the victim based on dentition. Dr Kirumira's reports is not conclusive regarding the actual age of the victim, as it is not based on scientific knowledge. As for Dr Kakembo's report, it is not conclusive regarding the actual age of the victim at the time of the offence in December 2019. Its effect is that at the time of the examination of the victim in December 2020, she had a full set of teeth. In any case, the statement of the victim's mother puts the victim's age at 17 years of age at the time in issue.

[33] According to the mother of the victim, the victim was studying at St. John Primary School in Primary six at the time of her disappearance from home. This too gives me the impression that the victim was still a child at the time she left school and met the accused. No harm will be caused to the prosecution's case if they reinforce their evidence concerning the victim's age, by obtaining school and other records of the victim inter-alia.

[34] I find that the evidence available establishes the fact that the victim was a child when she met the accused. It is also enough (although it is not a requirement in this case) to prove that the accused, an adult aged 26 years according to his charge and caution statement and PTID3, used his position of power as an adult to his advantage to sexually exploit the victim. The fact that the victim's mother in her own evidence states that she was pleased when she discovered that the accused was cohabiting with the victim and the accused's statement that the victim's mother gave him a go ahead to continue cohabiting with the victim shows that the two of them as adults abused their positions of power over the victim.

## **THE PURPOSE OF RECRUITING, HARBORING, TRANSPORTING OF THE VICTIM BY THE ACCUSED**



[35] The purpose for which the victim was being harboured by the accused was sexual exploitation according to the statement of the victim.

[36] Exploitation is defined in **Section 2 (d) of the Prevention of Trafficking in Persons Act** to include at a minimum, sexual exploitation, forced marriage, and child marriage. Sexual exploitation is defined in **Section 2 (j) of the Prevention of Trafficking in Persons Act** to mean 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.

[37] Mr. Kyomuhendo submitted that both the accused and the victim agreed to live together and had sexual intercourse. He stated that the accused admitted responsibility for the victim's pregnancy. According to him, that is evidence of the victim's sexual exploitation. He prayed that this court confirms the charge of aggravated trafficking in children or in the alternative, substitutes it with the cognate offence of aggravated trafficking in persons, considering that the accused's purpose for receiving and harbouring the victim was for the sole purpose of sexual exploitation as shown by his chasing the victim away, when he found out that she was pregnant and had refused to undergo an abort.

[38] The victim became pregnant and declined to abort her child. The accused chased her away from his home. As already mentioned above, the accused's charge and caution statement corroborates that fact when he states that he asked the victim to find somewhere to stay until he got settled. I find it odd that after finding out that the victim was pregnant, he asked her to find somewhere else to stay while he settled. His conduct, if this court were to believe his statement in that regard, shows that he was an irresponsible young adult, whose sole aim of living with the victim was sexual gratification.

[39] I thus believe the victim's statement that he chased her from his home when she refused to undergo an abortion. The victim had no choice but to report the matter to police in those circumstances. By demanding that the victim aborts their child and chasing her away when she declined to have an abortion, the accused exposed the fact that he had received and harboured the victim to use her sexually. There is thus sufficient evidence disclosed by the prosecution to establish substantial grounds to believe that the accused committed the preferred charge of aggravated trafficking in children.

**Count 2: Defilement contrary to Section 121(1) of the Penal Code Act, Cap 120**

[40] Section 129(1) of the Penal Code Act provides:

Any person who performs a sexual act with another person who is below the age of eighteen years, commits a felony known as defilement and is on conviction liable to life imprisonment.

[41] Therefore, for the prosecution to sustain the offence of defilement, the following ingredients must be proved:

- a) The age of the victim;
- b) The performance of a sexual act to the victim; and
- c) The participation of the accused.

**AGE OF THE VICTIM**

[42] According to the indictment, the prosecution stated that the victim was 17 years old at the time the accused committed the alleged offence. The alleged offence of defilement according to the victim occurred in 2019. In her statement recorded on 21<sup>st</sup> November 2020, the victim stated that she was 15 years old. Her mother stated that the victim was born in 5<sup>th</sup> May 2002, which would make her 17 years at the time the offence was committed. PTID2 shows that the victim was 19 years old. As already stated above, the most reliable way to know a child's age is through the testimony of her parents among other things. I find that the statement of the victim's mother clarifies the fact that the victim was a child at the time the alleged offence was committed. This offence has been proved to the required standard by the prosecution.

**THE PERFORMANCE OF A SEXUAL ACT ON THE VICTIM**

[43] State counsel submitted that the prosecution would rely on the victim's and accused person's police statements, in which it is admitted that they had sexual intercourse. He further submitted that the accused's admission that he was responsible for the victim's pregnancy is sufficient evidence to show that a sexual act had been performed by him on the victim.

[44] PTID1 (a) and PTID2 confirm that the victim was indeed pregnant. I therefore find that the prosecution has proved this element to the required standard.

**PARTICIPATION OF THE ACCUSED.**

[45] It is clear from the aforementioned evidence that it is the accused that committed the alleged offence considering that the accused admitted cohabiting with the victim, having sexual intercourse with her and finally being responsible for the victim's pregnancy. I find that this element has also been proved to the required standard, basing on the statements of the victim and her mother as well as the charge and caution statement of the accused.

[46] Consequently, this court finds that the prosecution has provided sufficient evidence to this court that establishes substantial grounds to believe that the accused is responsible, for the crimes charged in the indictment. He is for that reason committed to the Trial Court on the charges as confirmed.

Susan Okalany

**JUDGE**

**6/5/2022**