IN THE SUPERIOR COURTS OF THE GAMBIA

IN THE HIGH COURT OF THE GAMBIA

CRM. CASAE NO. HC/117/15/CR/031/AO

BETWEEN

THE STATE ..... COMPLAINTANT

AND

MUSA KEITA ..... ACCUSED PERSON

Wednesday 27th July 2016
Before Hon. Justice E. O. Otaba
Accused – Present

Appearances:

B. Jaiteh Esq. with J. Sambou Esq., S. K. Jobe Esq and
A. Mendy Esq. for the State
N. Gbuji Alfred Esq. for the Accused

J U D G M E N T

The Accused person is standing trial before this Court on a two count charge as shown below:-

COUNT 1

STATEMENT OF OFFENCE

Rape contrary to Section 122 of the Criminal Code, Cap. 10:01 Vol III Revised Laws of The Gambia.

PARTICULARS OF OFFENCE

Musa Keita in the year 2014 at Wellingara in the Kanifing Municipality of the Republic of The Gambia, within the jurisdiction of the Honourable Court had unlawful carnal knowledge of Alimatou Saidy aged sixteen without her consent and thereby committed an offence.

COUNT 2

STATEMENT OF OFFENCE

Incest Contrary to Section 148(1) of the Criminal Code Cap. 10:01 Vol. III Revised Laws of The Gambia, 2009 and punishable under the same section.

PARTICULARS OF OFFENCE

Musa Keita in the year 2014 at Wellingara in the Kanifing Municipality of the Republic of the Gambia, within the jurisdiction of this Honourable Court had carnal knowledge of your granddaughter. Alimatou Saidy, aged 16 years and thereby committed an offence.

The Accused was arraigned before this Court on 30/4/15. He pleaded not guilty to the charge. The prosecution called three witnesses and tendered three exhibits.

1. Exhibit 'A' – Voluntary Statement.
2. Exhibit "B" - Cautionary Statement.
3. Exhibit "C" – A letter with Reference No: EFSTH 61c/Vol. 1 dated 8/12/2014 on the age of Mariatou Saidy.
4. The Accused testified as DW1 and called one other witness. No exhibit was tendered by the defence. Both parties filed Written Briefs which were adopted on 19/7/2016.
5. The defenced raised two issues for determination in this appeal. They are:
    1. Whether the entire evidence led by the prosecution proved the charge of rape as provided by Section 121 of the Criminal Code against the Accused beyond reasonable doubt.

2. Whether the entire evidence led by the prosecution proved the charge of incest against the Accused beyond reasonable doubt.

The prosecution raised three issues for determination as follows:

1. Whether the Accused had sexual intercourse of the victim?
2. Whether the evidence of the prosecution was corrobated as required by law?
3. Whether the prosecution has proved its case beyond reasonable doubt?

I wish to adopt issue No. 3 raised by the prosecution and that is: Whether the prosecution proved its case beyond reasonable doubt. I am of the candid view that every other issue raised herein revolves round this issue which borders on proof the resolution of which will surely resolve other issues raised in this appeal.

In respect of Count one, the learned defence Counsel, N. Gbuji Esq.submitted that in order to secure the conviction of the accused in a charge of rape, the prosecution must prove the following elements beyond reasonable doubt:

(a) That sexual intercourse took place;

(b) That it took place without the consent of a woman or a girl; and

(c) That the Accused person was the man who committed the crime.

She cited the case of **IKO V. State (2003)3 ACLR P. 55.**

On the element of sexual intercourse having taken place, Counsel submitted that the prosecution must prove not only that sexual intercourse took place but also that it was the Accused and no other person who had sexual intercourse with PW2 (proseecutrix). That PW2 alleged that the Accused had series of sexual intercourse with her resulting to her pregnancy and delivery of a baby.

Counsel further contended that the evidence on record showed that the Accused did not have sexual intercourse with the prosecutrix. That the

prosecutrix testified during cross examination that she started living with the Accused and his family at the end of 2014 and when she was re-examined she said that the period of the year could be December, 2014.

Counsel submitted that it is not possible for the Accused to be responsible for the child of the prosecutrix who came to live with him at the end of 2014. Also Counsel argued that PW2 admitted during cross examination that one Foday Ceesay told her inside his house that she was pregnant and that there was no evidence of premature delivery by the prosecutrix neither was there medical evidence ascribing the paternity of the child born by the proscutrix to the Accused.

Counsel also contended, that all the doubts created by the prosecution evidence should be resolved in favour of the Accused. The cases of **KALU V. STATE (1998)4 NWLR (Pt. 110)455** were cited in support.

On this element, the Learned prosecution Counsel, M. Singhateh Esq. submitted that the prosecutrix testified that she slept in the inner room while the Accused slept in the parlour with his 1st wife and that was when the Accused had sexual intercourse with her. That she noticed blood and felt pains. That this piece of evidence was consistent creditable, reliable and was not shaken under cross examination. She cited the cases of **OGILNBAYO V. STATE (2007)2 NCC PAGE 351 RATIO 8 & IKO V. STATE (2001)14 NWLR (Pt. 732)** on penetration being the essential element of the offence of rape. Counsel finally submitted on this element that the fact that the prosecutrix was pregnant and put to birth a baby while still living with the Accused was sufficient proof of penetration.

In relation to the element of sexual intercourse taking place without the consent of a girl or a woman, defence counsel submitted that rape means a forcible sexual intercourse with a girl or a woman without her consent. That penetration is the most important ingredient of rape. She cited the case of **IKO V. STATE (supra).**

On the 3rd element of the Accused being the person who committed the crime, defence Counsel submitted that the Accused denied having sex with PW2 in exhibits A and B and, in his testimony on oath. That the prosecution did not call any eye witness who saw the Accused rape PW2 and the record

did not show anything that Accused had sex with PW2 (prosecutrix). That PW2 said the Accused's ex – wife, Yusufa and Dawda knew about the sexual encounter but were not called to testify by the prosecution.

On the meaning of corroboration, defence Counsel cited Section 179 of the Evidence Act, 1994 and stated that Section 180(2) of t5he Evidence Act (supra) mentioned rape as one of the offences requiring corrobaration.

Counsel further argued that there must be an independent testimony direct or circumstantial which confirmed in some material particular not only that the offence of rape was committed but that it was the Accused who committed it. She cited the case of **AKPANEFE V. THE STATE (1969)1 ALL NLR 420,** where it was held that the Court cannot convict on a charge of rape without corroboration. Counsel further contended that for a piece of evidence to amount to corroboration, the following 3 variables must co – exist:

1. There must be independent evidence from where a reasonable inference can be drawn.

2. The evidence must confirm and support in some material particular the evidence that needs corroboration.

3. The corroborated evidence should connect the relevant person with the offence in question, claim or defence.

And that such corroborative evidence must establish sexual intercourse between the prosecutrix and the Accused without consent. The cases of **THE STATE V. ABDOURAHMAN JALLOW CRIMINAL CASE NO. HC.178/12/CR/061/AO and B. V. BASKERVILLE(1916)2 KB 658 at 667** were cited in support.

Counsel also contended that there must be medical evidence to corroborate the evidence of PW2 (prosecutrix) that she sustained injury (ies) on her private part or other parts) of her body which might have been occasioned in a struggle, semen's stains on her clothes or the clothes of the Accused. The

case of **POSU V. THE STATE (2011) LPELR – SC. 134/2010** was cited in support.

The prosecution Counsel submitted that corroboration is a confirmation of witness's evidence by independent testimony. That a piece of evidence which reinforces, confirms or supports another piece of evidence of the same fact is a corroboration of that other one. And that exhibit 'B' provided the corroboration that the prosecutrix and the Accused were living in the same house when the offence was committed. She submitted that corroborative evidence need not be direct as it suffices to tend to show that the Accused committed the offence. She cited the case of **DARAGO V. THE STATE(1993) NWLR 9Pt.276) at 157.**

Counsel further cited the cases of **ANTOINE BANNA V. OCEAN VIEW RESORT LTD (2002 – 2008) 1 GLR 1 at 18 and AMUSA V. STATE (2005)1 NCC 91 ratio 7** on admitted facts requiring no further proof. Counsel also argued that the Court can convict on circumstantial evidence which is unequivocal, positive and point irresistibly to the guilt of the Accused.

Regarding Count 2, the defence Counsel referred the Court to Section 148 (1) of the Criminal Code which provides that, "A male person who has carnal knowledge of a female person, who is to his knowledge his granddaughter, daughter, sister or mother, commits a felony and is liable to imprisonment for a term of five years".

Counsel contended in order to prove this offence the prosecution must establish that the Accused is the grandfather of the prosecutrix (PW2). That the evidence on record did not establish that the Accused is the grandfather of PW2. Rather PW2's grandfather is one Alfusainey Keita. That the prosecution failed to prove that PW2 is the Accused's grand daughter. That the prosecutrix's grand mother and the grandfather were not called by the prosecution to establish paternal or maternal lineage between the Accused and the prosecutrix. And that PW1, DW2 and even PW2 confirmed that the Accused is not the grandfather of the prosecutrix.

On the issue of burden of proof in Criminal Cases, the defence Counsel argued that the burden is static. It never shifts. It is always on the prosecution to convince the Court that the Accused is guilty of the offence he is charged with. And this must be done beyond reasonable doubt. She cited the case of **MILIER V.MINISTER OF PENSIONS (1947)2 ALL ER 372 – 373** to buttress the submission: The prosecution Counsel also cited the same case, relying on Denning, J. (as he then was) who held thus", proof beyond reasonable doubt need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of doubt."

While the defence urged the Court to discharge and acquit the Accused for want of evidence, the prosecution prayed the Court to find the Accused guilty, convict and sentence him accordingly.

Section 121 of the Criminal Code Cap. 10:01, Vol. 3 Laws of the Republic of The Gambia, 2009 stipulates that, "A person who has unlawful carnal knowledge of a woman or girl without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or, in the case of a married woman, by personating her husband, commits the felony termed rape."

PW1, the Investigating Police Officer (IPO) testified on 9th June, 2015. He tendered exhibits 'A' and 'B'. He said in December, 2014 their office received a report from the office of Gender Based Violence that the Accused sexually abused his granddaughter Alimatou Saidy at Willengara Kombo North. He arrested the Accused and recorded exhibits A and B. Under cross examination, he said apart from recording exhibits 'A' and 'B' he did nothing else in this case. That the Accused told him that he was not the grandfather of the prosecutrix. That there were two boys who lived with the Accused and were sleeping in the same room with the prosecutrix. That they were many people living in the same compound where the Accused lived. He was not re-examined.

PW2 (prosecutrix) testified on the same date. She said the Accused is her grandfather. That the Accused is her mother's step father. That sometime

in 2014 she lived in Guinea Bissau. She returned to The Gambia after her father's death and stayed with her grand mother at Jarra Sutukung, Lower River Region. It was there the Accused met her and told her to come and live with him to help his pregnant wife. That the grandmother accepted and allowed her to come and live with the Accused at Wellingara. At that time one Alfusainey were staying in the Accused's house to receive treatment but he became well and left for Jarra Sutukung. That that was when the Accused started having sex with her. That she wanted to report the incident to one Fatou Keita, Accused's elder sister but the Accused restrained her. That she was in her room at 1am when the Accused left his wife who was not asleep to have sex with her (PW2). That when the wife confronted him the following morning, the Accused promised not to do so again. That the Accused used to sleep in the parlour with his wife. That he had sex with her (PW2) on several occasions which resulted to quarrel between him and his wife but he told the wife not to expose him. That she experienced blood and pains and became aware that she was pregnant. That at first she was not aware that she was pregnant. It was one Foday Ceeesay who told her that she was pregnant and she begot a baby.

Under cross examination, PW2 said it was in late 2014 that she started living with the Accused and his wife. That she put to birth on 20th February, 2015. That Alfusainey is her grandfather because he is her mother's father. That the Accused had two children with whom she was sleeping in the room. That she reported the incident to the Accused's wife who also told Yusupha and Dawda and not the police or family members. That he met Foday Ceesay inside his house where he told her she was pregnant. That the Accused is related to her mother's father who is of the same parents with the Accused. Upon re-examination as to when she moved into the Accused's house she said she did not know whether, it was in December 2014. PW3 was the medical officer who determined the age of the prosecutrix as 14 years, prepared and tendered exhibit 'C'

By virtue of Section 24 (3) (a) of the Constitution of the Republic of The Gambia, 1997 every person who is charged with a criminal offence shall be presumed innocent until he or she is proved, or has pleaded guilty. The Accused pleaded not guilty to the charge. Under Section 141 (1) of the Evidence Act, 1994 a person who desires a Court to give judgment as to a

legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. And Section 144 (1) of the Evidence Act (supra) also provides that the standard of proof in criminal cases or where a crime is alleged to have been committed is proof beyond reasonable doubt.

It is settled law that, "The burden of proof in all criminal cases is upon the prosecution to prove the Accused guilty of the offence charged beyond reasonable doubt. It is not for the Accused to prove his innocence as that will negate the constitutional provision that the Accused is presumed innocent until proved other wise." See the Supreme Court of Nigeria case of **NJOKWU V. STATE (2013) 9 NWLR (Pt. 1360)417 at 427 held 10.** To prove the offence of rape with which the Accused is charged, the prosecution must prove beyond reasonable doubt (a) that sexual intercourse has taken place; (b) that it took place without the consent of a woman or a girl; and, (c) that the Accused person was the man who committed the crime. See the case of **IKO V. STATE (supra)**

In the instant case, PW1 and PW3 did not lead any evidence of probative value to establish the offence of rape as seen in their evidence above. PW2 testified and tended to inculpate the Accused. However, her evidence is of doubtful validity and fraught with doubts. To start with the evidence of PW2 (prosecutrix) that the Accused had series of sexual intercourse with her in December, 2014 which resulted in her pregnancy and eventual delivery of a baby on the 20th day of February, 2015 (a period of two months) is unbelievable, unempirical and biologically invalid. It lacks medical veracity. Also, the prosecutrix's evidence that one night at 1:00am the Accused left his wife who was still awake to have sex with her (prosecutrix) to the knowledge of the wife of the Accused (who did not characteristically as a woman raise any alarm that night) is doubtful and antithetical to the common course of events. The law is trite that doubts in the evidence of the prosecution should be resolved in favour of the Accused. The foregoing doubts are hereby resolved in favour of the Accused.

To crown it all, under Section 180 (2) (a) of the Evidence Act, 1994 rape, and other sexual offences against complainants require corroboration. Corroboration is defined under Section 179 of the Evidence Act (supra) as

follows: "Corroboration consists of independent evidence from which a reasonable inference can be drawn which confirms and supports in some material particular the evidence to be corroborated and connects the relevant person with the offence, claim or defence" Learned Counsel for the prosecution submitted that the statement of the Accused in exhibit 'B' to the effect that "since she came to my house, I spent the night together with her in the same house, while she sleeps in the sitting room and I with my wife in the bedroom;" amounted to corroboration. This, to my mind, is misleading. There is no doubt that prosecutrix lived with the Accused and his family in the house of the Accused. In the case of **UWAZURIKIE V. ATTORNEY GENERAL OF THE FEDERATION (2013) ALL FWLR (Pt. 691)1520 – 1526** held 5, the Supreme Court of Nigeria held, inter alia that, **"……In a charge of rape, the corroborative evidence required must confirm in some material particulars as follows:**

(i) That sexual intercourse has taken place and
(ii) That it took place without the consent of the woman or girl; and also
(iii) That the Accused person was the man who committed the crime."

I have perused the evidence of the prosecution in this case. There is no such corroborative evidence on record. Section 180 (2) (a) of the Evidence Act (supra) stipulates that a Court shall not act on uncorroborated evidence, except in a criminal case, upon an Accused person's own plea of guilty in cases of rape and other sexual offences against complainants.

In relation to Count 2 concerning the offence of incest, under Section 148 (1) of the Criminal Code, 2009 the prosecution must prove beyond reasonable doubt that the Accused is the grandfather of the prosecutrix. According to the Oxford Advanced Learner's Dictionary, grand-daughter means a daughter of your son or daughter while grand-father means the father of your father or mother. The Accused person denied being the grand father of PW2 (prosecutrix). In her examination –in-chief PW2 said the Accused was her grandfather but under cross examination she said one Alfusainey Keita is her

grand – father while the Accused is her uncle. This is another material contradiction in the evidence of the prosecution which I also resolve in favour of the Accused.

In conclusion, I am of the humble but firm view theat the evidence of the prosecution has no legs. It cannot stand. In fact it has collapsed like a pack of carol cards. I agree with the submissions of the Learned Counsel for the Accused and the relevant cases cited in support. I discountenance all the submissions and authorities of the prosecution.

I find and hold that the prosecution has failed woefully to discharge the onus propandi bestowed on it by law. The case of the prosecution is hereby dismissed. I find the Accused not guilty of the offences of rape and incest. The Accused is accordingly discharged and acquitted.

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HON. JUSTICE E. O. OTABA
JUDGE
27th July 2016

ISSUED AT BANJUL UNDER THE SEAL OF THE COURT AND THE HANDS OF THE PRESIDING JUDGE THIS 27TH JULY 2016

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PRINCIPAL REGISTRAR