

*Establishing the Age of the Prosecutrix in Defilement Cases – Necessity of*

In the Court of Appeal  
In the Lagos Judicial Division  
Holden at Lagos  
On Friday, the 29<sup>th</sup> Day of November, 2024

**Before Their Lordships**

Jimi Olukayode Bada  
Zainab Bage Abubakar  
Abdu Dogo  
*Justices, Court of Appeal*

**Appeal No: CA/LAG/CR/48/2024**

**Between**

**Dr. Olufemi Olaleye                      ...                      APPELLANT**

**And**

**The State of Lagos                      ...                      RESPONDENT**

*(Lead judgement delivered by Honourable Jimi Olukayode Bada, JCA)*

**Facts**

The Appellant is a trained medical doctor, married to PW 1. The Appellant was alleged to have defiled and sexually assaulted PW 2 (his wife's niece, who was said to be underage at the time). The complaint was made to the Police who arrested and interrogated the Appellant. At the police station, the Appellant was said to have made confessional statement. The Appellant was subsequently charged and arraigned on a two-count charge of defilement and sexual assault by penetration contrary to Sections 137 and 261 of the Criminal Law, Chapter 17 Volume 3, Laws of Lagos State, 2025.

At the trial, the prosecution called six witnesses, including the prosecutrix, her aunt, investigating police officers, and medical doctor who conducted some tests on the prosecutrix. The Appellant gave evidence and called two other witnesses. At the conclusion of the trial, the court delivered its judgement, convicting the Appellant as charged.

Unhappy with the decision, the Appellant appealed to the Court of Appeal.

### **Issues for Determination**

The issues considered are:

- (1) Whether the honourable lower court having failed to conduct an inquiry into the age of the prosecutrix was right in coming to the conclusion that the prosecutrix was sixteen years of age at the time the alleged offence was purportedly committed in the absence of any credible evidence.*
- (2) Whether the honourable lower court was right to admit the purported confessional statements of the Appellant as exhibits "H" and "H2" and rely on same without conducting a trial within trial despite the evidence of the Appellant that both statements were not written by him voluntarily.*
- (3) Whether the honourable lower court in the absence of any positive evidence from the prosecution witnesses was right to hold that Exhibit H1 was a conversation between the Appellant and his wife – PW1, and proceed to convict the Appellant on same.*
- (4) Whether in the absence of cogent credible and reliable evidence by the prosecution, the honourable lower court was right in convicting the Appellant.*
- (5) Whether the honourable lower court did not exhibit grave bias and deny the Appellant its right to fair hearing in the course of trial.*

### **Arguments**

For the Appellant, it was contended that the standard of proof in criminal proceedings is one of proof beyond reasonable doubt without any of the

ingredient of an offence missing. Counsel argued that there was no direct evidence about the age of the prosecutrix as the evidence of witnesses relied on by the trial court to conclude that PW 2 is a child, did not give direct evidence of witnessing the birth of PW 2. He posited that the evidence of these witnesses constitute hearsay. Regarding the alleged confessional statement and undertaken relied upon by the trial court in convicting the Appellant, counsel argued that the said Exhibits H and H2 were not voluntarily made, and so, the trial court ought to have conducted trial-within-trial to determine their voluntariness; failure of which is fatal to the case of the prosecution.

Responding to the submissions above, counsel submitted that the Respondent discharged the burden of establishing the offence of defilement and sexual assault by penetration against the Appellant beyond reasonable doubt. Highlighting the ingredients of the offence, counsel contended that the Respondent established that PW 2 was 16 years when the Appellant started abusing her sexually, with reference to the evidence of PW 2 that she was 18 years during the trial when she testified. Counsel submitted PW 2 testified about being in Senior Secondary School, SS2 and SS3 in year 2020 and 2021 respectively. Relying on the case of **BAKARE v ISHOLA (1959) WRNLR 106**, it was submitted that facts judicially noticed need not be proved. It was stated further that PW 2 was under the guardianship and custody of PW 1 at the time of the incident, and the other witnesses, including the investigating police officer confirmed the age of PW 2 as 16 at the time of the incident. Counsel argued, contrary to the position of the Appellant, that evidence of an IPO is in law, not hearsay - **IKE v THE STATE OF LAGOS (2019) LPELR-47712 CA**. Reference was also made to the provisions of Section 261 of the Child's Right Law of Lagos State, which defines a child as a person under the age of 18 years. He submitted that inquiry into the age of the victim is necessary only where the age of the victim is in issue; unlike this instance where there is un rebutted evidence that the prosecutrix was a minor at the time of the incident. Counsel relied on oral and documentary evidence before the court to submit that the Appellant had sexual intercourse with PW 2. Reacting to the submissions on voluntariness of the confessional statements, it was argued that the Appellant who claimed they were doctored by the police did not provide any evidence to substantiate his claim.

More so, aside confessional statement, the guild can be established by eye witness account and PW 1 gave direct evidence.

### **Court's Judgement and Rationale**

Deciding issues one and two together, the appellate court reiterated the trite position of law that the prosecution in a criminal trial is required to prove its case against the accused person beyond reasonable doubt. Proof beyond reasonable doubt simply means that there is sufficient admissible and credible evidence that all the essential ingredients constituting the offence an accused was charged with were established to justify the conviction of the accused person by the trial court – **HASSAN v THE STATE (2017) 5 NWLR (PT. 1557) 7**. The conviction leading to this appeal was for the offence of defilement and sexual assault by penetration contrary to Section 137 and 261 of the Criminal Law, CAP C17 Vol. 3, Laws of Lagos State. All the ingredient of the offence must be established beyond reasonable doubt to secure a conviction. The ingredients of the offence in this instance are: (i) there must be sexual intercourse; (ii) the victim must be a child. And by Section 416 of the Criminal Law and the Child's Right Law of Lagos State, a child is a person under eighteen (18) years. It follows that *age of the victim is very important because if the prosecution fails to prove same beyond reasonable doubt, the conviction of the Appellant will not stand. This is because sexual intercourse per se, is not a crime. What makes it a crime is that the victim must be a child. a person should not be convicted for defilement is the victim is an adult. Age is therefore a critical element.*

The court referred to various authorities on proof of age, including **AGNASIM v EJIVUMERWERHAYE (2001)9 NWLR (PT. 718) 395 AT 410**, where it was held that *"age could be proved ... by ... birth certificate ... by ... a person who saw the birth or had knowledge of the birth."* Also, by Section 30 of the Children and Young Persons Law, *"one of the methods of proof of age of a juvenile is the evidence of a parent or anybody in whose presence the person was born ..."* In this appeal, the trial court reached its conclusion that PW 2 was a child at the relevant time based on testimonies of PW 1, PW 2, PW 4, PW 5 and PW 6, though none of them gave direct evidence of witnessing her birth or as an expert who examined PW 2 on her age. Only PW 1 knew PW 2 before the incident and she did not give direct

evidence about witnessing the birth of PW 2. Others witnesses gave evidence about the age of PW 2 based on the information received while interviewing PW 2. All these evidence constitute hearsay which is not admissible. Even PW 5 who is a medical doctor, is not an expert capable of determining the age of PW 2. The prosecution ought to have presented a direct evidence of the age of PW 2 such as document which recorded or registered her birth or evidence of person(s) who witnessed the birth of PW 2, such as the father, mother, older sibling or give an explanation for their unavailability. This failure created a credible and reasonable doubt in the prosecution's case, leaving the court to presume that the documents may be unfavourable to the Respondent's case in line with the provisions of Section 169(D) of the Evidence Act. The circumstantial evidence of the age of PW 2 alluded to by the trial court, relying on her testimony as being age 16 in SS2 and age 17 in SS 3 is not circumstantial evidence fit to ground a conviction because she may not have been of those ages and age do not determine enrolment in secondary schools in the country, today. For circumstantial evidence to ground a conviction, it must lead to only one conclusion. The trial court should have been guided by the decision in **SIMON v THE STATE (2022) LPELR-58178(CA)**, by conducting an inquiry into the age of PW 2, given that the Appellant was charged with a serious offence. The age put forward here (16) is a borderline age (compared to 18), and so, the prosecution must establish same beyond reasonable doubt.

Regarding Exhibits H, H1, and H2 which the Appellant contented were wrongly admitted and relied on by the trial court, despite allegations of duress, alteration and being doctored, the court held that the trial court ought to have conducted a trial-within-trial. Exhibit H is the confessional statement at the police station; Exhibit H1 is the printout of emails and WhatsApp messages between the Appellant and PW 1; and Exhibit H2 are handwritten and typed letter of undertaken dated 3/12/2021 and 5/12/2021. The court held that it is clear from the evidence of Appellant that Exhibits H and H2 were written under duress and dictated to him after several days in custody, thereby raising the issue of voluntariness necessitating a trial-within-trial. Also, PW 1 stated that a video recording was made while the Appellant wrote his statements in compliance with Section 9(3) of the Administration of Criminal Justice Law of Lagos State 2015, but this recording was not tendered in evidence. The presumption here is

either that the recording does not exist or if it exists, it is unsupportive of the Respondent's case on the issue of voluntariness – **DARBAR HOTEL PLC v KASABA UNITED LTD (2024) 1 NWLR (PT. 1919) 31 CA.**

Deciding issues 3, 4 and 5, the court examined the evidence on record regarding Exhibit H1 which the Appellant denied sending to PW 1. The court noted that *PW 1 had access to the Appellant's phone and devices and there is possibility and real likelihood of the Exhibits being contrived at the time. This creates a serious doubt, and the law is that all doubts are resolved in favour of a Defendant.*

The Court of Appeal also chronicled the marital disputes between the Appellant and PW1. The fact that PW 1 had surreptitiously changed the ownership of the Appellant's Mercedes Benz, tried to remove him as a signatory to their joint account, presented documents to the Appellants to sign off his house, abducted and relocated the children out of Nigeria, all show that PW 1 was a tainted witness with interest to serve. The testimony of a tainted witness should be treated with considerable caution, and be examined with a tooth comb. Further, the evidence of PW 1 was not credibly corroborated as the evidence of PW 2 (which also require credible corroboration) cannot serve to corroborate that of PW 1. Aside the lack of credible corroboration, there was also material contradictions in the evidence of PW 2 on the Appellant having sexual intercourse with her. More so, in defilement cases, the evidence of a child must be corroborated. The evidence of PW 1 relied on by the trial court as corroboration of the testimony of PW 2, is not independent as it was derived from PW 2. Therefore, the trial court was wrong to have convicted the Appellant on same – **ADONIKE v STATE (2015) 7 NWLR (PT. 1458) 237 AT 285.**

The court held further that in cases of sexual assault by penetration, it is the law that the prosecution must not only prove penetration, it must prove and establish lack of consent. In this case, assuming the Appellant had sexual intercourse with PW 2 for a period of 18months without any protest or complaint, it means that PW 2 must have probably consented to having sexual intercourse with the Appellant. The prosecution in this case failed to lead direct positive evidence of opposition or objection by PW 2. The court also examined the evidence of the investigating and medical officers and came to the conclusion that they were not

credible to ground the conviction of the Appellant. The court also noted the interference by the trial court with the proceedings with its resultant effect on the Appellant's right to fair hearing. In conclusion, all the issues were resolved in favour of the Appellant and against the Respondent.

*Appeal allowed; Appellant discharged and acquitted.*

**Representation**

Dr. Kemi Pinhero, SAN and Chukwudi Enebeli, SAN with Ikulas Aderibigbe, Esq.; Hammid Modibo, Esq. for the Appellant.

O. Aluko, Esq., Chief State Counsel, for the Respondent.

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