

**In the name of God the most gracious the most merciful
Supreme Court
Greater Darfur States Circuit
Criminal Circuit**

Before:

Yaqoub Osman Bakira

Presiding Judge

Hashim Ibrahim Al Toum

Member

Dr. Suleiman Mohamed Shayeb

Member

No. 45/2018

Trial of Abdullah Idris Abakar Mohamed

Judgment

Ms. Abeer Abakar Mohamed Mahmoud who alleges that she is the sister of victim Nasreen, the complainant to the Criminal Case, No. 41/2017 submitted before this circuit on 04/02/2018 a petition for examination challenging the judgment of South Darfur Court issued under the memorandum No. 293/2017 which cancelled on 25/11/2017 the judgment of Neyala Child Court issued in respect of the above case. The appeal court ordered the Appeal Court to return the papers to the trial court in light of its memorandum.

The petitioner believes that the appeal court judgment violated justice, law and proper conscience by reason, of the fact that the trial court verified the accused's age and his adulthood was proved as well, as the victim is 15 years where her consent does not change the description of the crime and the defense has not pleaded the accused to be a child in the preceding stages as his age exceeded 18 years. So, she seeks an intervention for the cancellation of the appeal court judgment and keeping the trial court judgment.

The petition for examination has been submitted within the framework of powers vested in this court under Article (188) of Criminal Procedures Act for 1991, with the satisfaction of the requirements of this Article in terms of issuance of judicial arrangement before the circuit of jurisdiction thereby requiring formal acceptance for the purpose of ensuring integrity of procedures, validity of law application and realization of justice.

From the subject matter point of view the facts of the present criminal case as written in the record of investigation conclude that on 13/07/2017 the above complainant lodged a report with Neyala Police Section of Family & Child Protection under a petition authorized by the Prosecution alleging that the accused Abdullah Idris Mohamed has sexually assaulted her 15 years old sister Nasreen (the victim) thereby causing her pregnancy.

In consideration of the premises, The Attorney General of Darfur Crimes indicted the 1st accused Abdullah Idris Abakar under Article (45/b) of Child Act for 2010 and the 2nd accused Abdullah Ibrahim Arbab under Article (156) of Criminal Act for 1991 and referred the papers to the court which has undertaken the non-summary trial proceedings and rendered its judgment that has been cancelled by a decision from the appeal court the subject of the appeal.

In pursuant to the perusal of the investigation record and examining the merits of the appeal court judgment together with the reasons raised by the petitioner, we conclude as follows:

Firstly: with regard to the criminal responsibility of the accused within the framework of the reason raised by the accused's attorney before the appeal court and under which the trial court judgment was challenged on the basis of verification of the accused's age in view of the fact that he has not yet attained adulthood.

Upon my thorough review of the investigation record and minutes of the trial, it was evident that the accused stated as from being interrogated that his age is 18 years and has never alleged to be of young ages in his statements before the interrogator on page (2-3) as well as when recorded his judicial admission on page (7) of the journal of inquiry.

The accused's attorney Al Noor Abd Al Ghani Suleiman has only sought before the Attorney General of Darfur Crimes the release of the accused pointing out therein that the accused was born in 2000 and requested to be send to the Medical Commission.

The Attorney General of Darfur Crimes being the supervising prosecutor over the investigation in respect of such report, has issued his decision on 10/08/2017 on page (109) of the journal of inquiry pointing out therein that the 1st accused admitted that he had attained the age of criminal responsibility and did not require age estimation. The Attorney General has therefore indicted him and referred the case papers to the court. The defence has not challenged such decision and was satisfied therewith.

The procedures moved to the court. At the beginning of hearing the accused admitted that his age was 18 years which was written down in the non-summary trial form. The accused did not allege to be of a young age when provided his statements before the court in page (13) of the minutes. When responding to the accusation on page (19) of the minutes he did not plead not guilty but responded in the words of his attorney that he was not guilty and the pregnancy was after the termination of relationship and was under threat (this was his defence line).

He neither pleaded to be of young age nor his attorney pointed out to the same in the final pleadings at the end of proceedings.

In consideration of the premises, it is evident that the accused appeared before the trial court in the appearance of 18 years old adult man. This was and evidence for bearing the consequences of his statements and acts. There is neither a doubt about bearing the criminal responsibility nor raising a doubt about his ages for initiating an investigation by the court.

In addition to this, the matter has not been decided upon at the level of investigation by the Attorney General of Darfur Crimes towards which the accused and his attorney kept silent throughout the proceedings before the court.

This has been raised only at the appeal level. The Rule provides that either litigant to a justice or legal case may not raise a new pleading at the appeal level which has not previously been raised before the trial court.

Further, the accused appeared before the trial court on the basis of being an adult in terms of appearance and age as previously stated.

The allegation at the appeal level that adulthood has not been attained is deemed to be too late. The appeal court should have not acted upon such pleading at this level.

Secondly: the second reason upon which the appeal court relied in cancelling the trial court judgment was the victim's consent, which the appeal court provided as part of reasons of appeal. I wish it had never done so.

The appeal court adopted a wrong method in the assessment of consent that means acceptance which is not reliable if provided by a non-adult person according to the definition contained in Article (3/b) of Criminal Act for 1991.

It is proved that the victim was a 15 years old non-adult child and nobody objected thereto or challenged the same.

We therefore agree with the petitioner that consent in this event does not change description of the crime.

The provision of Article (149/1) of Criminal Act of 1991 as amended for 2015 to which the appeal court referred to in its decision provides that ((shall be a rapist every person performs sexual intercourse with a person by an act resulting in penetration of a sex organ or any tool or part of the body into victim's vagina or anus by using force or against a person unable to express his consent for physical or seduced reasons or relevant to age)).

The last part of the provision of this Article is evident and completely in conformity with the definition contained in Article (3) hereinabove referred to and therefore consent of a minor un-adult female cannot be reliable.

Thirdly: The conviction was based on the accused's explicit admission at all levels of litigation starting from the statements which he provided at the investigation level before the interrogator on 06/08/2017 on page (2) of the same record and ending with his statements he provided before the court on 27/09/2017 on page (12) of the minutes of the trial.

There is nothing indicating that he changed his mind towards his admission even at the levels of appeal in cassation. So, we have no doubt about the validity of evidences reached by Neyala Child Court with invalidity of reasons upon which the Appeal Court relied in cancelling the trial court decision. We find, however, the Child Court restricted the conviction of the accused to Article (45/b) of Child Act for 2010 which is the Article of criminalization.

Since the penalty of this crime is contained in Article (86/F) of the same law, it should have to be added in respect of the conviction.

The awarded imprisonment penalty found to be the lower penalty for such crimes and in respect of which there is no room for intervention.

The fine penalty, however, despite being an obligatory penalty beside imprisonment penalty, the court omitted the provision contained in the bottom of this Article that the court may allocate part of the fine for the affected parties by way of compensation.

I am therefore in the opinion if my colleague agree, that the appeal court decision should have to be cancelled and restitution of the trial court decision in respect of the conviction with amendment as to be under Article 45/b read in conjunction with Article (86/f) of Child Act for 2011 together with restitution of imprisonment penalty issued by the trial court and reduction of fine penalty to be five thousand pounds of which if paid four thousand pounds to be allocated for the victim by way of compensation. Fine is to be collected in accordance with the provisions of Article (198) of Criminal Procedures Act for 1991.

Yaqoub Osman Bakira
Supreme Court Judge
02/04/2018

Second Opinion:

I agree
Hashim Ibrahim Al Toum
Supreme Court Judge
05/04/2018

Third Opinion:

Dr. Suleiman Mohamed Shayeb
Supreme Court Judge
13/04/2018

Final Order:

1. Cancelling the appeal court decision and restituting the trial court decision concerning the conviction and amendment thereof as to be under Article (45/b) read in conjunction with Article (86/f) of Child Act for 2010.

2. Restituting imprisonment penalty issued by trial court with reducing fine penalty to be five thousand pounds of which if paid four thousand to be allocated for the victim by way of compensation. Fine is to be collected in accordance with the provisions of Article (198) of Criminal Procedures Act for 1991.

Yaqoub Osman Bakira
Supreme Court Judge
16/04/2018