

**COURT OF APPEAL OF
OUAGADOUGOU**

**BURKINA FASO
Unity- Progress-Justice**

Judgement No. 12/2019
Legal Department No.: 107 /
2018

**HIGH COURT
OF KONGOUSSI**

**HEARING OF 20 FEBRUARY 2019,
ON MISDEMEANOUR MATTERS**

CASE:
Public Prosecution
Vs
O.E,
T.D and
S.H

At the public hearing of the High Court, holding in Kongoussi (Burkina Faso) on 2020/2/2019 (twentieth February two thousand and nineteen), on misdemeanour matters by:

Mr **Saïdou COMPAORE**, Judge at the seat of the court and acting as President;

TYPE OF OFFENCE

PRESIDENT

Attempted rape

Assisted by Mr **Olio PALE**, Judicial Assessor;

Mr **Noé Doflni DAKIO**, Deputy State Counsel, representing the Legal Department;

Imprisonment

LEGAL DEPARTMENT,

(See verdict)

Assisted by Barrister Victor **KABORE**, Court Registrar at the said court, taking notes:

COURT REGISTRAR,

The following judgement was delivered:

BETWEEN:

The State Counsel of Faso, petitioner in a flagrante delicto proceeding;

PANEL:

COMPAORE, President

ON THE ONE HAND:

DAKIO, L.D.

AND

KABORE, Court Registrar

- 1- O.E, born on August 3, 2001, in Kongoussi of O.J-P and S.R, a pupil, from Burkina Faso, living in Kongoussi, single with no children, who declares to have never been convicted, given award or recruited;
- 2- T.D, born on October 25, 2002, in Kongoussi of T.P and O.F, a pupil from Burkina Faso, residing in Kongoussi, single without children, who declares to have never been convicted, given an award or recruited;

Accused of:

having attempted to rape on O.W.N in Kongoussi, on 21 September 2018, a period of time not covered by the statute of limitations, the said attempt, manifested by a tentative execution, in the case at hand by engaging in a struggle with

the victim with the intention of putting her on the ground so as to carry out sexual intercourse; this attempt only failed due to circumstances beyond his control, in the case at hand by being prevented from doing so by the rescuers alerted by the said victim;

Acts provided for and punished by Articles 122-1, 122-2, 122-4 and 533-10 of the Penal Code;

3- S.H, born on May 18, 2002, in Kongoussi of S.N and K.A, pupil, Burkinabè national residing in Kongoussi, single without children, who declares to have never been convicted, given an award or recruited O.W.N.

Accused of:

having attempted to rape OWN, in Kongoussi, on 21 September 2018, a period of time not covered by the statute of limitations, the said attempt, manifested by a tentative execution, in the case at hand by engaging in a struggle with the victim with the intention of putting her on the ground so as to carry out sexual intercourse; this attempt only failed due to circumstances beyond his control, in the case at hand by being prevented from doing so by the rescuers alerted by the said victim;

Acts provided for and punished by Articles 122-1, 122-2, 122-4 and 533-10 of the Penal Code

ON THE OTHER HAND

When questioned at the hearing of February 20, 2019, in accordance with the provisions of Article 396 of the Code of Criminal Procedure, the accused, assisted by their parents, stated that they wanted to be tried immediately;

During the appeal, the State counsel of Faso stated that he had summoned the aforementioned accused to appear before the Court at today's hearing to defend themselves on account of the above-mentioned prejudice;

Then, the Court Registrar read out the documents in the case file;

And the accused were questioned;

The submissions of the Legal Department were heard;

The accused made their arguments to defend themselves;

The Court Registrar recorded the responses of the accused;

On this, the debates having ended, the Court ruled as follows:

THE COURT

Considering the documents in the file;

Having heard the answers of the Accused;

Having heard the submissions of the Legal Department;

Having heard the arguments of the Accused, who spoke last;

FACTS

In the morning of September 22, 2018, O.W.N and O.W.N, her twin sister, went to the Central Police Station of the city of Kongoussi to file a complaint against T.D, O.E and S.H for attempted rape committed on them. To clarify the circumstances of the events, the judicial police unit opened an investigation. The steps taken during the preliminary investigation, including the hearing of the complainants and accused, revealed that during the night of 21-22 September 2018, T.D and O.E effectively cornered O.W.N against a wall near the Head Office of the

Zood-Nooma Association of Kongoussi and began to fondle her breasts against her will. This investigation also revealed that S.H and two of his comrades, in the same circumstances of time and place, cornered O>WN who was doing her natural needs (urinating). Having heard their version of the facts, all the accused readily acknowledged the facts as revealed.

When referred to the Kongoussi Legal Department, where they were heard in an investigation of flagrante delicto, T.D, O.E and S.H remained consistent in their statements;

Thus, the accused were brought before the criminal division of the Court at the hearing of 20 February 2019, following the procedure of flagrante delicto for attempted rape under Articles 122-1, 122-2, 122-4 and 533-10 of the Penal Code;

At the bar of the court, the accused, apart from a few clarifications, did not refute the charges alleged against them;

The Legal Department requested the reclassification of the acts of attempted rape initially charged to the accused as acts of indecent assault, to find the accused guilty and to sentence each of them to 12 (twelve) months' imprisonment and a fine of CFA 500,000 (five hundred thousand);

The accused who had the last word implored the clemency of the Court.

On this, the Court dismissed the case as follows;

II- PROCEDURE

A- PROSECUTION

1 Guilt of TAONSA Daoua and of OUEDRAOGO Etienne

Whereas Article 533-10 of the Penal Code states that "any act of sexual penetration, of whatever nature, committed on another person by violence, coercion, threat or surprise constitutes rape. Rape is punishable by a prison sentence of 7 (seven) to 10 (ten) years and a fine of CFAF

600,000 (six hundred thousand) to CFAF 2,000,000 (two million), that under article 533-21, attempted rape is punishable;

Whereas, according to article 122-1, "the attempt consists of an undertaking to commit a crime or offence, manifested by unequivocal acts tending towards its execution, provided that these acts were suspended or failed to take effect only because of circumstances beyond the control of the perpetrator"; that, according to the provisions of this article, attempted rape involves unequivocal material acts performed by violence, coercion, surprise or threats aimed at sexually penetrating a living victim of either sex, and the failure to carry out such penetration as a result of circumstances beyond the control of the perpetrator;

Whereas in the case at hand, T.D and O.E are accused of having attempted to rape O.W.N; whereas these accused do not contest the charges against them; that they respectively explained to the bar of the Court that they had followed the victim who, on the day of the events, was waiting for her twin sister who was relieving herself towards the Head Office of the Zood-nooma association, cornered her against a wall and then began to touch her breasts; that when she resisted, they began to hit her;

Whereas O.W.N explains that on the day of the events, she accompanied O.W.N, her twin sister out of a maquis called "**galaxi plus**" for her to relieve herself; that on arriving towards the Head Office

of the Zood-nooma association in Kongoussi she stood a little aside to allow her sister to relieve herself; that against all expectations, the accused appeared in front of her; that when one of them grabbed her by her back belt and tightened it against her body, the other who positioned himself in front of her was groping her breasts; that when she succeeded in freeing herself from the hands of her aggressors, she then ran towards her sister who was also violated and struck down by another group of individuals; the accused began to chase her by hitting her to the point of breaking the screen of her branded Itel cell phone; that they had to be rescued by S.G and S.N.R, all witnesses to the events.

Whereas, on cross-reading the various statements made before the court and the acts of the case, it emerges that O.W.N was a victim of sexual touching by the accused; that the latter acknowledge having actually held and touched the breasts of the victim by force;

Whereas the groping of the breasts of the victim is certainly an act with sexual connotations; that even if it has been proved that had it not been for the resistance of the victim and the intervention of the above-mentioned witnesses, the accused would not have desisted; the investigation of the case did not establish that the actions of the latter clearly tended to sexually penetrate the victim; that therefore it is necessary to rule out the hypothesis of attempted rape;

Whereas, however, the same actions of the accused may be classified in a different way, in this case as an indecent assault; whereas, according to Article 533-2 of the Penal Code, "Any act of a sexual nature contrary to morality committed directly and intentionally on a minor or with violence, coercion or surprise on an adult constitutes an indecent assault;

Whereas the acts of groping the breasts of the victim committed by the accused are of a sexual nature; whereas these acts, which are contrary to the morality of Burkina Faso, in that they shock social morality, were committed by means of coercion, as evidenced by the circumstances of the acts described above;

That although the accused were minors at the time of the events, an analysis of the events suggests that they nonetheless acted with discernment; that by screening the victim and her sister and waiting for them to isolate themselves before attacking them, they testified that they had previously thought carefully about their act, from which they acted with discernment; that it also emerges from their statements made at the bar that they acted deliberately and with full knowledge of the reprehensible nature of their acts;

That, in short, the elements constituting an indecent assault are present; that it is appropriate to reclassify the acts of attempted rape initially charged against the accused as an indecent assault, to find them guilty of it, and to file a conviction against them;

2 GUILT OF S.H

Whereas, like T.D and O.E, S.H is accused of attempted rape on her twin sister, O.W.N, rather than on O.W.N, he does not refute the charges either; that he states that on the day of the events, while he was in the company of his friends named D.S aka Baba, O.E and Idrissa, they saw the victim and her twin sister coming out of the dancing bar "**Galxi plus**", that they accosted them and teased them until they returned inside the bar; that shortly afterwards the same girls came out to relieve themselves this time around; that it was at this moment that he and his friends followed them to the scene of the events; that he declares at the bar of the Court that he is one of those who forcibly restrained and sexually touched O.W.N;

Whereas O.W.N, declares after the accused that during the night of 21 to 22 September 2018, she went with her twin sister and others to the bar named above to watch an artistic performance; that at one point, the desire took her to relieve herself; that to do so, she had asked her sister to accompany her out of the bar so that she could relieve herself; that this is how they went in front of the Head Office of the Zood-nooma association of Kongoussi; that as she was relieving herself, a group of three individuals surrounded her; that one grabbed her arms from behind while the other two in front of her started unbuttoning her pants and felt her breasts; that in spite of her resistance, they succeeded in knocking her down; that they were saved by passers-by alerted by their cries; that she had, during the events, lost the sum of CFAF 10,000 (ten thousand);

Whereas a cross-reading of the various statements made before the court and other elements of the case file indicate that O.W.N was indeed the victim of sexual touching by the accused and his companions; that the accused reiterated at the hearing that he had sexually touched the victim against her will; that there is therefore no doubt that the accused touched the victim in a violent manner with a sexual connotation; that even if it has been proved that, had it not been for the resistance of the victim and the intervention of the above-mentioned witnesses, the accused would not have desisted from his undertaking, the investigation at the bar has not made it possible to establish that his actions clearly tended to penetrate the victim sexually, and that the hypothesis of attempted rape should therefore be rejected;

Whereas, however, the same actions of the accused may be classified in a different way, in this case as an indecent assault; whereas, according to Article 533-2 of the Penal Code, "Any act of a sexual nature contrary to morality committed directly and intentionally on a minor or with violence, coercion or surprise on an adult constitutes an indecent assault;

Whereas the acts of groping the breasts of the victim committed by the accused are of a sexual nature; whereas these acts, which are contrary to the morality of Burkinabè, in that they shock social morality, were committed by means of coercion, as evidenced by the circumstances of the acts described above;

That although the accused was a minor at the time of the events, an analysis of the events suggests that he nonetheless acted with discernment; that by screening the victim and her sister and waiting for them to isolate themselves before attacking them, he testified that he had previously thought carefully about his act, from which he acted with discernment; that it also appears from his statements made at the bar that he acted deliberately and

with full knowledge of the reprehensible nature of their acts;

That, in short, the elements constituting an indecent assault are present; that it is appropriate to reclassify the acts of attempted rape initially charged against the accused as an indecent assault, that he should be found guilty of it and be convicted of it;

3 Sentence

Whereas under the terms of Article 533-7 of the Penal Code "Any indecent assault committed or attempted with violence, coercion or surprise against persons of either sex shall be punishable by imprisonment for a term of 1 (one) to 3 (three) years and a fine of CFA 500,000 (five hundred thousand) to CFAF 1,000,000 (one million)".

Whereas in this case, T.D, S.H and O.E, all minors at the time of the events, are found guilty of indecent assault; in addition to their minority status, they are all first-time offenders; that in order to combine the dissuasive and resocializing nature of the sentence, it is appropriate to grant them the provisions of articles 717-4 paragraph 2 of the Penal Code and 694 of the Code of Criminal Procedure, by sentencing each of the three to a suspended prison term of 6 (six) months and a fine of CFAF 250,000 (two hundred and fifty thousand);

4 Costs

Whereas Article 473(1) of the Code of Criminal Procedure provides for that "any judgement of conviction handed down against the accused and possibly against the party liable in civil proceedings shall condemn them to pay expenses and costs to the State..."

Whereas in this case, T.D, O.E and S.H were found guilty of indecent assault; that they should be ordered to pay the costs;

B Civil action

Whereas pursuant to Article 2 of the Code of Criminal Procedure, any person claiming to be the victim of a criminal offence may seek compensation before the criminal courts hearing the criminal proceedings;

Whereas at today's hearing, O.W.N and O.W.N filed a civil action and claimed as damages, a sum of CFAF 10,000 (ten thousand) to compensate for the loss of their CFAF 10,000 (ten thousand) francs which occurred at the time of the events; whereas it is understood that their claim is justified; it is appropriate to receive them as civil parties and declare their claim well founded;

UPON THESE GROUNDS

Ruling in a public hearing following full trial of a misdemeanour matter in first resort, the court;

- Reclassifies the acts alleged against the accused as indecent assault and declares them guilty of it;
- sentences each of them to 6 (six) months suspended imprisonment and to a suspended fine of CFAF 250,000 (two hundred and fifty thousand);
- Receives and declares well founded the filing of a civil claim by O.W.N and O.W.N;
- Consequently, jointly and severally sentences T.D, O.E and S.H to pay them the total sum of CFAF 10,000 (ten thousand) as damages;
- Calls on O.J-P, K.A and O.F to guarantee the payment of damages;
- Further orders T.D, O.E and S.H to pay the costs;

All this pursuant to Articles 122-1, 122-2, 122-4, 217-4, 533-2, 533-7, 533-10 of the Penal Code, 2, 473, 477, 694 and 699'A 718 of the Code of Criminal Procedure, which was read out by the President;

In witness whereof, this judgement has been signed by the Judge who delivered it and by the Court Registrar on the above-mentioned days, months and years.

THE PRESIDENT
REGISTRAR

THE COURT