

COURT OF APPEAL OF OUAGADOUGOU

HIGH COURT OF OUAHIGOUYA

HEARING OF FEBRUARY 19, 2020,
ON FLAGRANTE DELICTO

Judgement No. 26/2020
of 19/02/2020
Legal Department No. 008/2020

Legal Department
Vs.
Tall Aliou

Type of offence
Rape

Victims
Belem Afissatou and
Belem Amadé

Witnesses
Belem Abdoul Nourou
Tall Adama

Decision
(See verdict)

Panel:
President: Dielo Mahamed
Member: Bazongo Boris Herbert
Member: Nassa Issouf
Legal Department: Some Tergou Pie
CR: Bazongon Vilbié
Interpreter: Diallo Drissa

JUDICIAL ASSESSORS:

Belem Ousmane;
Yerbanga D. Maurice;
Ouedraogo Ismaël;
Bourgou Y. Bienvenu;
Kindo Noufou

The Ouahigouya High Court (Burkina Faso) ruling in a criminal suit during an ordinary court hearing on 19/02/2020 (nineteen February two thousand and twenty), holden at the court house of the said city, presided over by Mr **Dielo Mahamed**, Judge at the said Court;

President

Messrs **Bazongo Boris Herbert** and **Nassa Issouf**;

Members

With the assistance of Yerbanga D. Maurice,
Belem Ousmane and Ouedraogo Ismaël;

Judicial Assessors

Also in attendance was Mr Some Tergou Pie
Deputy State Counsel of Faso at the said court;

Legal Department

Assisted by Bourgou Y. Bienvenue and Kindo Nofou;

Judicial Assessors

Barrister Bazongo Vilbié, Court Registrar-in-Chief
at the said court;

Court Registrar

And Mr Diallo Drissa;

Sworn Interpreter

Delivered the following judgement:

BETWEEN

The State Counsel of Faso pressing
charges in a flagrante delicto suit

ON THE ONE HAND

AND

Tall Aliou, born in 1997 in You to Tall Kouka a.k.a. Hamadou Amadou and Tall Kadigueta, Burkinabese shepherd residing in Kelembali, single with no children, never convicted, decorated nor recruited before;

Accused “of having in Kelembali, on 18 January 2020, in any case, less than 03 (three) months ago, raped Belem Afissatou, not leaving out that the victim is a minor aged 14 (fourteen)”; *Acts provided for and punishable by articles 533 (10) and (11) of the Penal Code*;

ON THE OTHER HAND,

Scheduled on the cause list for 19 February 2020 hearing, the suit held and tried on that same date;

When questioned during the hearing pursuant to article 321(18) of the Criminal Procedure Code, the accused sought to be judge immediately;

At the call of the case, the State Counsel explained that by means mentioned above, he had the Accused appear in court on this day’s court hearing to present his defence with regards to the above prejudice;

The President then maintained the same day for the hearing;

The Accused was questioned and the Court Registrar recorded his answers;

The Accused presented the grounds of his defence;

On that, after full trial, the court ruled as follows:

THE COURT,

Mindful of the suit in flagrante delicto against Tall Aliou;

Mindful of the documents in the case file;

Having heard the pleas of the Accused;

Having heard the victim’s explanations;

Having heard witnesses’ report;

Having heard the submissions of the Legal Department;

Having heard the grounds in the defence of the Accused who received the floor in last position;

I- FACTS

On 18 January 2020, the Territorial Gendarmerie Brigade of Titao had some members

of the Koglweogo vigilante group come into their premises with Tall Aliou, who had allegedly raped a minor; they said they were called to her rescue by the younger brother of the victim; when interrogated by investigating officers on the veracity of this allegation, Tall Aliou concurred and confessed he was sorry;

Submissions to qualified person No. 019/2 of 19 January 2020 were addressed to the Senior Nurse, Unit Head of the Social Promotion Health Centre of You, enjoining an examination of the victim to provide a medical certificate thereof;

Going on to conduct a detailed investigation to elucidate the circumstances under which the offence was committed, agents of the Titao Territorial Gendarmerie Brigade recorded the statement of the victim, Belem Afissatou and her father's Belem Amadé, those of witnesses, Belem Abdoul Nourou, Tall Adama before locking up the Accused, Tall Aliou; in her statement, Belem Afissatou explains that on 18 January 2020, she and her younger brother, Belem Abdoul aged 9 had left Bangpooré village to meet their uncle, Nacanabo Kelsba in Dougouri village; that while on their way, at the exit of the Kelembali village, two young boys came out of the bushes and rushed towards them; that out of panic, they tried to run away; that one of the boys tried to make them feel safe by telling them they were looking for their stray animals; that being perplexed she ended up running away; that the oldest ran after her; that at one point she got out of breath; that this was how he finally caught her; that he used a piece of cloth to tie her legs undressed her by force and had forceful sexual intercourse with her; that it is her brother who had ran to the next village Baobani, and inhabitants thereof who rescued her; that after he was done, the Accused released her and took to his heels; that after this, she went to Dougouri village; that upon her arrival, she met that a group of men had already caught the boy who assaulted her; that these men took both of them to the Titao Gendarmerie; In his statement, Belem Abdoul Nourou concurred with the statement of the victim, Belem Afissatou; they pointed out that when they were stopped by the two fulanis, the youngest stepped aside; that the eldest tried to grab the hand of the elder sister but she refused; that he went and blew the alarm in the next village whose inhabitants

arrested the Accused; in his statement, Belem Amadé, tailor by profession and father of the victim stated that he was working in Titao on that day; that he was informed about the incident by an acquaintance and the head of the Koglweogo vigilante group of their village; that when he got to the village he found two Fulani who had been arrested by members of the Koglweogo vigilante group as being the ones who had assaulted his daughter; that they brought them to the Titao Gendarmerie together;

Whereas Tall Adama states that on 18 January 2020, he took his parents' herd to water the animals; that he found Tall Aliou there who then asked for help in finding his missing goats in the bushes; that he was walking behind him and on their way they came across a girl and a boy; that his mate told him he was going to stop them; that the girl who had heard him says that dropped the bag she was carrying and started running; that Aliou was telling her not to run away for he meant no harm; that at this point in time he sat aside and started staring at them; that the girl, obviously not feeling safe about what Tall Aliou had said, began running away; that Tall Aliou started chasing her; that since he realised he could not stop him, he turned back to his herd: that on his way back he could hear the girl screaming while running away; that the Koglweogo came to his house to lead him to the Titao Gendarmerie;

After his arrest, Tall Aliou acknowledged the crime he was accused of once again; he stated that he pursued the girl; that after catching her, he forced her into the bushes, that the idea to have sexual intercourse with the girl just pop-up at that exact moment; that he lose control and forced her to have sexual intercourse with him; that she fought him in the beginning but finally gave-in; that he was in the bushes when the Koglweogo came to fish him out and took him to the Titao Gendarmerie;

Tall Aliou appeared before the Legal Department where he was interviewed and acknowledged the charges reiterating his confessional statement during preliminary inquiries; the State Counsel of Faso pressed charges against him in flagrante delicto procedure based on article 533(10) and (11) of the Penal Code and brought him to the dock in a criminal matter at the said court; once at the said dock, the

Accused changed his mind denying the charges pressed against him; he argued that he had previously acknowledged the charges out of fear; when confused by the questions of the court, he finally made a confessional statement which concurred with those of the preliminary inquiries and the State Counsel of Faso;

Before the submissions of the Legal Department, the victim, through her civilly liable person decided to claim for damages parallel to prosecution amounting to CFA F 500,000 (five hundred thousand);

After parties were done presenting their arguments, and summarized the facts, the Legal Department requested that the charges of rape against the Accused be maintained and that he be sentenced to 10 (ten) years' imprisonment with 3 (three) years suspended sentence and a CFA F 1,000,000 (one million) suspended sentence;

The Accused got scared and apologetically asked for clemency;

II- PROCEDURE

A- PROSECUTION

Whereas Tall Aliou is charged with the rape of Belem Afissatou as provided by article 533(10) of the Penal Code; which according to provisions thereof, for rape to be established, its material and moral elements should be established;

Whereas the material scope of rape covers violence, threat, constraint or surprise with the sole purpose of having sexual intercourse with somebody;

Whereas as it is, the above-mentioned Accused acknowledged while in court, to have chased the victim, caught her, forcefully lead her into the bushes; that while there, the thought of having sexual intercourse with her came to his mind; that he informed the victim of his desire; that she did not give any answer accepting or refusing; that he then decided to have sexual intercourse with her; that after struggling briefly, his victim finally gave in; that his sexual intercourse with the victim was consensual;

Whereas the facts of the case allow us to determine that the victim did not consent; that in fact, by chasing the victim, catching her and forcefully pulling her into the bushes was constraining on the victim; that even if she had

given her consent, this could only have been out of her senses; that as for the rest, the Accused himself acknowledged that the victim resisted him at first when he started penetration; that based on this, the argument of the Accused according to which the sexual intercourse was consensual is ungrounded; that consequently, the lack of consent of the victim is established;

Whereas for the moral aspect of a rape to be qualified, it should be established that the rapist, at one point, consciously kicked against the will of the victim, and, on the other hand, that he consciously executed a sexual act;

Whereas as it is, the Accused acknowledges that he acted out of his own free will, freely and consciously to satisfy his sexual needs; that to this end he used his penis which he introduced into the vagina of the victim; that the sexual aspect of his action is definitely obvious; that in the light of what has just been said, the moral aspect of the rape is established against the Accused Tall Aliou;

Whereas all the constituting aspects of rape are gathered against the Accused Tall Aliou; that it would be proper to conclude that the full trial of 19 January 2020 yielded enough evidence incriminating him for the rape in Kelembali on 18 January 2020, in any case, less than 3 (three) years ago of Belem Afissatou; that it would be appropriate to find him guilty and pass a verdict against him;

B- SENTENCE

Whereas Tall Aliou has been found guilty of rape; that pursuant to article 533(10) of the Penal Code, he is liable to be sentenced to seven to ten years' imprisonment with a fine between CFA F 600,000 (six hundred thousand) and CFA F 2,000,000 (two million); that according to article 216(1) of the Penal Code, within the legal framework, the jurisdiction orders the sentence and sets its range depending on the prevailing circumstances of the offence and the personality of the Accused; that besides, pursuant to the last subsections of article 217-4 of the same code, where the law provides for imprisonment and payment of fine, the court can reduce both or just one of them;

Whereas as it is, it would be proper to point out that from documents of the case file,

Tall Aliou is a first-time offender for having never been sentenced before; that although he tried to deny the facts at the hearing, he ended-up acknowledging them following the court's examination of the case file; that since then he has been expressing remorse and regrets what he has done; that speaking last he requested clemency from the court; that all these elements act as mitigating circumstances which it would be proper to add to his credit; that despite the seriousness of the offence for which he was found guilty, it would be proper to grant him a partial suspended sentence rather than sentencing him to an actual prison term of 48 (forty-eight) months and a fine of CFA F 1,000,000 (one million);

CIVIL ACTION

1- As to form

Whereas article 321-40 of the Criminal Procedure Code provides that any person who claims to be a victim of a criminal offence can claim damages thereof before the criminal jurisdiction is seized by the Legal Department; that according to this provision, the claim for damages parallel to prosecution is a right of the victim; that according to articles 321-41 and 321-43 of the Criminal Procedure Code, the claim for damages parallel to prosecution can be presented in a hearing before the submissions of the State Counsel of Faso

Whereas in this case the father of the victim, Belem Amadé, appeared in court and declared his claim for damages parallel to prosecution before the submissions of the State Counsel of Faso; that he is hence admissible as to form

2- On the Merits

Whereas as article 1382 of the Civil Code provides, he by whose action causes damage to someone will have to pay reparation resulting thereof; that it is established Belem Amadé suffered damage as a result of the offence for which Tall Aliou was found guilty; that he requests CFA F 500,000 (five hundred thousand) as damages; that, moreover, medical fees for the rape and expatiating rites thereto amount to CFA F 32,500 (thirty-two thousand five hundred); that the father of the Accused paid CFA F 25,000 (twenty-five thousand); that his personal

contribution was only CFA F 7,500 (seven thousand five hundred) for reparation;

3- D- COSTS

Whereas the Accused is found guilty pursuant to article 321-94 of the Criminal Procedure Code and have the costs ordered against him;

Whereas as it is, Tall Aliou was found guilty of rape; that it would be proper to order the costs against him;

UPON THESE GROUNDS

Ruling in a public hearing following full trial of a criminal matter in first resort;

- Find Tall Aliou guilty as charged;
- In repression, sentence him in criminal matter, to an actual prison term of 28 (twenty-eight) months and a CFA F 1,000,000 (one million fine) suspended sentence;
- Receive the claim for damages parallel to prosecution of Belem Amadé, and declare it partially grounded on the merits;
- Consequently convict Tall Aliou to pay him CFA F 7,500 (seven thousand five hundred) as damages;
- Order the costs against Tall Aliou.

Thus done, judged and delivered on the same day, month and year as above

The President

The Court Registrar