

Judgment n°
After trial

REPUBLIC OF SENEGAL
—————
DAKAR COURT OF APPEAL
—————
CORRECTIONNAL CHAMBER

Office of the Public Prosecutor, xxx
Advocate General

PARTIES:

Office of the Public Prosecutor and

1°) xxx

2°) xxx heard in the presence of her tutor

3°) xxx Thiaroye Azur quartier "Mbatal",
Cell xxx in the presence of his tutor

4°) xxx. Defendants, appearing and assisted
by their counsel xxx, attorney at the court

PRESENTS
xxx

On one hand

AND

1°) xxx

2°) xxx

Appellants, appearing with their counsels xxx,
attorneys at the Court

Accused of attempted rape of minors aged below
13 years, pedophilia and abduction of minors;

On the other

The High Court of Pikine-Guediawaye, ruling in said cause, rendered on 12/11/2019 a judgment with the following operative part;

“Ruling publicly, after trial, in correctional matters and in first instance;

In the form

Declares admissible the public action;

On Merits

Re-characterizes the acts of attempted rape on minors under 13 initially brought against the defendants, in indecent assault without violence;

Declares them guilty of it as well as of the surplus;

Sentences them to a sentence of two (02) years of imprisonment each after concurrent sentencing in application of articles 320, 320 bis, 348 and 433 of the Criminal Code;

Declares admissible the action of the civil parties;

Sentences xxx to pay the sums of 3,000,000 francs to xxx, 3,000,000 francs to xxx, 3,000,000 francs to xxx and 3,000,000 francs to Fatoumata.

Sentences xxx to pay the sum of 3,000,000 Francs as damages;

Orders the provisional execution;

The accused pays the costs;

Set the maximum imprisonment term for failure to pay the reparations;

The Defendants and the Public Prosecutor have appealed against the above-mentioned judgment following acts at the registry dated 21 and 29/11/2019;

As a result of these appeals and at the request of the Attorney General to the Court, the defendants received a notice dated 31/01/2020 and the civil parties were summoned to appear before the aforementioned Court of Appeal at the hearing on 02/04/2020 to witness the ruling on the merits of the aforementioned appeals.

The case on this summons was entered on the Court's roll at the said hearing, and called in turn, it was successively postponed until 22.09.2020, date on which it was usefully retained and pleaded; Madam counselor xxx reported on the case; The Public Ministry was heard in his submissions; Thereupon, the Court closed the pleadings and postponed the case for judgment on 08/12/2020; On that date, the court extended the deliberation to 22.12.2020; In the hearing of that day, the Court, after deliberation, ruled as follows:

THE COURT

Considering the judgment of the High Court of Pikine-Guediawaye dated 12/11/2019.

Considering the appeals lodged against the judgment by the defendants and the public prosecutor according to acts filed at the registry dated 21 and 29/11/2019;

Considering the report of Madam advisor xxx

Considering the request of Mr. Advocate General;

Having regard to the documents in the file; After having deliberated in accordance with the law; Considering that by acts of appeal dated 21 and 29 November 2019, xxx and xxx respectively appealed against the judgment n ° 2353 rendered on November 12, 2019 in a correctional matter by the High Court of Pikine-Guediawaye in the case opposing them to the public prosecutor, and rendered the judgment whose operative part is as follows:

“Ruling publicly, after trial, in correctional matters and in first instance;

In the form

Declares admissible the public action;

On Merits

Re-characterizes the acts of attempted rape on minors under 13 years initially brought against the defendants, in indecent assault without violence;

Declares them guilty of it as well as of the surplus;

Sentences them to a penalty of two (02) years of imprisonment each after confusion of the penalties in application of articles 320, 320 bis, 348 and 433 of the Criminal Code;

Declares admissible the action of the civil parties;

Sentences xxx to pay the sums of 3,000,000 francs to xxx, 3,000,000 francs to xxx, 3,000,000 francs to xxx and 3,000,000 francs to Fatoumata.

Sentences xxx to pay the sum of 3,000,000 Francs as damages;

Orders the provisional execution;

The accused pays the costs;

Set the maximum imprisonment term for failure to pay the reparations”;

Considering that the following acts dated 21 and 29 November 2019, the Public Prosecutor filed an incidental appeal against the same decision;

Considering that all the parties have appeared assisted by their counsels: that it befits to rule after trial regarding them;

In the Form

Considering that the appeals were made in the required form and before they were time barred;

whereas they shall be declared admissible;

On merits

On public action

Considering that it emerges from the procedure that on September 6, 2019, xxx lodged a

complaint with the Police Station of Diamaguene against xxx for pedophilia and abduction of a minor on her 12-year-old daughter: that she explained that she had been alerted by the nurse of a clinic where she took her daughter for consultation following her recurrent illnesses: that she was informed that the girl was the object of sexual touching and the latter, when questioned by the investigating officers, designated xxx, the guard of her school and xxx owner of a hotel as being the perpetrators of these acts: that she also, during the course of the investigation, revealed that xxx took advantage of the break time and the quietude in the school to lure her into the toilets or his room and began to rub his penis against her sex; as for xxx he proposed to her and to her other friends xxx, xxx, xxx and xxx to come to his house next to his hotel to offer them food before he too proceeded to touch her.

That the young plaintiffs were interrogated both at the preliminary investigation and at the bar of the court and did not vary in their statements; that xxx maintained that Mr. xxx found them on the beach with her friends selling sachets of water to invite them to come to his place to eat pasta and after the meal Mr. xxx would put on shorts to start one by one rubbing his penis on them; that girl xxx maintained that she did not go back there and that it only happened to her once.

As for xxx, she confirmed what xxx said by specifying that she was there twice with her friends but Mr. xxx when making the touching asked them to undress but did not take off their panties and he also kept his panties on; that Mr. did it to her only once and afterwards he had given them 1000 Francs to share;

That xxx heard in turn explained, like the other girls, the circumstances in which she found herself at xxx home while specifying that the latter certainly touched her before giving them the 1000 Francs but did not cause her injury;

Considering that xxx questioned at the preliminary investigation and at the hearing denied all the alleged facts by maintaining that the father of xxx was a guard of his hotel and that the members of his family, namely women and children, used to come to his house; that according to him the accusation was put together by the wife of his former guard, who was also the mother of one of the daughters who wanted to arrange for him a romantic relationship with her friend, which he refused moreover; and that subsequently because of the pedophilia case tried in Mbour and for which he was granted an acquittal decision, the parents of these children wanted to take the opportunity to extract money from him; that he said he never harmed these children and that it was the girls like other children from Mbattal village who regularly came to his house begging for food; that in doing so he left them in his kitchen to prepare food before going upstairs;

Considering that xxx, who was only accused by xxx, declared during the investigation and the hearing proceedings that he admits to the facts, that he explained that he has been

the guard at the school since 1983 and had never touched any of the students at this school, he added that xxx never approached him but he sometimes gave them some coins at lunchtime to buy food; that according to him the girl is not telling the truth by saying that this happened in the school toilets since the said rooms do not have doors and do not close consequently;

Considering that pleading for their client, counsels for xxx maintained that the plaintiffs varied in their statements during all the procedure and that elements were added to the facts; that according to them while the medical certificates revealed simple scratches on the hymens, the complainants were unanimous in declaring that Mr. xxx did not take off his underwear at the time of the touching; that these are contradictions which do not allow the Court to enter into conviction; that in reality it was xxx's mother who insisted that the proceedings be continued, while the police and the medical doctors had concluded that there had been no lesions on her daughter's hymen; that there has never been a rape and according to the counsels for xxx the civil parties are only looking for a way to enrich themselves to the detriment of the defendant who by reputation has always been generous to the people of the village; which they concluded by requesting the release of their client who according to them is ill;

Considering that the counsel for xxx has, on his part, maintained that the latter is old and has been wrongly accused; that according to him the real victims in this case are the defendants who have already suffered whatever the outcome of the trial; that he noted that the whole procedure was crafted from scratch by lady xxx , who by wanting to give credit to the story engulfed Mr. xxx in it; that he explained that xxx not satisfied with the follow-up given by the Police to her complaint, brought the matter to the gendarmerie where Mr. xxx was not at all worried and it was only through a report from the prosecution that he was referred; that he explained that what was said at first instance is totally different from the statements made before the Court; he added that there is no witness in the file and the medical certificates show an absence of hymeneal lesions; That he ultimately maintained that xxx is 81 years old and has never had a problem with the law; that only the release for the benefit of the doubt is necessary to restore his dignity;

Considering that the Advocate General by making his submissions expressed his discomfort in this file due to the fact that there are only declarations emanating from the two parties; whereas the victims' medical certificates showed that the girls' hymens were intact; that there is thus contradiction and doubt and that should benefit the defendants; that he requested the reversal of the decision and release for the benefit of the doubt;

Considering that the counsel for the civil parties in his pleadings clarified that there was never any question of rape but rather of attempted rape; that in relation to the contradictions invoked by the defense and the prosecution to seek release, he replied that there is no contradiction in the statements made by the girls who, moreover, had all been

in xxx's room, that elsewhere the public prosecutor admitted that the girls were able to describe the room of xxx and the fact that some say that he appeared naked and others dressed in his panties is not determinative; that these facts contribute, according to him, to confirm the presence of the girls in his room and to sufficiently characterize the offense of abduction of minor; that for this purpose he has noted that Mr. xxx moved the children from the beach to his room against the will of those who had custody of them; whereas the decision therefore deserves confirmation on this point;

That with regard to pedophilia, the counsel for the civil parties stated that the facts are constant since it is not disputed that the defendants made touches on the children which cannot however be ascertained by the medical certificates; that however the girls constantly declared to have been touched by the defendant xxx and not raped; that he added that the simple fact of appearing naked in front of children is an act of a sexual nature; that he concluded in the existence of the offense of pedophilia reproached to the accused;

That with regard to xxx, his statements tending to say that the toilets are not equipped with doors, corroborates those of xxx because it was in this case easier for him to reach her in these toilets;

That he requested on behalf of the victims the confirmation of the impugned judgment in all its provisions and to order the *Caisse des Dépôts et Consignations* the payment of 12 million for the benefit of the civil parties.

For these reasons

On the indecent assault

Considering that it follows from the provisions of article 319 of the Penal Code that any indecent assault consumed or attempted without violence on the person of a child of one or the other sex aged thirteen years will be punished by imprisonment of three months to two years and a fine of 20,000 to 200,000 FCFA;

Considering that in this case no material element has emerged from the proceedings, in particular from the investigation and from the hearings, going towards establishing the existence of molestation on the child; that indeed the indecent assault was retained by the first judges who de-characterized the facts of attempted rape initially retained by the prosecuting prosecution; that, however, it should be noted that the molestation is an indecent act which is held as an offense when the acts alleged against the penal agent could not fall under one of the characterizations of sexual assault; that in the present case, however, the facts thus characterized as indecent assault fit perfectly and fully with the characterization of pedophilia, second in the act of prosecution: let there be added that the same facts cannot have a double characterization. it is necessary to acquit the defendants

on this count and to reverse the decision on this count;

On pedophilia

Considering that it results from the provisions of article 320 bis of the Penal Code that any gesture, touching, fondling, pornographic manipulation, use of images or sounds by any technical process, for sexual purposes on a child under 16 of either sex constitutes the pedophile act punishable by imprisonment of 5 to 10 years;

Considering that it is constant as resulting from the documents of the proceedings and the constant declarations of the victims xxx, xxx, xxx and xxx respectively 13 years old, 13 years old, 12 years old and 11 years old that xxx always appeared before them half-dressed (in panties) to rub on them; that the girls were unanimous in saying that there was never any penetration and that Mr. xxx was limited only to rubbing his penis on them; that it is the same with victim of xxx in this case xxx who always said that Mr. only rubbed his penis on her but never went beyond such touching; that these facts, the sexual purpose of which is not questionable, are entirely sufficient to characterize the offense of pedophilia for which xxx and xxx are being prosecuted in this case, that it is necessary to confirm the first judgment on this count by declaring them guilty of pedophilia;

Considering that article 320 bis punishes pedophilia with imprisonment of 5 to 10 years; Considering that in this case nothing in the file calls into question the quality of first offender of the defendants; whereas it befits to grant them the benefit of mitigating circumstances by sentencing them to a fixed prison term of two years each in application of the provisions of Articles 320 bis and 433 of the Criminal Code;

On the abduction of a minor

Considering that it follows from the provisions of article 348 of the penal code that anyone who without fraud or violence has kidnapped or diverted, or tenaciously kidnapped or diverted a minor under 18 years of age will be punished with imprisonment of two to five years and a fine of 20,000 to 200,000 francs;

Considering that in this case it emerges from the procedure that both xxx and xxx have, to perform acts for sexual purposes for who they were found guilty, removed the children from the places where they were supposed to be; that it was indeed for xxx to attract xxx in the school during the break hours and for xxx to invite his victims in charge of selling water bags on the beach in his house next to his hotel, promising them food; whereas in doing so, children under the age of 18 were abducted without fraud or violence from the places where they were placed by those who had custody of them;

That it is therefore necessary to confirm the impugned judgment on this count by declaring them also guilty of abduction of minors and to sentence them to a term of imprisonment of two years each in accordance with the provisions of Articles 348 and 433 of the Penal Code;

Considering that the defendants were found guilty of several offenses; that it is necessary to order the confusion of the penalties in accordance with the provisions of article 5 of the Penal Code by condemning them definitively to a prison term of two years each;

On civil action

Considering that the civil parties whose actions are admissible have requested on this point the confirmation of the decision on civil damages and the return of the 12 millions deposited at the *Caisse des Dépôts et Consignations* to them;

Considering that the pedophile acts and the abduction of minors of Mrs. xxx and xxx on their victims necessarily caused moral and psychological damage to the latter; whereas, however, the sums awarded by the first judges appear to be excessive in view of the elements of the procedure; that it therefore befits to confirm the impugned judgment on the principle of reparation to the victims, by granting however the sum of 1,500,000 FCFA to each victim; that it is therefore appropriate to order xxx to pay to xxx the sum of 1,500,000 FCFA and xxx to pay the sum of 1,500,000 FCFA to each of his victims, i.e. an amount of 6,000,000 FCFA;

Considering that it results from the procedure that an amount of 15,000,000 FCFA was deposited at the *Caisse des Depots et Consignation (CDC)* by xxx following judgment no 179 of 12/05/2020 of this court and this for his appearance in court and in guarantee of possible convictions; that it is therefore necessary to order the CDC to grant victims xxx, xxx, xxx and xxx the sum of 1,500,000 FCFA each and to return the remaining sum, i.e. 9,000,000 FCFA to xxx who had deposited it;

Considering that xxx had also deposited his passport as a guarantee of his appearance; that it befits to order its restitution;

On the costs

Considering that the costs shall be borne by xxx and xxx

FOR THESE REASONS

Ruling publicly, after trial, in correctional matters and as a last resort;

In the form

Declares admissible the appeals;

On Merits

Partially reverses the impugned judgment;

Ruling again:

Acquits the defendants of the count of indecent assault on the basis of article 457 of the Code of Criminal Procedure;

Find them guilty of pedophilia and abduction of minors;

Sentences them each to a prison term of two (02) years in application of the provisions of articles 5, 320 bis and 348 of the Penal Code;

Declares admissible civil actions instituted by xxx and xxx

Sentences xxx to pay to xxx the sum of one million five hundred thousand (1,500,000 FCFA) for all causes of prejudice combined;

Orders xxx to pay to xxx, xxx, xxx and xxx the sum of one million five hundred thousand (1,500,000) FCFA each for all causes of prejudice combined;

Orders the payment of the sum of one million five hundred thousand (1,500,000) FCFA to each of the victims of xxx namely xxx, xxx, xxx and xxx from the amount of fifteen million (15,000,000) deposited according to receipt n ° 100012020001225 of 14/05/2020 from the Caisse des Depots et Consignations;

Orders the restitution to xxx of the remaining amount, i.e. sum of nine million (9,000,000) CFA francs, consigned according to receipt n ° 100012020001225 of 14/05/2020 from the *Caisse des Dépôts et Consignations*;

Also orders the return of his passport to xxx;

Orders the defendants to pay the costs:

Thus done, judged and pronounced publicly by the Court of Appeal of Dakar, the day, month and year above;

SIGNED BY THE PRESIDENT AND THE REGISTRAR / -
