

ARRET No....

The Prosecutor....

Versus

.....

PRESENT

....., President

and

..... Registrar

## REPUBLIC OF SENEGAL

### Dakar Court of Appeal

### Criminal Chamber

Between:

The Prosecutor and

1. Ms. ..., born on 25/05/1955 at Ziguinchor to the Late ... and ..., residing at Keur Mbaye FALL Mbao, Tel: .....
2. ... , born on 16/02/1910 at Mbour to the ... and ...;

Accused appearing at the hearing, assisted by their Counsel, Barrister..., attorney at the Court in Dakar;

On the one hand

*And:*

... born on 25/12/1980 at Guediawaye to ... and ....., shopkeeper residing at Keur Mbaye (Toll Diaz);

Appellant appearing before the Court, assisted by Counsel, Barrister ..., attorney at the Court in Dakar;

Accused of raping a 13-year-old girl, pedophilia and abduction of minor.

On the other hand

The Pikine-Guediawaye High Court, after deliberating on the said case, on 26/04/2019 passed the following judgment:

“Deliberating publicly, on the basis of counter-argumentation, on criminal matters and in first instance;

#### **On the form**

Admits the public action;

#### **On the merit**

Declares ... alias ... guilty;

Sentences him to 10 years of imprisonment;

Admits ... constitution of civil party in the capacity of legal representative of ...;

Condemns the accused to pay the applicant the sum of 500,00 CFA franc for damages;

Orders for provisional execution;

Attributes cost to the accused;

Maximum duration of imprisonment for failure to pay dues.”

The accused and the Prosecutor appealed against the above-mentioned judgment following briefs filed at the registry on 29/04/2019 and 21/05/2019.

Following the said appeals, and the request of the Attorney General at the jurisdiction, the accused and the civil party were summoned to appeal before the Appeal Court for hearing on the merit of the appeal on 20/08/2019.

The said case was enlisted on the cause list of the Court, and was adjourned to 08/09/2020 for hearing.

The President ... did the report of the case;

The Prosecutor's requisitions were heard;

Thus, the Court adjourned the matter for judgment on 24/11/2020.

During the days' hearing, the Court ordered for deliberations on the matter to be re-opened, and noted that there was no observation, before re-adjourning for judgment.

The Court, concluding its deliberation, ruled as follows:

### THE COURT

Considering the judgment of the Dakar High Court of 26/04/2019;

Considering the appeals filed against the judgment by the accused and the Prosecutor, in accordance with the deeds at the Court registry dated 29/04/2019 and 21/05/2019;

Having heard the report of the President....;

Having heard the requisitions of the Prosecutor;

Considering the documents in the file;

After deliberating on the matter in accordance with the law;

Considering that by declaration registered at the registry on 29 April 2019, Barrister..., advocate at the Court, acting on behalf of ... alias ..., filed an appeal against judgment No 932/19 delivered on 26 April 2019 by the Pikine-Guediawaye High Court, ruling on flagrante delicto matter, with the following content:

“Deliberating publicly on the basis of counter-argumentation on criminal matter and in first instance;

#### **On the form**

Admits the public action.

#### **On the merit**

Declares ... alias ... guilty;

Sentence him to 10 years of imprisonment;

Admits the ... constitution of civil party in the capacity of legal representative of ...;

Condemns the accused to the applicant 500,000 CFA francs for damages;

Orders for provisional execution;

Attributes cost to the accused;

Maximum duration of imprisonment for failure to pay dues.”

Considering that, by deed registered on the same day, the Prosecutor filed an appeal.

#### **On the form**

Considering that the appeals were made in the legal form and within the deadline;

That it is appropriate to declare them admissible;

Considering that all the parties appeared at the hearing;

That it is appropriate to rule on the basis of counter-argumentation;

### **On the merit**

#### **On the facts and the procedures**

Considering that it emerges from the investigation report No... of 18 February 2019 that Ms had deposited a complaint at the gendarmerie brigade of the zone against .... for raping her grand-daughter.

That when heard, she said that in February, she noticed that her grand-daughter had difficulty sitting down during meals, struggling with pain in her private parts, holding coins worth 125 francs and wearing a watch that she said she had received from the accused on credit; That she told her that the latter, taking advantage of her presence in his shop, had raped and injured her in sex organ, reason for which she could not stand up;

That..., heard as a witness, confirmed the statements of the complainant by specifying that she noted red stains on the victim's dress the day she had returned from the shop wearing a watch, and that the latter had revealed to her on this occasion that twice ... had sexually touched her;

That during her auditioning, ... said the accused had asked her to come and take a commission from her grandmother, and that on her arrival, he took her behind the shop, undressed and pulled her to himself after lowering his black pair of trousers and red knickers; That when he had finished penetrating her, he gave her lollipops and ordered her not to tell anyone; That when he tried repeating the act in the shop a second time, she screamed before he stopped.

Questioned by the investigating gendarmes, ... disputed the accusations and claimed to have left his business place on the day of the said acts around 12:30 p.m. and only went back there in the evening;

That he confirmed that he was wearing jeans trousers, a green t-shirt and red knickers and admitted having given ... a watch on credit, and that should was to pay him the sum of ...;

That he affirms that the girl had never entered his shop;

Considering that the medical examination conducted on the victim on 05 February 2019 revealed the breaking of the hymen estimated to have happened between 2:00am and 6:00am;

Accused of raping a girl below the age of 13, pedophilia and abduction of a minor, ... alias ... was tried by the Pikine-Guediawaye High Court, deliberating on flagrante delicto case, which passed the judgment being contested in appeal;

### **On the appeal**

Considering that the accused denied the accusations and claims to have neither raped nor abducted the girl, whom he claims never to have approached, that he said he has two wives and six children; that he also noted that his shop does not have a toilet, and that it is the toilet of the apartment that he was using;

That he specified that his wives were not in Dakar at the time of the alleged incidents;

That he admitted selling charcoal and tuna fish at his shop, but refused having sold charcoal and bread with tuna fish to the girl; that he admitted having sold her a watch;

That he admitted having a red knickers and a black pair of trousers;

Considering that,.... who declared to be ten (10) years old, said that on the day of the incidents, her grandmother had sent her to buy charcoal and that, soon after having sold her the charcoal, the accused asked her to come closer to him for a commission he was to give to his grandmother; that he thus seized her before taking off her panties to penetrate her, and that she was almost bleeding and in pain; that she specified that he had raped her twice and that the second time was when she had gone to buy tuna;

That she specified that she had not said anything to her grandmother because he had threatened to take her to a place where people were killed; that he raped her in a corner of the toilet behind the shop; that the first time was around 10 a.m. and the second time was around 1 p.m. after school;

Considering that ... grandmother of ... declared that she had instructed her granddaughter to go and buy charcoal because it was cold and therefore they needed to prepare warm water for bathing; that on her return from school she noticed that ... could not sit normally, did not look sound, was not eating, complained of stomach aches and was vomiting, but told her that she had no problem when she sought to know what had happened to her, though she realized that the shopkeeper had sold her a watch for 200 FCFA whereas it is worth 300 FCFA.

That she specified that she had to threaten her with a knife because of her strange behavior for her to confess to her that ... had abused her twice on Monday and the following Thursday; that the blood-stained panties had been sealed;

Considering that counsel for the accused noted that his client reiterated before the Court his previous statements as did the victim, except that the latter told the Court that she forgot the color of the trousers and the knickers that the accused was wearing, whereas she had earlier stated that the accused was wearing a black pair of trousers and red knickers; that it is disturbing; that his client argues that he wears torn black trousers and red knickers because he sells charcoal; That the girl did not present the pant which she said was stained; that his client has consistently denied the accusations; that the shop of his client is always busy with customers, and that it is incomprehensible that he could have the time to commit the acts he is accused of; that his client argued that the first time he was not even around; that the medical report attests to a breaking of the hymen sometime in the past, whereas it was only on Thursday that the child was examined by the doctor for an act supposedly committed for the first time just the preceding Monday;

That he ended his pleadings by asking the Court for the reversal of the judgment in all its provisions and for the release of the accused;

Considering that the Prosecutor began by recalling the devolutive nature of the appeal which allows the Court to assess the entirety of the procedure, then noted that the accused was inconsistent in his statements; That the matter dates back to February 2019 when t the victim was 09 years old; That she had been recommended for a commission from the known neighbor who sold charcoal; That the grandmother could not imagine that her daughter was going to be abused, but she was careful to notice her daughter's unusual behavior; That the logic of seasoned adults is not that of a 9-year-old girl who naively followed the accused. That is indeed guilty of rape, pedophilia and abduction of a minor; That the decision must be confirmed; That the rape is evident; That the victim's version is credible by the circumstances of the facts; That the consistency of the statements of a 09-year-old girl for facts dating back to 02 years is edifying; That she had said that ... was wearing black trousers and red knickers, and that it was what the investigators found in the accused's house and it was the girl who spoke about it first; That the facts are constant; That the medical report is edifying; That there was a tear without deep penetration; That the girl's panties were found in the laundry and added to the file;

That he asked the Court to hold that the act of penetration was consumed on a girl who was constant in her statements; that his responsibility is unquestionable; that the materiality of the touching is evident; that the abduction of minor is also evident for having been withdrawn from the attention of her grandmother to be abused;

That, in conclusion, he requested the confirmation of the decision;

Considering that counsel for the civil party observed that both ... and her grandmother were consistent in their statements; that in matters of rape there is no testimony because it is in an isolated place that this happens; that the jurisdiction bases on elements of appreciation; That ... clearly and precisely described the facts; That when she went to buy charcoal, ... preferred to sell to everyone before the girl; That she clearly described the scene of the rape; That the black trousers and red panties described by the girl were found at the home of the accused; That the accused denied the facts which are undisputable; That he sold charcoal, bread with tuna fish, and a watch;

That to conclude his pleadings, he solicited the Court to confirm, the decision and the appreciation of the public interest;

Considering that in order to declare ... alias ... guilty of raping a girl of 13 years, pedophilia and abduction of a minor, the first judges ha presumed that, considering rape, besides medical certificate, the victim has constantly designated the accused as the perpetrator of the offence; that she clearly described his outfit on the day of the offence and inevitably maintained that the latter led her behind his shop before undressing and raping her, and then gave her lollipop and intimidated ordered not to talk about it to anyone, and that the accused only made systematic denials to the clear and precise accusations of the victim;

That for the count of pedophilia, it was considered that it is common ground that ..., by penetrating ..., less than 16 years old, committed on the latter acts related to fondling or touching for sexual purposes referred to in Article 320 bis of the Penal Code;

That with regard to the abduction of a minor, the judges considered that the victim was taken away from the authority of her parents and held back against her will and that of her parents, in violation of article 348 of the penal code;

Considering that by deliberating, as they did, the first judges made an objective assessment of the facts of the case and a proper application of the law;

That in fact, the constant, clear and precise declarations of the victim, which coincide with the data of the investigation, lead to a greater conviction that the systematic and clumsy denials of the accused ... alias ... ;

That it is appropriate, in view of the foregoing, to declare the appeal of the accused unfounded and to confirm the judgment entered in all its provisions;

Considering that it is appropriate, moreover, to condemn ... to pay the costs.

**FOR THESE REASONS,**

Deliberating publicly, on the basis of counter-argumentation, in criminal matter and as last resort;

**On the form**

Declare the appeals admissible;

**On the merit**

Confirms the judgment rendered in all its provisions;

Condemns ... alias ... to costs;

Thus decided and pronounced publicly by the Dakar Court of Appeal, on the day, month and year above.

**AND SIGNED BY THE PRESIDENT AND THE REGISTRAR.**