

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY**  
**IN THE ABUJA JUDICIAL DIVISION**  
**HOLDEN AT GUDU, ABUJA**  
**THIS MONDAY THE 14<sup>TH</sup> DAY OF JANUARY, 2019**  
**BEFORE HIS LORDSHIP HON: JUSTICE A. B. MOHAMMED**

**SUIT. NO. FCT/CV/834/17**

NOTICE OF APPLICATION FOR ORDER ENFORCING FUNDAMENTAL RIGHT  
(ORDER RULE 1)2009

**AND**

IN THE MATTER OF APPLICATION OF NGUMAN FELICIA AKULA (SUING AS NEXT  
FRIEND OF JENNIFER AKULA) FOR AN ORDER FOR THE ENFORCEMENT OF HER  
FUNDAMENTAL RIGHTS.

**BETWEEN:**

1. JENNIFER AKULA	}	APPLICANTS
2. NGUMAN FELICIA AKULA		
(SUING AS NEXT FRIEND OF JENNIFER AKULA)		

-

**AND**

JOSEPH ZAKI	-	RESPONDENT
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**JUDGMENT**  
**DELIVERED BY HON. JUSTICE A. B. MOHAMMED**

Vide a Motion on Notice dated and filed on the 3<sup>rd</sup> of February, 2017, and brought pursuant to Order II, Order III, Order IV Rules (1) and (2) of the Fundamental Rights (Enforcement Procedure) Rules, 2009, Sections 33(1) and

34(1)(a) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), Articles 4 and 5 of the African Charter on Human & Peoples Rights (Ratification and Enforcement) Act, Cap. 10, LFN, 1990 and Sections 3, 4, 11, 13 and 31 of the Child Rights Act, 2003, as well as the inherent jurisdiction of the Court, the Applicants sought for the following reliefs against the Respondent:

1. A Declaration that the unlawful carnal knowledge, indecent assault and defilement of tender and vulnerable seven (7) year old Miss Jennifer Akula by Joseph Zaki is inhuman, degrading, unlawful and an abuse of her rights to life, respect and dignity of a human person as enshrined in Section 33 and 34 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Articles 4 and 5 of the African Charter on Human and People's Right (Ratification and Enforcement Act )CAP 10 LFN 1990.
2. A Declaration that the action of Joseph Zaki amounts to torture physical and psychological abuse and violation of Jennifer Akula's right to survival and development as provided for in Section 3, 4 11 and 13 of the Child's Right Act (2003).
3. A Declaration that the unlawful carnal knowledge, indecent assault and defilement of tender and vulnerable seven (7) year old Miss Jennifer Akula by Joseph Zaki is an outright violation of Section 31 of the Child's Right Act 2003.
4. A Declaration that the act of the defendant is unconstitutional, degrading and an inhuman treatment.

5. An Order mandating a comprehensive health examination and treatment of little Jennifer Akula at the expense of the respondent.
6. An Order for payment by the respondent of the sum of Twenty Million Naira (N20,000,000.00) being exemplary damages for infringement of Jennifer Akula's fundamental rights.
7. And for such further order or other orders as this Honourable Court may deem fit to make in the circumstance.

The grounds upon which the reliefs are sought are:

1. The 1<sup>st</sup> Applicant is entitled to the protection of her right to life and human dignity as enshrined in Sections 33 and 34 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Articles 4 and 5 of the African Charter on Human and People's Right (Ratification and Enforcement Act)CAP 10 LFN 1990.
2. The 1<sup>st</sup> Applicant is entitled to the protection of her right to survival and development and her right to the best attainable state of physical, mental and spiritual health as provided for in Section 3, 4, 11 and 13 of the Child's Rights Act (2003).
3. The unlawful carnal knowledge, indecent assault and defilement of tender and vulnerable seven (7) year old Miss Jennifer Akula by Joseph Zaki are an outright violation of Section 31 of the Child's Right Act (2003).

4. The defilement and unlawful carnal knowledge of the 1<sup>st</sup> Applicant, which has caused a huge threat to her life, survival and development is wrongful and unconstitutional.
5. The 1<sup>st</sup> Applicant has suffered grave health complications and psychological trauma as a result of the grievous act of the Respondent.
6. The 1<sup>st</sup> Applicant requires further specialist medical attention to salvage whatever is left of her reproductive and other vital organs.

The application was supported by a 29 paragraph affidavit deposed to by one Chidinma Matthew, a litigation secretary in the law firm of Haptagon and Associates the law firm representing the Applicant. Attached to the supporting affidavit were three documents labelled Exhibits A, B and C. A Written Address dated 3<sup>rd</sup> February, 2017 was filed and adopted in support of the application by the learned Counsel for the Applicants, Esther Uzoma Esq.

In opposition, the Respondent deposed to and filed a Counter Affidavit dated 30<sup>th</sup> October, 2018. Attached to the Counter Affidavit was a document marked Exhibit A. A Written Address dated 29<sup>th</sup> October, 2018 was also filed and adopted in opposition to the application by Moses B. Bature Esq, the learned Counsel for the Respondent.

In his own adopted written address, the learned Counsel to the Applicants Esther Uzoma Esq, formulated five issues for determination, namely –

1. Whether the 1<sup>st</sup> Applicant is entitled to the protection of her right to life and dignity as guaranteed by Sections 33 and 34 of the 1999 Constitution of the Federal Republic of Nigeria and Article 4 and 5 of the African Charter on Human and Peoples Right (Ratification

and Enforcement Act)CAP 10 LFN 1990 and Section 11 of the Child's Right Act, 2003.

2. Whether the 1<sup>st</sup> Applicant is entitled to the protection of her right to survival and development and right to the best attainable state of physical, mental and spiritual health as provided for in Sections 3, 4, 11 and 13 of the Childs Right Act, 2003.
3. Whether the Respondent has powers under the law whatsoever to brutally defile the 1<sup>st</sup> Applicant (Little Jennifer Akula).
4. Whether the court should in the circumstance of the case shift the onus of the proof of whether or not the right of the 1<sup>st</sup> Applicant has been infringed upon on the Respondent.
5. Where the issues raised above are answered in the affirmative, whether the 1<sup>st</sup> Applicant is entitled to the reliefs set out in the motion paper.

On his part, the learned Counsel for the Respondent, Moses B. Batire Esq, raised the following sole issue for determination in his adopted written address:

Whether the application made out by the Applicant is competent.

From the issues raised by the parties and their respective submissions, I am of the considered view that the sole issue for determination in this case is:

Whether the Applicant has made out a case for the infringement of the fundamental rights of Jennifer Akula (a child) as to be entitled to the reliefs sought in this suit.

Learned Counsel for the Applicant, Esther Uzoma Esq, had submitted that the rights of life and human dignity of the 1<sup>st</sup> Applicant have been abused by the Respondent. Counsel referred to the depositions on the supporting affidavit and Medical Report (Exhibit C). He added that the actions of the Respondent is unlawful and an abuse of her fundamental right to life and dignity. Counsel insist that the 1<sup>st</sup> Applicant is entitled to this protection of these rights and relied on **ODOGU v ATTORNEY GENERAL OF THE FEDERATION (1996) 6 NWLR (Pt. 456) 508;** and Article 4 of the African Charter on Human and Peoples Rights.

Learned Counsel submitted that the Respondent's rape of the 1<sup>st</sup> Applicant is a gross violation of Sections 4 and 13 of the Child's Right Act and Chapter IV of the 1999 Constitution, as amended and urged this court to hold that the 1<sup>st</sup> Applicant is entitled to the Protection of her rights as enshrined in Sections 3, 4, 11 and 13 of the Child's Rights Act. He argued that the Respondent has no right whatsoever to inflict such agonising and dehumanising pains on the little 1<sup>st</sup> Applicant and that by doing that he had contravened Section 31(1) and (2) of the Child's Rights Act. He added that the Respondent's rape of the trusting, innocent unsuspecting and vulnerable 1<sup>st</sup> Applicant is both callous and animalistic. He cited **EZEAKO v NWANKWO (2000) 2 HRLRA 167; and EDWIN EZEIGBO v THE STATE (2012) 16 NWLR (Pt. 1326).**

Learned Counsel further submitted that in the circumstance of this case, the onus should shift to the Respondent to prove that he did not have carnal knowledge of the 1<sup>st</sup> Applicant and as such did not infringe on her fundamental rights. Counsel cited **AGHAKOBA v DIRECTOR OF SSS (1998) 1 HRLRA 252.** He urged the Court to hold that it is the responsibility of the Respondent to prove that he has not infringed on the rights of the 1<sup>st</sup> Applicant.

Learned Counsel also submitted that the 1<sup>st</sup> Applicant is entitled to the enforcement of her fundamental rights and award of damages. Counsel added that the fundamental rights of the little girl to life, human dignity survival and development has been infringed upon and that she is entitled to the award of damages and enforcement of her fundamental right. Counsel cited **ABIOLA v ABACHA (1982) 3 NCLR 945, IHLRA 455; SHUGABA DARMAN v MINISTER OF INTERNAL AFFAIRS (1982 3 NCLR 945; and EZEAKA v NWANKWO (2000) 2 HRLRA 167.** Counsel finally urged the Court to grant the 1<sup>st</sup> Applicant's prayers for the enforcement of fundamental rights and award her damages.

Arguing in opposition, learned Counsel for the Respondent submitted that this application is not competent and lacks merit and should be discountenanced on the ground that there is no affidavit in support of the motion on notice. He argued that the affidavit which the Applicant is relying on offends the provisions of Section 85 of the Evidence Act as the averments are legal concussions. He added that an Applicant seeking for a declaration cannot get same on admission of the other party, but only upon the Applicant satisfying the Court with credible evidence that he is entitled to such declaration.

Learned counsel further submitted that there is no material evidence placed before this Court by the Applicants to link or show that the Respondent committed any offence and has been convicted of such offence. He added that the Respondent has shown that there is a pending criminal suit yet to be determined and that it is better to await the outcome of the case and not to pre-empt it.

Learned Counsel finally contended that the law is trite that the Respondent is not to prove a negative assertion against him as the burden is on the Applicant. He referred to Section 135 of the Evidence Act and cited the case of **ALHAJI**

**OLARUN & SONS LTD v IDRIS (1999) 6 NWLR (Pt.606) 330;** and urged the Court to dismiss the application.

Instead of filing a proper Reply on Points of Law to the Respondent's submission, I observe that the learned Counsel for the Applicant raised another four issues for determination again and proceeded to make arguments on them. This clearly is not what a Reply on Points of Law is supposed to contain. A Reply on Points of Law should, as its nomenclature depicts, be only a response to points of law raised in the Respondent's address. It is not supposed to be another address that formulates new issues as had been done by the learned Counsel for the Applicant in this case.

In the said address however, I could see that the learned Counsel had strenuously urged this Court to expunge paragraphs C, H, K and M of the Respondent's Counter affidavit as they constitute legal conclusions, arguments and prayers. He relied on Section 115(2) of the Evidence Act, 2011 and the cases of **A-G ANAMBRA STATE v A-G. OF THE FEDERATION (2007) All FWLR (Pt. 379) 1218 at 1246; HALIRU v FRN (2008) All FWLR (Pt. 425) 1697 at 1717-1719; BAMAIYI v THE STATE (2001) FWLR (Pt. 46) 956.**

On the submission of Counsel to the Respondent urging this court to discountenance the Applicant's averments which are legal conclusions, learned Counsel for the Applicant submitted that the assertion was misconceived. He Pointed out that the learned Counsel had misdirected the Court to Section 85 of the Evidence Act which has nothing to do with an affidavit. Counsel added that such erroneous submission cannot be relied on by this Court to expunge any paragraph of the Applicant's affidavit.



Learned Counsel further submitted that the Respondent only made a sweeping denial in his counter affidavit and insisted that in law denials in a counter-affidavit must be precise, concise, exact and must not give room for any speculation, doubt or conjecture. Counsel further submitted that the Respondent's denial in his counter affidavit is vague and cannot be relied upon as a proper denial. Counsel cited **TAIWO v DANBARE (2001) 14 WRN 52 at 67.**

Learned Counsel finally submitted that the pendency of the criminal trial of the Respondent at the Upper Area Court does not constitute a bar to this suit. Counsel argued that the rule in **SMITH v SELWYN (1914) 3 KB 98**, which was canvassed in the paragraphs I, J and K of the Respondent's counter affidavit, had been abolished even in Britain and is also not applicable in Nigeria. He submitted that civil cases could now go side by side with criminal cases. He relied on **VERITAS INSURANCE CO. LTD. v CITI TRUST INVESTMENT CO. LTD. (1993) 2 NWLR (Pt. 281) 349; and ADEDIRAN v INTERLAND TRANSPORT LTD. (1991) 9 NWLR (Pt. 214) 5515.** Counsel finally urged the Court to grant the Applicant's reliefs.

I have considered the submissions of the parties in this application. Before proceedings with consideration of the substantive application, I need to observe that the Counsel had in bringing this Application included the minor child, Jennifer Akula of 7 years as the first applicant, despite stating that the second applicant, Nguman Felicia Akula is suing as Next-Friend to the said child, Jennifer Akula. It is trite law that a child or an infant cannot sue or defend an action by himself or herself. He or she can only by a next-friend or defend an action through a guardian ad litem. See: **NWAGU v OKOLO (2012) LPELR-9460(CA), per Abdul-kadir, JCA at page 12, paras C – G.**

In the instant case where Nguman Felicia Akula is stated to be the Next-Friend of the child Jennifer Akula, there is no need to now include Jennifer Akula as an Applicant in this case. Accordingly, I hereby strike out the name of Jennifer Akula stated to be the 1<sup>st</sup> Applicant from this case, leaving only Nguman Felicia Akula as the Applicant, who now sues as the Next-Friend of the child, Jennifer Akula

The law is trite that in an action for the enforcement of fundamental rights, as in this case, the Applicant has the duty to place before the Court vital evidence in proof of his case. This is because an action for infringement of fundamental right is in the nature of a declaratory claim. The Court would have to first declare that the Applicant's right has been infringed before proceeding to enforce same. Hence, the trite position of law is that in a claim for infringement of fundamental right such as in this case, the Applicant has the burden of establishing such infringement before he becomes entitled to any relief. See: **FAJIMIROKUN v C.B. (C. I.) NIG. LTD. (2002) 10 NWLR (Pt. 744) 94, per Sanusi, JCA (as he then was).**

In the instant case, the Applicant alleges that the fundamental rights of a seven year old girl, Jennifer Akula to life, respect and dignity of human person, to survival and development as guaranteed by Sections 33 and 34 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Sections 3, 4, 11 and 13 of the Child Rights Act, 2003, were infringed by the Respondent.

The pertinent factual depositions relied upon by the Applicant as contained in the affidavit in support were those in paragraphs 2 – 26 which I reproduce below for ease of reference:

2. That she Nguman Felicia Akula is the mother of the 1<sup>st</sup> Applicant, Miss Jennifer Akula and the 2<sup>nd</sup> Applicant in this suit, applying as next-friend of Jennifer Akula, the seven year old victim.
3. That the respondent, Mr. Joseph Zaki is landlord of the residence where the 1<sup>st</sup> and 2<sup>nd</sup> Applicants reside.
4. That the 1<sup>st</sup> Applicant (Jennifer Akula), the victim is a seven year old innocent, helpless, powerless and defenceless Nigerian primary two pupil, of Creative Destiny Kids Academy, Kabusa, in the FCT, born on the 22<sup>nd</sup> of January, 2010. Attached herein and marked as Exhibit A is her birth certificate.
5. That the 1<sup>st</sup> Applicant is a pupil of Creative Destiny Kids Academy. Also attached and marked as Exhibit B is a school fees receipt issued by Creative Destiny Kids Academy, Kabusa, FCT.
6. That the 1<sup>st</sup> Applicant is applying for the enforcement of her Fundamental Rights.
7. That sometime in November, 2016 at Kabusa, behind the Dunamis Church, Kabusa in te Federal Capital Territory (FCT) Joseph Zaki (Repsondent) their landlord, a father of five (5) children (3 girls, 2 boys) and a husband of two wives indecently assaulted, defiled and had unlawful carnal knowledge of little Jennifer Akula.
8. That in the night of 10<sup>th</sup> November, 2016, the (2<sup>nd</sup> Applicant) mother of Jennifer noticed a milky coloured fluid flowing out of her daughter's private part.

9. That she questioned her daughter who then revealed that their landlord, Joseph Zaki (Respondent) had sexual intercourse with her.
10. That the little girl told her (2<sup>nd</sup> Applicant) the Respondent sent her (1<sup>st</sup> Applicant) to buy sugar.
  - a. That when she returned with the sugar, the Respondent took her inside his house and had carnal knowledge of her.
  - b. That the little girl also stated that the Respondent had had carnal knowledge of her three different times but always told her not to tell her mother or else he would beat her.
11. That on the same 10<sup>th</sup> of November, 2016, she (2<sup>nd</sup> Respondent) reported the matter to Kabusa Police Station but was asked to come back the next day as it was already night.
12. That she went back to the Police Station the following day being 11<sup>th</sup> November and the Respondent was subsequently arrested.
13. That his family came and pleaded for the case to be withdrawn from the Police and that an agreement was reached that the little girl be taken to hospital but they did nothing.
14. That at about 6 pm on the 12<sup>th</sup> of November, 2016, she called her husband's nephew (Mr. Kenneth Akula) and narrated what happened.
15. That on the following day, 13<sup>th</sup> November, 2016, he (Mr. Kenneth Akula) went to the police station where the matter was reported and asked that the case be re-opened.

16. That the Respondent was re-arrested on the 14<sup>th</sup> of November, 2016 and the case was transferred to Apo Police Station on the same day.
17. That at Apo Police Station, the Police took the 1<sup>st</sup> Applicant to the Police Hospital where medical examination was carried out on her by a doctor who confirmed that she had been raped. Attached herein and marked as Exhibit C is the Medical Report dated 22<sup>nd</sup> November, 2016.
18. That although the Police took both the 1<sup>st</sup> Applicant and the Respondent to the hospital for medical examination, only her own report was made available to the family.
19. That the detailed medical report showing whether the 1<sup>st</sup> Applicant has contacted sexually transmitted diseases is still unavailable to the family in spite of the fact that the Medical Report (Exhibit C) revealed that:  
  
“Investigations which include Hepatitis B & C, HIV, Syphilis, HVS M/C/S were done and results noted.”
20. That they were neither shown nor given any information about the medical result of the Respondent.
21. That they are concerned and afraid that the 1<sup>st</sup> Applicant might have been infected with some deadly disease as there is still discharge from her vagina.
22. That on the 25<sup>th</sup> of November, 2016, the case was transferred to the FCT Command.

23. That on the 26<sup>th</sup> of November, 2016, the Respondent confessed in the presence of Mr. Kenneth Akula and other to having raped little Jennifer on three different occasion. First in his Palour, second and third times in one of his wife's room.
24. That the 1<sup>st</sup> respondent (sic) applicant has been sick as a result of the incident and worse still is smelly discharges flowing from her vagina.
25. That the condition in paragraph 18 above requires urgent medical attentionto see what can be salvaged of the reproductive and other vital organs of the 1<sup>st</sup> Applicant as she is silently and slowly being killed by the effect of her defilement by Joseph Zaki.
26. That she and her family have exhausted all they have, both material and physical in pursuit of this case.
27. That it is in the interest of justice that this application be granted.

As stated in the above quoted affidavit, the three exhibits attached were: (1) the Birth Certificate of the child, Jennifer Akula - Exhibit A; (2) School Fees Receipt issued by Creative Destiny Kids Academy - Exhibit B; and a Medical Report - Exhibit C.

I have examined the above affidavit evidence put forward by the Applicant in this case. As pointed out by the learned Counsel for the Respondent, the nature of the allegations raised by the Applicant against the Respondent in this application is one that is criminal in nature. It is an allegation of rape and defilement of a minor. It is trite law that allegations of crime must be proved

beyond reasonable doubt. See Section 135(1) of the Evidence Act, 2011. In **FOLAMI & ORS. v COLE & ORS. (1990) LPELR-1285(SC)**, His Lordship Belgore, JSC (as he then was) stated this position clearly when he held that:

If commission of a crime by a party is directly in issue in any proceedings civil or criminal, it must be proved beyond reasonable doubt. (Page 12, paras. C – D).

See also: **PDP v INEC & ORS (2014) LPELR-23808(SC), per Okoro, JSC at pages 39 – 41, paras. E – A; IKPEAZU v OTTI & ORS (2016) LPELR-40055(SC), per Kekere-Ekun, JSC at pages 77, paras. D – F; and ATUCHUKWU v ADINDU (2011) LPELR-3821(CA), per Ogunwumiju, JCA at page 41, paras. E – F.**

In the instant case, the Applicant had brought this application on behalf the child Jennifer Akula alleging unlawful carnal knowledge, indecent assault and defilement of a tender and vulnerable child by the Respondent in contravention of Section 31 of the Child Rights Act and in breach of the child's fundamental rights to life, respect and dignity of human person as well as right to survival and development as enshrined in Sections 33 and 34 of the 1999 Constitution and Sections 3, 4, 11 and 13 of the Child Rights Act, 2003.

Section 31 of the Child Rights Act, 2003 which is relied upon by the Applicant provides as follows:

31. Unlawful Sexual Intercourse with a Child, etc
  - (1) No person shall have sexual intercourse with a child.
  - (2) A person who contravenes the provision of subsection (1) of this section commits an offence of rape and is liable on conviction to imprisonment for life.

- (3) Where a person is charged with an offence under this section, it is immaterial that –
- (a) the offender believed the person to be of or above the age of eighteen years; or
  - (b) the sexual intercourse was with the consent of the child.

By Section 135(2) of the Evidence Act, 2011, the burden of proving the allegation beyond reasonable doubt is on the Applicant who raised the allegation and not the Respondent as contended by the learned Counsel for the Applicant. See: **UKEJE & ANOR v UKEJE (2014) LPELR-22724(SC), per Ogunbiyi, JSC at page 36, paras. D – F; and ATUCHUKWU v. ADINDU (supra).**

In the instant case, apart from the depositions contained in the supporting affidavit which I have quoted above, the Applicant had annexed only the three exhibits (A, B. and C) stated above. Exhibit A is a copy of Birth Certificate of Jennifer Akula which showed that the child was born on 22<sup>nd</sup> January, 2010 at Benue. Exhibit B, dated 1<sup>st</sup> November, 2016, is a copy of Receipt of payment of 1<sup>st</sup> Term school fees of Four Thousand Eight Hundred Naira (N4,800.00) for Jennifer Akula at the Creative Destined Kids Academy, Nursery/Primary School, Kabusa. Exhibit C is a Medical Report issued by a Dr. Ogundimete Oyiola, Medical Officer, of the Police Hospital, FCT Police Command, Area 1, Garki, Abuja. The content of the said Medical Report, DATED 22<sup>ND</sup> November, 2016, is as follows:

**AR:3000/NPMS/FCT/VOL.3/100**

22<sup>ND</sup> November, 2016

**TO WHOM IT MAY CONCERN**

**MEDICAL REPORT**



**RE: AKURA JENNIFER/F/6YRS/HOSP. NO. 4424/16**

She is a 6 yrs old girl brought in by Police Officer (W/Inspr Esther Zakari) and her Uncle on account of Sexual Assault by a neighbour in their Compound.

Examination revealed a calm child, not pale, anicteric, afebrile, not dehydrated, no pedal oedema.

Cital signs were stable clinically.

Vaginal Examination revealed laceration on the anterior part of the vagina opening. Hymen not intact.

No blood seen around the opening. There is whitish discharge around the vagina.

Assessment of Sexual defilement was made.

Investigations which include Hepatitis B & C, HIV, Syphilis, HVS, M/C/S were done and results noted.

Above for your information, please.

Thanks you.

Sgd

DR OGUNDIMITE OYIOLA

Medical Officer

It is evident that the above depositions in the supporting affidavit and exhibits relied upon by the Applicant cannot prove the criminal allegations of unlawful carnal knowledge and defilement raised against the Respondent by the Applicant. Although Exhibit C, the Medical Report states that the child, Jennifer Akula had been sexually assaulted, there is nowhere the Respondent was stated to be the person who had committed the Sexual Assault on the said child. In addition, Mr Kenneth Akula before whom the Respondent was alleged to have confessed to the commission of the crime had never deposed to any facts to that effect nor has the confession of the Respondent been attached to this supporting affidavit. Indeed, apart from the deposition of Chidinma Mathew as told to her by the Applicant in this case, there is no evidence linking the Respondent with the criminal allegation being against him by the Applicant.

In his counter affidavit, the Respondent had specifically denied the allegations labelled against him by the Applicant in the supporting affidavit and stated that he did not defile the said Child. The Respondent had also deposed that based on the said allegations he was arrested detained and charged to court and that he was granted bail on 16<sup>th</sup> December, 2016, but that the Court has not yet delivered judgment. He further deposed that that medical report attached by the Applicant did not link him to the crime. He also denied that he had at any time anywhere confessed to the crime. He attached to the counter affidavit as Exhibit A, a Written Application for his Bail dated 22<sup>nd</sup> November, 2016 addressed to the Commissioner of Police, FCT Command, Garki, Abuja by El-Eleos Solicitors, the law firm representing the Respondent. It is therefore clear that the criminal allegation labelled against the Respondent is still being tried at the Upper Area Court in the FCT.

A look at Section 31 of the Child Rights Act relied upon by the Applicant in this application which I have quoted above shows that the Section also talks about liability upon conviction. Whilst as rightly contended by the learned Counsel for the Applicant, the old principle in **SMITH v SELWYN (supra)**, which required a stay of civil proceedings until criminal proceedings on the same matter have been concluded had been jettisoned, it is significant to state that the jettisoning of that rule had not lowered the burden of proof beyond reasonable required in relation to allegations of crime whether in criminal or civil proceedings. The burden of the Applicant, who had raised criminal allegations against the Respondent in this fundamental rights proceeding therefore, is not lessened by the jettisoning of that rule.

As I had said earlier, the Applicant had merely relied on the above depositions of Chidinma Mathew, a litigation secretary in the law firm representing the

Applicant, as told to her by the Applicant, as well as a medical report which though confirming that the child was defiled, had not linked the defilement to the Respondent. This cannot, most certainly amount to proof beyond reasonable doubt that it was the Respondent who had defiled the child, Jennifer Akula. Indeed, the evidence does not even support the contention of the learned Counsel for the Applicant that a prima facie case has been established against the Respondent, since the Respondent had denied the depositions contained in the Applicant's supporting affidavit and the medical Certificate does not link the Respondent with the defilement of the child, Jennifer Akula.

It seems to me that for the Applicant to establish the allegations made against the Respondent in this case beyond reasonable doubt whether in criminal or civil proceedings, it would require a full trial in which relevant witnesses would be called to give evidence and be cross examined. I find and hold that the affidavit evidence and three exhibits relied upon by the Applicant in this case fall short of proving beyond reasonable doubt the allegations made by against the Respondent.

In **FAJIMIROKUN v C.B. (C. I.) NIG. LTD. (supra)**, the Court of Appeal, per Sanusi, JCA (as he then was), held that:

For an application alleging infringement of fundamental rights to succeed, the applicant must place before the Court all vital evidence regarding the infringement or breach of such rights. The burden shifts to the respondent after that. Where that has not been done, or where scanty evidence was put in by the applicant the trial Court can strike out such application for being meritless.

In the instant case where I have found that the Applicant has not established beyond reasonable doubt the allegations of crime upon which she had brought this fundamental rights proceedings against the Respondent, I hereby resolve the sole issue for determination in the negative and hold that the Applicant has not made out a case for the infringement of the fundamental rights of Jennifer Akula (a child) as to be entitled to the declaratory and other reliefs sought in this suit. Accordingly, I hereby dismiss this suit for lack of merit.

**JUSTICE A. B. MOHAMMED**  
JUDGE  
14<sup>TH</sup> JANUARY, 2019

**Appearances:**

Esther Uzoma Esq, with Lilian Okenwa Esq, for the Applicant.

Moses B. Bature Esq, for the Respondent.