



IN THE HIGH COURT OF JUSTICE
IN THE FEDERAL CAPITAL TERRITORY, ABUJA
HOLDEN AT WUSE ZONE 2, ABUJA
BEFORE HON. JUSTICE NJIDEKA K. NWOSU-IHEME
ON TUESDAY, 28th DAY OF MARCH, 2023

CHARGE NO: FCT/HC/CR/196/2022

BETWEEN:

FEDERAL REPUBLIC OF NIGERIA - COMPLAINANT

VS

SABO MUSA DEFENDANTS.

JUDGEMENT

On 26/01/2023, the defendant was arraigned on a 2-count charge filed on 18/05/2022. The defendant pleaded not guilty to all the counts. The Particulars of the Offences in respect of the 2-count charges are:

COUNT 1

That you SABO MUSA "m", 35 years old resident at Lokogoma, Federal Capital Territory, on or about the 12th October 2021 at Lokogoma area, Federal Capital Territory, Abuja within the jurisdiction of this Honourable Court by threats, intentionally penetrated the vagina of PRECIOUS, female, 10 years old with your penis, thereby committed an offence of Rape contrary to section 1(2) (a) of the Violence Against Persons (Prohibition) Act, 2015.

COUNT 2

That you SABO MUSA "m", 35 years old resident at Lokogoma, Federal Capital Territory, on or about the 12th October 2021 at Lokogoma area, Federal Capital Territory, Abuja within the jurisdiction of this Honourable Court by threats knowingly and wilfully had carnal knowledge of

PRECIOUS, female, 10 years old by penetrating her vagina with your penis, thereby committed the offence of incest contrary to section 25(a) of the Violence Against Persons (Prohibition) Act, 2015.

The defendant was arraigned before this Court on 26/01/2023 and he pleaded not guilty to each of the 2 counts. The charges were rendered in English language. In proof of its case, the prosecution called 2 witnesses namely:

- a. Precious Sabo [PW1];
- b. A. Idowu [PW2].

The defendant testified in his defence as DW1.

Evidence of PW1 – Precious Sabo:

The evidence of PW1 was unsworn as she is 11 years and in keeping with Section 209(1) of the Evidence Act the court was satisfied that she understood the purport of the proceedings.

The evidence of PW1 is that she knows the defendant he is her father, her step mom rented a house in Kubwa and moved out of their house with her younger sister and her father did not let her go as he said he could not live alone so she stayed with him. One night he entered her room, removed the blanket she used to cover her body, tore her cloth and started sleeping with her. Every night he would go to her room and sleep with her. One day, he brought a knife and told her that if she told anybody he would use the knife and kill her. The next morning, she ran to her step mom's friend's house and refused to go back home. The next morning, she told her all the things that her father had done to her and she boiled hot water and told her to sit in hot water. She called her step mom and told her to come. A policeman who lived near her step moms house directed them to a police station and at the police station, they said they could not work on her case, the policeman told them to go to NAPTIP and at NAPTIP she told them everything that happened to her.

During cross-examination

She admitted to living alone in the house with her father, she admitted to not remembering her step moms name and that her father would sleep with her every day.

Evidence of PW2 – Abolarinwa Edoro:

The evidence of PW2 is that she is an investigating police officer, NAPTIP. On 12th October, 2021 Miss Elizabeth Sabo came to the office and reported a case of rape of a girl Precious Sabo, that the girl had been raped by her father, the case was assigned to her and she commenced her investigation and headed to Lokogoma where the suspect was staying and that same day, she arrested the suspect and his statement was taken by her based on his inability to write and read. The statement of the victim was taken same day with Defendant. The victim was taken to Federal Ministry of Health where a medical examination was conducted on her which confirmed that the hymen was not intact. During investigation, the victim claimed her father had been raping her severally.

The day her stepmom left the home. On 11/10/21, the victim said her father came as usual to rape her. This made her to run out of the house. All these allegation, suspect denied before he was brought to Court. Under Cross-examination PW2 admitted to taking the victim for a medical examination on 20/10/2021 and the result came out on 22/10/21 which was 9 days interval after the alleged offence. PW2 admitted that she had no other exhibits from the victim and she did not have the victim's clothes or any other extraneous matters and her investigation was based solely on what the victim told her. The victim told her the suspect took her pant and clothes.

PW2 tendered following:

1. Federal Ministry Health Medical Report of Precious Sabo dated 22/10/21 Exhibit P1.

2. Statement of suspect/Accused Sabo Musa dated 12/10/21. Exhibit P2.
3. Statement of witness - Precious Sabo dated 12/10/21. Exhibit P3.

Evidence of DW1 – SABO MUSA:

Testifying for himself as DW1 his evidence was rendered in English. He testified to being a business man who sold soft drinks and 'fowl', he is married to a woman named Elizabeth and he has children. His wife packed out of his house and only Precious and himself were left at home and they stayed together for a month and 2 weeks. He would send her to go and buy things for them to eat and she would go and not return. When she returns eventually he would flog her. It happened for 3 days and when she repeated it again he flogged her and she ran to their neighbor. He asked the neighbor to ask Precious what her problem is. When he did not see Precious he continued his trade. The next day NAPTIP came to his shop and after identifying him arrested him and told him Precious was raped and when he asked Precious who raped her she said it was him and he does not know who raped Precious.

Under Cross-examination he admitted that himself and Precious mother are not together and his statement at the police station and in court are the same. Under his native law it is a taboo to rape his daughter and somebody raped her not him.

Question: because it is a bad thing you have refused to tell people what happened?

Answer: somebody raped my daughter it is not true none of my people wey no know.

Examination in chief

Answer: only Precious and me dey house.

Question: How long you and Precious stay together?

Answer: 1 Month and 2 weeks.

Issues for Determination:

At the conclusion of trial, PaulyAbhulimen Esq. filed the defendant's final address on 9/3/2023; while Selbol. A. Langyi Esq. filed the final address of the prosecution on 15/3/2023.

In the final address of the defendant, PaulyAbhulimenEsq. formulated one issue for determination, to wit:

Whether the prosecution has proved all the essential ingredients of the alleged offences and whether the court can safely convict on the evidence adduced?

In the final address of the prosecution, Selbol A. Langyi Esq. adopted the same issue for determination as the Defendant Counsel.

By virtue of section 36[5] of the 1999 Constitution [as amended] (the constitution), every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty. Thus, the prosecution has the duty or burden to prove the guilt of a person alleged to have committed a criminal offence beyond reasonable doubt. In the light of the above, the Court shall adopt the issue as formulated by the Prosecutor.

SOLE ISSUE FOR DETERMINATION

In count 1, the defendant is charged with the offence of rape contrary to section 1(2)(a) of the Violence Against Persons (Prohibition) act, 2015
1(1) A person commits the offence of rape if-

- (a) he or she intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or anything else;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse.

(2) a person convicted of an offence under subsection (1) of this section is liable to imprisonment for life.

In Count 2, the defendant is charged with the offence of incest contrary to section 25(a) of the Violence Against Persons (Prohibition) act, 2015

25 A person who knowingly and willfully have carnal knowledge of another within the prohibited degrees of consanguinity and affinity contained in the schedule to this Act with or without consent, commits incest and is liable on conviction to a minimum term of-

(a) 10 years imprisonment without an option of fine.

Submissions of Learned Counsel for the Defendant:

Abhulimen Esq. submitted the ingredients that prosecution must prove to establish the charge of rape or unlawful carnal knowledge relying on ***ALI V STATE (2021) 12 NWLR PT. 1789 PAGE 167*** and ***DAMUNA V STATE (2021) 4NWLR PART 1767***. By the combined reading of sections 131, 132 and 135(1), (2) and (3) the prosecution has the burden to prove the allegations beyond reasonable doubt until it is discharged, the burden remains permanently with the prosecution. Referring to ***ADENEKAN V THE STATE OF LAGOS (2021) 1 NWLR PART 1756 PAGE 130 AT PAGE 144***.

The Prosecution called 2 witnesses PW1 and PW2 and the evidence of PW1 who is 11 years old cannot stand alone without corroboration see section 209(1)-(3) of Evidence Act. relying on ***DAMUNA V STATE (supra) P. 431 PARAS D-E***. Corroborative evidence of rape must confirm (a) that sexual intercourse has taken place (b) that it took place without consent of the victim (c) that the accused was the person who committed the offence. See ***DAMUNA V STATE (supra) Page 199, paras F-G***. PW2 has nothing before this court to corroborate the evidence of PW1 in proof of the cases of rape and incest she found nothing in the course of her investigation. The medical report has its

own lapses and it was taken 9 days after the commission of the alleged offences and after PW1's mother's friend boiled hot water for PW1 to sit on. This lapse of days has affected the accuracy of the report. And the medical report does not show it was the Defendant that had carnal knowledge of PW1 which is an essential ingredient of the 2 offences. Evidence of defendant that he never raped his daughter still stands and was not impeached and cannot corroborate the evidence of PW1.

Counsel submitted that prosecution has failed to establish any prima facie case against the defendant which is fatal and incurable.

Submissions of Learned Counsel for the Prosecution:

The prosecution has 3 ingredients to establish to secure a conviction for the offence of rape because she cannot give consent as an 11 year old relying on ***ISA V STATE (2016) 6NWLR (PT 1508) 245*** and she is his biological daughter which are;

- a. that the accused had sexual intercourse with the prosecutrix;
- b. that the accused had the mens rea, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not;
- c. that there was penetration

Relying on case of ***POSU V STATE (2011) 2 NWLR (PT 1234) 393 @ 416***. On element (a) that the accused had sexual intercourse with the prosecutrix, PW1 testified that defendant tore her cloth, removed his trousers and slept severally with her. Even the slightest penetration is sufficient to constitute the act of sexual intercourse and crime of rape. Where penetration is proved but not of such a depth as to injure the hymen, it is sufficient to constitute crime of rape. ***DANLADI V STATE (2019) 16 NWLR (PT 1698) 342***.

On element (b) mens rea refusing to let her go with her step mom to Kabusa shows he has intention to have sexual intercourse with the prosecutrix and PW1 was never cross examined on this point and her testimony was never shaken during cross examination. Relying on Section 223 Evidence Act and **CHIEF CHUKWUDEBERE OKOLIE V PROF PETER EBIGBO (2016 LPLER 40456 CA** and her testimony was unchallenged and uncontroverted and court should act upon it relying on **JAMES SIMON V THE STATE (2017) 1-2 SC (PT 1) 1**. The evidence is deemed accepted **IBRAHIM ABDULLAHI V STATE (2023) 2 NWLR (PT 1869) 407**. The case of **ADENEKAN V THE STATE OF LAGOS (supra)** does not apply to the instant case because the evidence of PW1 is corroborated by other pieces of evidence admitted.

On corroboration in a rape case, it is the evidence which tends to show that the story of the victim, the prosecutrix, points to the fact that the Defendant committed the crime. the evidence need not be direct it is enough if it corroborates the said evidence in some material particular to the charge in question. Where rape is denied by accused the evidence of corroboration that court must lookat is the medical evidence showing injury to the private part or parts of her body or semen stains on her clothes or the clothes of the accused or on the place where the offence is alleged to have been committed. **POSU V STATE (supra)**. Counsel submitted that corroboration need not consist of direct evidence that the accused committed the offence nor need it amount to a confirmation of the whole account given by witness, if it corroborates the evidence in some respect material to the charge. **AHMED V NIGERIAN ARMY (2011) 1NWLR (PT 1227) 89**.

The medical report shows hymen was ruptured and it corroborates the evidence of PW1 that the Defendant had sexual intercourse with her and failure to take her immediately for the medical examination after the alleged rape cannot be fatal. Medical report is not mandatory to prove a case of rape **POPOOLA V STATE (2013) 17 NWLR (PT 1832) 93**.

On count 2 which bothers on incest. PW1's evidence is unchallenged that defendant had sexual intercourse with her.

Counsel submitted that it has adduced credible, sufficient evidence and authentic evidence which established the various elements of the substantive offence charged. These pieces of evidence were never challenged in course of cross examination.

Decision of the Court:

The law is trite and both parties are in unison on this point that in a criminal trial, the prosecution has the duty to prove the guilt of the defendant beyond reasonable doubt. There are three ways of proving the commission of a crime, namely:

- [a] Evidence of eye witnesses;
- [b] The confession of the accused person; or
- [c] Circumstantial evidence. See the case of ***Nwokearu v. State [2010] 15 NWLR [Pt. 1215] 1.***

Section 1(1) of the VAPP act states that a person commits the offence of rape if-

- (a) He or she intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or anything else;
- (b) The other person does not consent to the penetration; or
- (c) The consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse.

By section 277 of the Child's rights Act, a person attains the age of majority upon attainment of the age of 18 years.

Therefore, Subsections (b) and (c) of the VAPP act will not apply in this case because the prosecutrix is 11 years old and is thus incapable of giving consent. The prosecutrix under examination-in-chief testified that she was 11 years old. The age of the prosecutrix was uncontradicted having not been denied by the defendant and uncontradicted evidence can be acted upon by the court as evidence of proof of facts they relate to. ***DAMUNA V STATE (SUPRA) P. 431 PARAS B-C.***

In ***APOTI V. STATE (2023) LPELR-59505(CA) (PP. 15 PARAS. D);*** "Generally, a person under the age of 14 years is incapable of giving consent. Thus, once it is proved that the accused had sexual intercourse with a child under the age of 14 years, he is automatically guilty of rape."

In ***IDI V. STATE (2017) LPELR-42587(SC) (PP. 35 PARAS. A)*** "Rape is defined as the unlawful carnal knowledge of a woman or girl without her consent or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of harm, or by means of false and fraudulent representation as to the nature of the act. See: Posu Vs The State (2011) 3 NWLR (Pt.1234) 393; Iko Vs The State (2001) 7 SC (Pt. II) 15; Afor Lucky Vs The State (2016) LPELR - 40541 (SC); (2016) 5 - 6 SC 144. Penetration, no matter how slight, is the most important and essential element of the offence. See: Iko Vs The State (supra), Habibu Musa Vs The State (2013) LPELR - 19932 (SC); Jegede Vs The State (2001) 14 NWLR (Pt.733) 264."

From the authorities cited above, once it is proved that the defendant had sexual intercourse with the child, then he is guilty of rape and need not prove consent as it is a child being referred to.

Therefore, for the defendant to be convicted on count 1 of committing the offence of rape, the prosecution is required to establish that;

- (a) sexual intercourse has taken place,**
- (b) that the victim was a child, and**
- (c) that the accused person was the man who committed the offence.**

See OKA V. STATE (2018) LPELR-43914(CA) (PP. 26-27 PARAS. D). Ingredient 1, the prosecution must prove that sexual intercourse has taken place.

The testimony in chief of PW1 is that:

Then one night he now come to my room and now come and remove the blanket I am using to cover my body. He now tear my cloth and now start sleeping with me. Every night he used to come and be sleeping with me. One day, he now bring knife and he now said that if I tell anybody he will use the knife and kill me. Then the next morning I now run to my mommy friend house and she now asked me why I don't want to go back home.

In her statement at the police station Exhibit P3:

"... my step mother left sometime three weeks ago and since then my father had been having sex with me. My father always treating me with knife anytime he wanted to had sex with me. My father always tear my pant and remove my pant anytime he wanted to sleep with me and also off his own cloth and trouser and put his pennis into my vigena. The last time which is on 11th October 2021 my father wanted to have sex as usual before I ran out of the house.

The evidence of PW1 is the only direct eye witness account of what transpired. Ordinarily, direct eye witness account is the best evidence. The evidence of PW1 was unimpeached under cross-examination and

the law is trite in the apex decision of **MOHAMMED v. STATE (2020) LPELR-52451(SC) (Pp. 18-19 paras. F)** that the Court can convict on a clear and credible evidence of a single witness. See **AFOLALU V. THE STATE (2010) 16 NWLR (PT 1220) 584 at 613**. Prosecutrix had testified thus; **"One day, he now bring knife and he now said that if I tell anybody he will use the knife and kill me"**. This vital piece of evidence was unimpeached and the law is trite that where a party was not cross-examined on this vital piece of evidence. It should therefore be taken as admitted by the respondent." See **OLORUNFUNNIBI AKINTOMIDE V THE STATE (2015) LPLER 24294 P. 17 PARA B**. Failure to cross-examine the witness on an issue or fact on which he has given evidence the testimony of such witness is deemed to have been admitted as true. See **WAEC V FELIX OSHIONEBO (2006) LPLER 7739 P. 3 PARAS D-E**.

However, the witness is 11 years old, a child under section 277 of the child's rights act and by virtue of section 209 of the evidence act, her evidence must be corroborated.

See Section 209(1) of the Evidence Act provides as follows;

- (1) in any proceeding in which a child who has not attained the age of 14 years is tendered as a witness, such child shall not be sworn and shall give evidence otherwise than on oath or affirmation, in in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth.

This section is mandatory and requires that a child under the age of 14 years shall not be sworn. I conducted an inquiry under section 209(1) and came to the conclusion that the prosecutrix understood the duty of speaking the truth and she told me in court she will go to hell if she tells lies.

The accused cannot be convicted on the unsworn testimony of PW1 in the appellate decision of **GITATA V. STATE (2020) LPELR-50211(CA) (PP. 27-28 PARAS. D-D)** the court held;

"It is vital to state that the law is trite that an unsworn evidence of a witness under the age of 14 requires corroboration. Section 209 (3) of the Evidence Act (supra) provides that:(3) A person shall not be liable to be convicted of an offence unless the testimony of admitted by virtue of sub-section (1) of this section and given on behalf of the prosecution is corroborated by some other material evidence in support of such testimony implicating the defendant. Flowing from the above, it suffices to state that the evidence of PW1 without more is incapable of establishing the guilt of the Appellant. The learned trial judge was not oblivious of the provision of Section 209(3) of the Evidence Act (supra) when he held at pages 40 - 41 of the record of appeal as follows: "...But by way of abundant caution I proceed to evaluate other evidence in the light of the provision of Section 209(3) of the Evidence Act which prohibits conviction on the unsworn testimony of a child unless such evidence is corroborated by some other material evidence."

In ***MOHAMMED v. KANO STATE (2018) LPELR-43913(SC) (Pp. 27-28 paras. D)*** the apex court held;

"In a rape case, corroboration means evidence which confirms the evidence of the prosecutrix. It is that evidence which tends to show that the story of the victim, the prosecutrix, is true and that it is the accused person that committed the crime. Such evidence need not be direct as this may not be possible as rape is not committed in the open. It is enough if it corroborates the said evidence in some material particular to the charge in question. However, where the child is a minor of some discernible age, her sworn evidence need no further corroboration. There is no law or statutory provision that in rape cases, evidence of the prosecutrix must be corroborated. However, it is a rule of prudence and the settled course of practice by the Court to seek for corroboration in

rape cases. See Posu v. The State 2011) 3 NWLR (pt. 1234) 393, Okoyomon v. The State (1973) NSCC, Isa v. The State (2016) LPELR - 40011 (SC), Ezigbo v The State (2012) 16 NWLR (pt. 1326) 318 Sambo v. The State (1993) 6 NWLR (pt. 300) 399."

Corroboration means evidence which confirms the evidence of the prosecutrix. The practice in the courts where allegations of rape are made in criminal prosecutions, is for the courts to look out for corroborative evidence which materially support the charge. **See DAMUNA V STATE (SUPRA) 432 PARAS E-F.**

In **AFOR LUCKY v. THE STATE"(2016) LPELR-40541(SC) (Pp. 47-48, paras. C-A)**the apex court held;

In cases of an under-aged prosecutrix, e.g., a charge under Section 218 (Defilement of girls under thirteen years) corroboration is required. Whether any particular evidence can be corroboration is for the judge to decide and also to decide the weight to be attached to it. In this regard the distressed condition of the prosecutrix soon after the unlawful sexual intercourse may amount to corroboration. See R v. Redpath (1962) 46 Arp R p. 319. Corroboration in this case means evidence that supports the evidence of the prosecutrix. Corroboration is not restricted only to evidence of a witness pointing to the appellant as the person who committed the offence. This is not the position of the law. Sex is usually not performed in the presence of a third party. In most cases it is a hidden act performed behind closed doors, away from prying eyes. It is rare to get a witness to give evidence on oath that he saw the appellant have sex with the prosecutrix."

Now, besides the testimony of PW1 the prosecutrix, we have the testimony of the PW2 the IPO who testified thus;

On 12/10/21, a woman by name Miss Elizabeth Sabo came to office and reported a case of Rape together with a girl

Precious Sabo, said that the girl has been raped by her father, immediately case was assigned to me this made me commence my investigation and head to Lokogoma where suspect was staying that same day, we arrested suspect and his statement was taken down by me based on inability to write and read. The statement was taken of victim same day with Defendant. We later took victim to Federal Ministry of health to conduct a medical examination.

Question: Tell Court outcome of your investigation.

Answer: During investigation, the victim claimed her father has been raping her severally. The day her stepmom left the house. On 11/10/21, the victim said her father came as usual to rape her. This made her to ran out of the house. All these allegation, suspect denied before he was brought to Court.

Cross examination of PW2

Answer: Yes

Question: You said Elizabeth Sabo came to station with Victim?

Answer: Yes

Question: Who is she?

Answer: Step mother of Precious.

Question: You said you conducted the investigation personally?

Answer: Yes I did, I investigated victim and victims mother

Question: What of her clothes?

Answer: I don't have her clothes

Question: Your investigation was based on what victim told you?

Answer: Yes

Question: Is it your usual style in investigation not to look for other extraneous matters?

Answer: I asked victim where her clothes and pant is and she said he took it and no access to it.

Question: What of Defendant

Answer: He said nothing like that happened.

Exhibit P1

Vaginal examination Normal external female genitalia, nil lacerations seen, hymen not intact.

The most essential and important ingredient of the offence is penetration. The court will deem that sexual intercourse is complete upon proof of penetration of the penis into the vagina. Any or even the slightest penetration will be sufficient to constitute the act of sexual intercourse. See ***POSU V STATE (2011) ALL FWLR (PT 565) 234 @ 250 PARAS B-E***. Similarly penetration however slight is sufficient and it is not necessary to prove any injury or the rupture of the hymen to constitute the crime of rape. In ***EDWIN EZIGBO V THE STATE (2012) LPELR-7855(SC)*** a mother PW1 saw her 2 young daughters, aged 8 and 6 years respectively, in the company of the appellant with ice cream in their hands. When she called to them, the appellant changed direction and continued to walk away. The girls did not heed their mothers call. The mother ran after them, at which point the appellant abandoned the girls and ran away. Upon inquiry, it was discovered that the appellant used to lure the girls to his shop where he would have sexual intercourse with them occasionally and occasionally give them money. PW1 reported the matter to her husband who reported the matter to the police. The appellant was charged and convicted for the offence of rape. One of the issues in contention in that case was whether there was sufficient corroboration of the unsworn testimony of PW2 having regard to the evidence of the medical doctor, PW5, who in her medical report, exhibit P2 found that the hymen of the 2 girls had been ruptured but did not testify that it was penetration of the appellants penis into their vaginas that caused the hymens to disappear. The Defendant was convicted on the offence of rape and I must say the case referred to is similar to the case before me.

In ***ADENEKAN V STATE (SUPRA) 203-204 PARAS H-B*** Corroboration in respect of the offence of rape is evidence which tends to show that the story of the prosecutrix that the accused committed the crime is true. ***SAMBO V STATE (1993) 6NWLR (PT 300) 399.*** Corroboration need not consist of direct evidence that the accused committed the offence, charged, nor need it amount to confirmation of the whole account given by the prosecutrix.

In ***EDWIN EZIGBO V THE STATE (SUPRA) PER WALTER SAMUEL NKANU ONNOGHEN, JSC (PP. 9-10, PARAS. F-A).***

"Corroboration need not consist of direct evidence that the accused committed the offence charged, nor need it amount to a confirmation of the whole account given by the witness/prosecutrix. It must, however, corroborate the said evidence in some respects material to the charge in question. It is also settled that corroborative evidence must in itself be a completely credible evidence."

I find that ingredient one has been satisfied by the evidence of PW1, PW2 and the medical report which pointed to the fact that the hymen of the prosecutrix is not intact which corroborates her eye witness testimony that sexual intercourse had taken place. The case law is clear that penetration of the penis into the vagina of the prosecutrix, no matter how slight, is enough to complete the act of sexual intercourse ***DAMUNA V STATE P. 433 PARAS B-C***). The evidence of the prosecutrix is overwhelmingly clear and I had the opportunity to hear her speak and observe her demeanor as well as the demeanor of the defendant. The court in ***Adenekan v state of lagos P. 206 paras A-B*** held; Demeanor of witnesses in sexual offences trial play a very prominent role in believing the evidence of the victim and the accused as stated in the leading judgment, sexual offences are committed in utmost secrecy. This courts observation of the demeanor of the victim is of utmost important. This fact has been established in this case and I so hold.

On ingredient 2, it is uncontroverted that the prosecutrix is a child of 11 years old, she testified as to her age under examination in chief and admitted same under cross examination and same was not denied by the defendant and is thus uncontradicted relying on ***DAMUNA V STATE (SUPRA) P. 431 PARAS B-C***. The prosecution has satisfied ingredient 2 that the victim was a child.

On ingredient 3 that the accused person was the man who committed the offence, the case of the prosecution is that the PW1 was raped by her father and he did so under threat/intimidation. The PW1 testimony being unsworn needs to be corroborated. The PW2, the IPO testified to being the investigator assigned to handle the case, the medical report was tendered through her and from the medical report her hymen was broken and there was no other medical proof of sexual intercourse because the alleged offence spanned over a period of time and if there was any evidence of penetration it must have healed. Both parties admitted that the father and daughter lived alone. The fact that they both lived together alone goes to show that the DW1 must have been the one to have ruptured her hymen. The fact that the father insisted that the step mom leave the prosecutrix behind when she was leaving goes to show mens rea, the intention to have sexual intercourse with the prosecutrix ***see POSU V STATE PART 1234 (SUPRA) PP.416-417, PARAS F-B***. Having considered the evidence against the 3 methods of proving commission of an offence, the evidence of the eye witness the victim herself was corroborated by circumstantial evidence being the circumstantial evidence of PW2 and the exhibit P3. See the case of ***EDWIN EZIGBO V THE STATE (2012) LPELR-7855(SC)***.

On count 2, the defendant is charged with the offence of incest contrary to section 25(a) of the Violence Against Persons (Prohibition) act, 2015
25 A person who knowingly and willfully have carnal knowledge of another within the prohibited degrees of consanguinity and affinity contained in the schedule to this Act with or without consent, commits incest.

On meaning of incest, Blacks law dictionary, 7th edition page 764 defines the word as sexual relations between family members or close relatives, including children related by adoption. it is the marriage or sexual intercourse with a relative within the prohibited degree of consanguinity. In other words, incest is sexual contact between close blood relatives, including brothers and sisters, parents and children, grandparents and grandchildren, or aunts or uncles with nephews or nieces.

It is uncontroverted that the defendant is the father of the prosecutrix and no party is denying this fact. The issue is whether he had carnal knowledge of his daughter. From the testimony of PW1 which was unimpeached, the evidence of PW2 and exhibit P2 all point to the defendant as having had unlawful carnal knowledge of his daughter. The uncontroverted evidence of PW1 and defendant living in the same house alone goes to show that no one save the defendant could have ruptured her hymen. In ***ADENEKAN V THE STATE OF LAGOS (SUPRA) P, 205-206 PARAS C-C*** the court held;

I just wish to comment on the issue of corroboration of the evidence of the prosecuterix, which the learned Appellants counsel argued was absent before the trial Court. Apart from the fact that in this case, there was indeed corroboration of the victims testimony through the evidence of PW5, in which he tendered the medical report of examination conducted on the prosecutrix and the recording of the interview with her; it needs to be stressed that it is not the law that there must be corroboration of the evidence of victim before the Court can convict for sexual offences. In the case of Mohammed V. State (2018) 13 NWLR (pt. 1635) 85 , the Supreme Court following its earlier decision in Habibu Musa V. State (2013) 9 NWLR (pt. 1359) 214 at 237-238 F-B held that:

...it has to be restated that in offences of a sexual nature, it is very desirable that the evidence of the prosecutrix or complainant is buttressed by other pieces of evidence implicating the accused person in a substantial way. This does not detract from the fact that the Court is not hindered from convicting an accused on the uncorroborated evidence of the complainant. In the use of corroborative evidence however little or slight it may be there is no room as to what a corroborative piece of evidence is and how it can be applied. This is because the trial Judge is best suited to make use of the evidence being well situated and having the opportunity and singular privilege of hearing first hand the witnesses, considering their demeanor including that of the Appellant...

The medical report exhibit P3 does not confirm the act of penetration but confirms that the hymen was ruptured, A medical report is not mandatory to prove commission of the offence of rape but in this case where the defendant has denied the commission of the offence, the prosecutrix evidence being unsworn, the existence of pieces of evidence to corroborate her testimony comes to play and in this case, the medical report showing injury to the private part or any other part of the body of the alleged victim goes to show that the story of the prosecutrix is highly probable and in this case the medical report revealed that the hymen was not intact. See ***IKO V STATE (2001) 14NWLR PART 732 PAGE 221 and KAZEEM POPOOLA V THE STATE (2013) 17NWLR (PT 1382)P. 96.***

Defence of the defendant is that the prosecutrix was fond of disappearing and that he did not rape her. His testimony in chief states;

Answer: 1 Month and 2 weeks. I will send her to go and find change she go disappear go play when I come I send Precious to go and buy things wey we go chop, she comot no come back again. When you send Precious message, she no go come

back. She won't come back, she will waste time when she come back I will flog her. It happened for 3 days, na wen she repeat again I flog her. She run to my neighbor.

Question: Wetin be her name?

Answer: I no sabi but I tell am say make them help me ask Precious wetin be her problem in front of people. She said make them take her to my sister place. My neighbours ask her why she stubborn, she said I dey beat am and I told her not to follow Igbo person weydey sell leaf, they children. The other man say so the Neighbour tell me to take her to my parents in Bauchi State. I no carry am go, I leave am for my neighbour house. As I no see am I continue to sell market. In the morning the woman asks me say she think say Precious go ease herself she no see am. I told them that is why I beat her. One of my people, Amanda deyLokogoma and if she go there , they go bring am back. Next day see Naptip come my shop asked what kind of drink I have, I said which one dey want to buy? They asked me my name, I tell them, they said I am under arrest, I said for what did I do. I followed them go to their Office, I asked them to allow me pack my things and go inside. I lock shop. Naptip they asked me if I know Precious, I said yes my daughter and Elizabeth is my wife. They told me she was raped, I asked my daughter who raped you, she said na me. I tell them it is not me.

It is a well-established legal principle that, before an accused is to be tried, he is presumed innocent until proved guilty. This is the constitutional presumption of innocence under Section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999. Therefore, an accused person is presumed innocent until proved guilty by the prosecution and he is not expected to prove his innocence. This Court

recently restated this legal position in the case of: *Abegunrin v. State* (2010) 10 W.R.N. p. 160 at p. 169, lines 38 - 42 Pet Thomas, J.C.A., that:

The cause of justice in criminal and even civil cases is never one sided. In criminal matters, it is not just to hear the prosecution's case alone. The court must look at the defence of the accused or suspect, no matter how flimsy or stupid or foolish the defence raised may be.

Furthermore, in the said case of: *Adegunrin v. State supra*, at p. 175, lines 10 - 20, C.N. Uwa, J.C.A., had the following to say:

An accused is presumed innocent until proved guilty, he is not to prove his innocence, therefore once he raises a defence, such defence must be considered along with the totality of the evidence holistically by relating them to each other to determine whether there is a reasonable doubt in the particular circumstances of the case, such defence ought to be considered, no matter how improbable or stupid it may seem. See *Opeyemi v. State* (1985) 2 NWLR (Pt. 5) 101 and *Omorie v. The State* (2008) 8 WRN 1; (2008) 18 NWLR (Pt. 1119) 464..." Per OMOLEYE, J.C.A in *YUSUFF AL-HASSANI v. THE STATE* (2010) LPELR-8674(CA) (Pp. 33-35 paras. E).

The denial made by the defendant is not plausible as a father who discovers that his daughter has been raped ought to have shown more consternation, shock and disgust at what happened to his daughter and actually seek justice. The demeanor of the defendant appeared to me as one of non-chalance and an act to mask his true feelings of disdain towards the prosecutrix when he owed a standard of care and responsibility towards the prosecutrix as enshrined in the following sections of the Childs Right Act;

2(1) A child shall be given such protection and care as is necessary for the well-being of the child, taking into account

the rights and duties of the child's parents, legal guardians, or other individuals, institutions, services, agencies, organisations, or bodies legally responsible for the child.

- (2) Every person, institution, service, agency, organisation and body responsible for the care or protection of children shall conform with the standards established by the appropriate authorities, particularly in the areas of safety, health, welfare, number and suitability of their staff and competent supervision.

11. Every Child is entitled to respect for the dignity of his person, and accordingly, no child shall be-

- (a) subjected to physical, mental or emotional injury, abuse, neglect or maltreatment, including sexual abuse;

The defendant is her father and he owed his daughter a duty of care which he failed woefully to do.

This court agrees with counsel to the prosecution that the case of ***ADNEKAN v THE STATE OF LAGOS (SUPRA)*** does not apply to the instant case as the evidence of the child 4 year old in that case was sworn which is at variance with the case at hand. In addition, the case of ***DAMUNA V THE STATE (SUPRA)*** also relied on by the defendant counsel can be distinguished as in that case, there was no corroboration of the evidence of the prosecutrix, neither the blood stained clothes of the prosecutrix nor the medical report were tendered in evidence and the court in that case held that in the absence of any independent evidence to establish the fact that appellant's penis penetrated the vagina of the prosecutrix, and thus had sexual intercourse with the latter, as a form of corroborative evidence, implicating the appellant, thus the prosecution's case fell short of the standard of proof beyond reasonable doubt.

On the fact that the torn cloths of the prosecutrix was not tendered, this alone is not enough to confirm that the offence did not take place as the witness testified that the defendant took her torn pant and clothes.

In ***DAMUNA V STATE (SUPRA) P. 429 @ PARAS A-B*** by virtue of section 135(1) & (2) of the Evidence Act, 2011, in criminal prosecutions, the prosecution is by law bound to prove all the essential ingredients that constitute any given offence by a standard of proof beyond reasonable doubt and I find that in the instant case, the prosecution has proven the its case beyond reasonable doubt.

On count one, I find you SABO MUSA guilty of the offence of rape contrary to section 1(2)(a) of the Violence Against Persons (Prohibition) Act, 2015.

On count two, I find you SABO MUSA guilty of the offence of incest contrary to section 25(a) of the Violence Against Persons (Prohibition) Act, 2015.

Allocutus:

Abhulimen Esq.: I want to plead to tamper justice with mercy accused being a first time offender he has been in detention since he was apprehended. Exercise discretion to give the minimum sentence.

Convict: I don't have anything to say make you have mercy on me.

Jack Esq.: I don't have anything to say.

Sentence:

On the first count, Section 1(2) reads:

(2) a person convicted of an offence under subsection (1) of this section is liable to imprisonment for life. The wordings of subsection (2), the phrase used is "liable on conviction to..." The question this poses is whether the wording of the sub-sections leave the court with the option of exercising discretion in the sentencing of the convict. From the

wordings of the section it is my view that what the law imposes is a maximum sentence that can be passed upon conviction which allows for the exercise of judicial discretion. This is different from instance where the law creates a minimum sentence below which the court cannot descend. As earlier noted, the operative word used in the above subsection which prescribes discretionary life sentence is that the convict: "is liable to" imprisonment for life. Black's law dictionary, 11th edition defines the word "liable" to mean "responsible or answerable in law, legally obligated, subject to or likely to incur (a fine, penalty, etc) at page 1099. Thus, the use of the word liable as opposed to shall means the drafters intended to mean a maximum sentence in respect of which the court can exercise discretion to impose a lesser term. Section 416(2) (d) of the Administration of Criminal Justice Act (ACJA) states that the court shall not pass a maximum sentence on a first time offender. See ALEXANDER MICAH PAMAN V FEDERAL REPUBLIC OF NIGERIA (2021) LPLER 54976.

The undisputed testimony before me is that the defendant is first time offender who has no previous record of crime and I am minded not to impose the maximum sentence. Section 1(b) provides that in all other cases, to a minimum of 12 years imprisonment without an option of fine.

In the final analysis on the first count of raping a child contrary to section 1(2) of VAPP ACT and punishable under section 1(2) of the Act I hereby sentence you SABO MUSA to 12 years imprisonment.

On the second count of incest contrary to section 25(a) and punishable under same section I hereby sentence you SABO MUSA to 10 years imprisonment and both sentences are to run concurrently.

Rape is a violent act that inflicts injury on the very essence of the self. For the victim I therefore recommend immediate therapy to resuscitate her self-worth and dignity and I recommend Mirabel center to the

prosecution for this support. The victim is to remain in WOTCLEF till arrangements can be made for Elizabeth Sabo to take her into her custody.

HON. JUSTICE NJIDEKA K. NWOSU-IHEME
[JUDGE]

Appearance:

1. H. G. Jack for the Complainant
2. PaulynAbhulimen Esq. for the Defendant