

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT ARUA**

**CRIMINAL APPEAL NO. 29 OF 2009**

*(Arising from the Judgment in Original High Court, Arua, Criminal Session Case No. 0009 of 2008 (Kwesiga, J.) delivered on 21.07.2008)*

**ATANDU MARCELO ::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**UGANDA ::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**Coram: Hon. Mr. Justice Remmy Kasule, JA**

**Hon. Lady Justice Hellen Obura, JA**

**Hon. Mr. Justice Byabakama Mugenyi Simon, JA**

**JUDGMENT OF THE COURT**

This appeal, with leave of the Court, is only against the sentence of fifteen years imprisonment passed upon the appellant on 21.07.2008.

The appellant pleaded guilty and was convicted for aggravated defilement contrary to Section 129(3) of the Penal Code Act.

The facts of the case confirmed by the appellant were that on 06.06.06 at Ojude village, Arua, the appellant aged 17 years, defiled the victim aged 4 years. On that day the mother of the victim had gone to the market, leaving the victim in the care of the appellant. The victim, the appellant and the victim's mother all stayed together in the same home.

At noon, the appellant invited the victim to go with him to the bush to look for firewood. While in the bush the appellant defiled her. She reported to the mother immediately on her return from the market. The mother reported the case to the Local Council Officials and later to the Police. The appellant was arrested. He admitted the offence both to the Local Council Officials and to the Police. He was charged and he pleaded guilty in the High Court (Kwesiga, J.). He was thus convicted and sentenced.

He now appeals on a single ground:

“1. That the trial Judge erred in law in meting out a harsh sentence upon the appellant who had readily pleaded guilty”.

On appeal, learned Counsel Ikilai Ben represented the appellant while Principal State Attorney Tumuheise Rose was for the respondent.

For the appellant, it was submitted that the learned trial Judge erred in law when he proceeded to sentence the appellant to a term of imprisonment and yet the appellant was below the age of eighteen years at the time of the commission of the offence. The trial Judge thus acted contrary to Section 104 of the Children Act which mandatorily required the trial Court, to remit the case to the Children's Court to do the sentencing. Counsel thus prayed this Court to set aside the sentence as being illegal in law. Since the appellant had already served almost half of the illegal sentence, Counsel prayed that the appellant be released instead of his case being remitted to the Family and Children Court.

Counsel for the respondent, by way of reply contended that, since the appellant was already an adult being above eighteen years by the time of the trial, the trial Judge was within his powers to sentence the appellant as he did. Counsel maintained that the sentence passed by the trial Judge was valid under Section 100(1) and (3) of the Children Act. Accordingly the appeal ought to be dismissed.

By Section 2 of the Children Act a child is one below the age of eighteen years. The appellant was medically examined on and found to be seventeen years of age. He was thus a child on 06.06.06 when the offence was committed but was nineteen years old when he was tried, convicted and sentenced.

Section 104 Children Act provides:

“104

1. A child shall be tried in the High Court for an offence with which the child is jointly charged with a person over eighteen years of age and for which only the High Court has jurisdiction.

2. Where a child is tried jointly with an adult in the High Court, the child shall be remitted to the family and Children Court for an appropriate order to be made if the offence is proved against the child.

3. In any proceedings before the High Court in which a child is involved, the High Court shall have due regard to the child's age and to the provisions of the law relating to the procedure of trials involving children.

In ***Court of Appeal at Fort Portal Criminal Appeal No. 136 of 2009 Kajura Kiiza & 2 Others vs Uganda***, one of the appellants was apparently below the age of eighteen years at the time of the commission of the offence, but was aged 22 at the time of his trial and conviction. This Court held:

*“The appeal against sentence by A. Museveni George is allowed by reason of its having been passed on him by the High Court instead of the Family and Children Court in accordance with S. 104 of the Children Act. In view of the fact that this appellant, Museveni George, has spent a long period in prison, Court orders for his immediate release instead of forwarding him for sentence by the Family and Children Court. ”*

Our appreciation of Section 104(3) of the Children Act is that where the accused was a child at the time of the commission of the offence, but is not a child by the time of trial, the material age applicable for the purposes of this provision is the age at the time of the commission of the offence. We accordingly, with respect, do not agree with the submission of learned Counsel for the respondent in this regard. See also:

**:Criminal Appeal No. 09/2008: Taremwa vs Uganda (COA)**

**:Criminal Appeal No. 0102/2008: Kiiza Samuel vs Uganda (COA)**

**:Criminal Appeal No. 150/2010:Sendyose Joseph vs Uganda (COA)**

**:Criminal Appeal No. 20/2001: Birembo Sebastian & Anor vs Uganda (SC)**

An appellate Court will exercise its jurisdiction to review a sentence passed by the trial Court only on the basis of established principles. These are that the appellate Court will not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence. The Court will also not ordinarily interfere with the discretion exercised by the trial Judge, unless it is evident that the *trial* Judge has acted upon some wrong principle or overlooked some material factor. The Court will also interfere if it finds the sentence manifestly excessive or too low, in view of the circumstances of the case, so as to amount to a miscarriage of justice: See: **OGALO s/o OWOUR V R [1954] 21 EACA 270.**

In the case of this appeal, the trial Judge overlooked the question of the age of the appellant at the time of the commission of the offence and also acted contrary to the law, that is Section 104(3) of the Children Act.

We accordingly set aside the sentence of fifteen years imprisonment he imposed upon the appellant as being wrong in law.

We have considered the fact that the appellant had already spent 1 y e a r s on remand at the time of his conviction and sentence and has, as of now, June 2016, served almost eight years of the sentence of fifteen years we have held to be illegal. The interests of justice, in our considered view, will not be served if we order that the appellant's case be remitted to the Family and Children Court for an appropriate order. In any event, the maximum sentence the appellant could have received under Section 94(1) (g) of the Children Act is three (3) years. Appellant has already served almost eight (8) years since his conviction on 21.07.08. This is far much more than the maximum sentence under the Children Act.

In the circumstances we have come to the conclusion that the proper order to make is that the appellant be released.

We accordingly allow this appeal. We order that the sentence of fifteen years imprisonment imposed upon the appellant be vacated as being wrong in law.

We order that the appellant be released from custody forthwith, unless he is being held on some

other lawful charge.

Dated at Arua this 6<sup>th</sup> day of June 2016.

Hon. Justice Remmy Kasule

JUSTICE OF APPEAL

Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL

Hon. Justice Simon Byabakama Mugenyi

JUSTICE OF APPEAL