THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

CRIMINAL APPEAL NO. 326 OF 2009

KALEMA MUHAMMED ....APPELLANT

VERSUS

UGANDA.. RESPONDENT

[An appeal from a Judgment, Conviction and Sentence of the High Court Holden at Apac before Honourable Lady Justice Caroline A. Okello dated the 10th day of September, 2008, in Criminal Case No. 28 of 2008]

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA
HON. MR. JUSTICE F.M.S EGONDA- NTENDE, JA
HON. LADY JUSTICE HELLEN OBURA, JA

JUDGMENT OF THE COURT

This appeal arises from the Judgement of Honourable Lady Justice Caroline A. Okello in High Court *Criminal Case No. 28 of 2008* at Apac dated 10th day of September 2008.

The appellant was on 10th day of September 2008, convicted on his own plea of guilt of the offence of aggravated defilement contrary to Section 129 (3) and (4) of the Penal Code Amendment Act of 2007 and sentenced to 12 years imprisonment.
Being dissatisfied with both the conviction and sentence he now appeals to this Court on the following grounds.

1) *The learned trial Judge erred in law when she convicted the appellant on an equivocal plea, thereby occasioning a grave miscarriage of justice.*

2) *That the learned trial Judge erred in law and fact when she failed to properly evaluate the evidence and thereby arriving at the wrong conclusion.*

3) *The learned trial erred in law and fact when she imposed an excessive sentence.*

Representation

At the hearing of this appeal, learned Counsel ***Mr. Olwoch Daniel Evans*** assisted by learned counsel ***Ms. Amolo Shamim*** appeared for the appellant who was in Court while ***Mr. Omia Patrick*** learned Senior State Attorney appeared for the respondent.

Appellant's case

Mr. Olwoch for the appellant submitted on grounds one and two that, the learned trial Judge had failed to properly evaluate the evidence on record, had she done so, she would have found that the appellant had raised a valid defence to the case and his plea was equivocal. The appellant having raised the defence of intoxication in his plea, the learned trial Judge ought to have entered a plea of not guilty as the defence he had raised rendered the plea equivocal.

Counsel further submitted that, the appellant was coerced into changing his plea from that of not guilty to that of guilty after a lot of pressure had been exerted upon him by his Counsel.

He submitted further that, had the appellant been granted an opportunity to defend himself, he would have adduced evidence to prove that, at the time of the commission of the offence he was intoxicated to the point of being unaware of what he was doing and this would have been a mitigating factor that would have resulted into a much less sentence.

Counsel also contended that, the trial Judge had over looked the fact the appellant could have been below the age of 18 years at the time of the commission of the offence. He pointed to the discrepancy in the evidence relating to the age of the

appellant. The age of the appellant was indicated to have been 18 years in the charge sheet. This age was changed by the police officer who signed Police Form 24 requesting for medical examination and raised the appellant's age to 20 years. The medical officer who examined him indicated that he was of the apparent age of 18 years. The age of the victim also varied from 4 years in the summary of evidence to 6 years in the medical examination report. Further that, the learned trial Judge erred when she did not ascertain the exact age of the appellant and when she went ahead to convict him and sentence him as an adult in the absence of any evidence pointing to the fact that the appellant was at the time of the commission of the offence an adult.

In the alternative but without prejudice to the submission in grounds one and two, counsel submitted on ground 3 that, the sentence of 12 years imprisonment for the offence of defilement, was manifestly high and excessive. He also submitted that, the sentence was arrived at without the Court having taken into account the fact that the appellant was at the time intoxicated. Further, that the learned trial Judge did not take into account the period the appellant had spent on remand prior to his conviction, which was one year and six months. That act, he submitted, contravened *Article 23(8)* of the Constitution and rendered the sentence a nullity. He prayed for the appeal to be allowed on grounds one and two or in the alternative to set aside the sentence and substitute with a lesser one.

Respondent's Case

Mr. Omia for the respondent opposed the appeal and supported both the conviction and sentence. He submitted that, the learned trial Judge had carefully followed the procedure of taking plea as set out in *Adan Vs R [1973] EA,* before entering a plea of guilt.

The plea, counsel asserted, was unequivocal, the appellant having admitted to all the ingredients of the offence.

Further that, the sentence was consumerate with the gravity of the offence of aggravated defilement, and was legal. Counsel submitted that, the learned trial Judge had taken into account the period the appellant had spent on remand while imposing the sentence of 12 years imprisonment upon the appellant, and as such it did not contravene Article 23(8) of the Constitution and was not a nullity.

In respect of the age of the appellant, counsel submitted that the medical evidence on record clearly established that the appellant was of the apparent age of 18 years and when the charge was read to him, he did not raise any objection to its accuracy. He asked this Court to dismiss the appeal.

Resolution of issues

This is a first appeal and as such we are required to re-appraise the evidence adduced at the trial and make our own inferences on all issues of law and fact.

See; *Rule 30(1)* of the Rules of this Court, *Bogere Moses Vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997* and *Kifamunte Henry Vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997.*

Grounds one and two

The appellant was charged with the offence of aggravated defilement contrary to Section 129(3) and (4) the Penal Code (Amendment Act) of 2007. It was the prosecution's case that the appellant on the 6th day of April 2008 at Akukuru cell in Apac District performed unlawful act with Nabasa Jane a person aged 4 years. When the case came up for trial the appellant pleaded not guilty on the 10th September 2009.

His Counsel Mr Adams Kibwarya appeared to have requested for the hearing to be stood over. Counsel was on state brief. The trial Judge stood over the case, probably to allow Counsel consult with his client, the appellant, and the appellant to compose

himself. The time was 2:50 pm. When the Court reconvened at 4:13 pm the indictment was read again to the appellant and explained to him in Swahili language to which he objected as he did not understand it. A Luganda interpreter was found and the indictment was read and explained to the appellant in Luganda. He answered as follows:-

> *"I have heard and understood the indictment. I agree, I broke the law by sleeping with the girl".*

The Court entered a plea of not guilty. The Court on application of prosecution allowed the indictment to be amended by substituting the words "paragraph (4) to be read as paragraph 4(a).

The amended indictment was read and explained to the appellant again in Luganda. The appellant upon being asked by the Court whether he had understood the indictment he replied as follows:-

> *"I have understood the amended indictment. I agree I performed unlawful act after getting drunk. I then found myself on the bed of the girl".*

The court then explained the essential ingredients of the offence of aggravated defilement. When asked whether he had understood the facts, he stated as follows:-

> *"I was drunk, I woke up and went to the girl. The mother caught me and called the father. She found that I entered the vagina of the girl. Even my penis had some sperms.*

Thereupon the court entered a plea of guilt.

We have carefully studied the court records. We have found nothing to suggest that the appellant's plea was not unequivocal.

We found that the procedure set out in the *Adan Vs R [1973] EA at page 445* was followed by the trial Judge and we have no reason to fault her.

Ground one therefore fails.

Ground 3

It is the appellant's case that at the time of the commission of the offence he had not attained the age of 18 years and as such he ought to have been tried, convicted and sentenced as a minor.

The summary of evidence does set out the age of the appellant but indicates that the offence was committed on 6th April, 2008 and the victim was at the time aged 4 years. The charge sheet indicates that the appellant was at the time of the commission the offence aged 18 years.

In his submission in respect of sentence the learned State Attorney stated that the appellant had been examined by a medical officer on Police Form 24 and was found to be of sound mind, HIV negative and was 18 years old. The medical form was tendered in evidence with no objection from counsel for the appellant. The facts as set in the Police Form 24 – exhibit P3 and P1 – P form in respect of examination of the victim exhibit P2 were put to the appellant who stated that the facts were correct.

The appellant was then convicted and sentenced to 12 years in prison.

In his *allocutus* the appellant's counsel stated as follows:-

> *"This is one of the sad moments in court where there are 2 victims. The victim of offence and the convict also a victim.*
>
> *When offence occurred, convict was almost a child. He had no one to look after himself. He was sexually assaulted, he moved from home to home in search of parents as his died when he was 7 years old. He never got the parent fingers.*

He is 1st offender. He has co-operated with this court. He has been in custody for 1 year and 5 months. He is remorseful and had changed. He had just got a job when offence took place.

He prays for leniency and give opportunity to live the life of a human being which has been denied to him. He understands the grief of the victim's family."

We have carefully studied the evidence on record in respect to the age of the appellant. The charge sheet indicates it to be 18 years at the time the offence was committed. Exhibit P3 Police Form 24 the Police officer requesting for medical examination of the victim put his age at 20 years.

The medical officer who phýsically examined the appellant on 8th April 2008 indicated his age as "apparent age of 18 years". The word apparent is defined in Oxford Advanced learner's Dictionary as follows;-

> *"1. Easy to see or understand. Obvious. 2. (Usually before a noun) that seems to be real or true but may not be".*

The words "apparent age of 18 years" used by the medical officer indicate that he was not certain of the appellant's exact age.

There appears to have been no attempt to establish and prove exact age of the appellant. This was critical to the case. The doctor's evidence was insufficient to prove that the appellant was at the time of examination above the age of 18. He only found that he was of the apparent age of 18 years which was just an estimate with a magin of error of probably 2 years. There is a possibility that, the appellant could have been a minor. This doubt in respect of age ought to have been resolved in his favour. It was not.

With all due respect, we find that the learned Judge erred when she sentenced the appellant to 12 years imprisonment without having ascertained whether or not he was an adult at the time of the commission of the offence. Both the Article 257 (1) (c) of the Constitution and Section 2 of the Children Act (Cap 59) define a child as a person under the age of eighteen years. We find that the appellant was a child at the time the offence was committed in the absence of any evidence to the contrary.

Section 14 of the Children Act (Cap 59), provides as follows:-

14. Jurisdiction of family and children's court.

(1) A family and Children Court shall have power to hear and determine-

(a) Criminal charges against a child subject to Sections 93 and 94; and

(b) Applications relating to child care and protection.

(2) The Court shall also exercise any other jurisdiction conferred on it by this or any other written law.

Section 94 (g) of the Children's Act states as follows:

(1) A family and children court shall have the power to make any of the following orders where the charges have been admitted or proved against a child-

(g) detention for a maximum of three months for a child under sixteen years of age and a maximum of twelve months for a child above sixteen years of age and in the case of an offence punishable by death, three years in respect of any child. (Emphasis added)

Article 28 (8) of the Constitution States:-

> *(8) No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.*

The appellant therefore should have upon conviction been referred to the Family Court for sentencing. This was not done. The trial Judge had no jurisdiction to pass a sentence on the appellant who was at the time a minor. The sentence of imprisonment upon him as an adult was therefore illegal and we find so.

In *Taremwa Asaph versus Uganda, Court of Appeal Criminal Appeal No. 9 of 2008* (unreported). The appellant in that appeal was 17 years old at the time of the commission of the offence. At the time of conviction he had spent 8 years and 11 months on remand.

This Court held as follows:-

> *"There is no dispute on the facts before us that the appellant was a child as defined under Section 2 of the Children's Act, Cap 59 Laws of Uganda at the time of the commission of the offence. He ought to have been sent to family and children's court for sentence under Section 94 of the same Act. The sentence of life imprisonment imposed by the trial court was illegal in the eyes of the law and occasioned a miscarriage of justice".*

In *Ssendyose Joseph –vs- Uganda, (Court of Appeal Criminal Appeal No. 15 of 2010)* this Court held that:-

> *"in circumstances such as this, where the appellant had served more than 3 years of custodial sentence, the maximum detention period allowed under Section 94 (1) (g) of the Children Act, Cap 59, he ought to be released forthwith, without the case being referred to the Children's Court for sentencing".*

See also: - *Birembo Sebastian and Nyonzima Mariko vs Uganda, (Supreme Court Criminal Appeal No. 20 of 2001).*

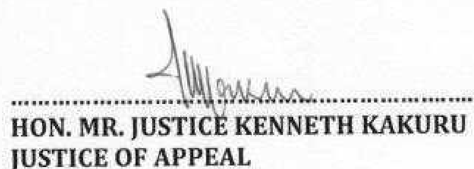
For the reasons we have set out above, the sentence of 12 years imprisonment imposed on the appellant is hereby set aside.

As he has already substantially served the sentence, we cannot refer him to the Children's Court for re-sentencing. Under the children's Act, he would have served a maximum sentence of 3 (three) years. He has already spent far more than that period in prison. He is due to be released from prison in a few days.

We therefore, set him free. We order that he be released from prison forthwith.

We regret the delay in hearing of this appeal. An earlier hearing would have served better the ends of justice.

Dated at **Gulu** this ...18th....... day of **September** 2017.



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