THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBARARA
(Coram : Egonda Ntende, Catherine Bamugemereire, Madrama JJA)

CRIMINAL APPEAL NO. 268 OF 2014
NIWAMANYA DENIS. .....APPELLANT
VERSUS
UGANDA. .....RESPONDENT
[Appeal from the Decision of J.W Kwesiga, J Uganda at the High Court at Kabale dated 1st March 2013]

REASONS FOR THE DECISION OF COURT

The Appellant, **Niwamanya Denis** was indicted for the offence of Aggravated Defilement contrary to section 129 (3) & (4) of the Penal Code Act. It was alleged that during the night of 12thDecember 2011, the Appellant had unlawful sexual intercourse with F.A a child aged six years, at Makanga cell, Central Division, Kabale district. The Appellant was convicted of Aggravated defilement and sentenced to 20 years imprisonment. He appealed against sentence only.

The singular ground of Appeal is that;

1. **The Learned Trial Judge erred in law and fact in imposing the sentence of twenty (20) years imprisonment on the Appellant, which is manifestly excessive and harsh in all circumstances.**

Appearances

At the hearing of the appeal, Mr. Sam Dhabangi represented the Appellant on state brief while the respondent was represented by Mr. Sam Oola a Senior Assistant Director of Public Prosecutions. Both counsel relied on written submissions.

We had had occasion to critically review the evidence before this matter came up for hearing. On the 15th of December when the Appellant appeared before us and in view of the knowledge that he ought to have been tried as a juvenile and had therefore been wrongfully tried, convicted and sentenced as an adult, we unconditionally set him free and reserved the reasons for our decision.

Reasons for the Court' Decision

We now set out below reasons why we arrived at the decision to set the appellant free. In **Kamya Johnson Wavamuno S.C.C.A No. 16 of 2000** the Supreme Court laid down guidelines thus;

> *"...It is well settled that the court of Appeal will not interfere with the exercise of discretion unless there has been a failure to take into account a material consideration, or an error in principle was made. It was not sufficient that the members of the court would have exercised their discretion differently."*

As a 1st Appellate court we have reviewed this case with the necessary rigour and found that at the trial court, the Appellant testified that he was 18 years in 2013. This offence had been committed in 2011, implying that he was 16 years old when the offence was committed. At this point the trial Judge ought to have investigated the age of the Appellant.

In any proceedings before the High Court in which a child is involved, the High Court is under obligation to inquire into the circumstances and the age of the minor on trial. Under **Section 104 (3) of the**

Children's Act the High court shall among others, have due regard to the provisions of the law relating to the procedure of trials involving children .

Child offending is a sensitive issue and as noted above our courts are enjoined not to treat child offendors as adults. Uganda is signatory to the **United Nations Convention on the Rights of the Child (UNCRC)**. The convention addresses issues related with education, health care, juvenile justice and the rights of children with disabilities. We are not like countries such as the United States of America which have never ratified the UNCRC and therefore try children found to be in conflict with the law as adults. In the preamble to the UNCRC it is noted that "***the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth***".

In the **Constitutional (Sentencing guidelines for Courts of Judicature) (Practice) Directions, 2013, Rule 9 (4) (c);** it is stipulated that the court may not sentence an offender to a custodial sentence where the offender; (c) … below 18 years at the time of the commission of the offence. The Children Act CAP 59 under s. 100 lays down procedures which courts trying children should adhere to.

100. Remission of cases

'(1)Where it appears to a court other than a family and children court, that a person charged before it with an offence is a child, the court shall remit the case to a family and children court.' This means that under

the Children Act a court trying a child is required to defer the sentencing of the minor to the Family and Children Court (the FCC). When the child appears before Family and Children's Court on remission from the High Court s.94 gives the court a wide discretion of the types of order it can mete out.

94. Orders of family and children court

(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:

(a)absolute discharge;

(b)caution;

(c)conditional discharge for not more than twelve months;

(d)binding the child over to be of good behaviour for a maximum of twelve months;

(e)compensation, restitution or fine, taking into consideration the means of the child so far as they are known to the court; but an order of detention shall not be made in default of payment of a fine;

(f)a probation order in accordance with the Probation Act for not more than twelve months, with such conditions as may be included as recommended by the probation and social welfare officer; but a probation order shall not require a child to reside in a remand home;

(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.

(2)For the purposes of subsection (1)(g), detention means placement in a centre designated for that purpose by the Minister in such circumstances and with such conditions as may be recommended to the court by the probation and social welfare officer.

(3)Where a child has been remanded in custody prior to an order of detention being made in respect of the child, the period

spent on remand shall be taken into consideration when making the order.
(4)Detention shall be a matter of last resort and shall only be made after careful consideration and after all other reasonable alternatives have been tried and where the gravity of the offence warrants the order.
(5)Before making a detention order, the court shall be satisfied that a suitable place is readily available.(6)No child shall be detained in an adult prison.
(6a)For avoidance of doubt, a person who has attained the age of eighteen at the time of sentencing shall serve the sentence in an adult detention centre.

Indeed, had the trial Judge applied his mind to the provisions and the procedure under the Children Act, to the age of the appellant, and the circumstances of this case, he would have found that the appellant was a minor below the 18 years not an adult prisoner. The issues of trying child-offendors are issues of law and have jurisdictional and sentence implications. A child would ordinarily be sent to the FCC for sentence and the magistrate would only pass a maximum prison sentence of 3 years. In this case, we note with concern that the minor was sentenced by the High Court to 20years imprisonment. Section 94(1)g explicitly states that in the case of an offence punishable by death a child below the age of 18 can only serve three years. For avoidance of doubt, where the offence was committed by a child below the age of 18years but has become 18years by the time of sentencing, he may serve his sentence in an adult detention centre. It is concerning to us that when the appellant revealed that he was a minor at commission of the crime, the trail Judge did not take time to make an inquiry as provided by law.

In view of the fact that the appellant was wrongfully tried and sentenced as an adult leading to a gross miscarriage of justice, this is a proper case for this court to interfere with the sentence of the lower court.

1. This appeal is allowed
2. The sentence of 20 years is quashed.
3. And the Appellant is set at liberty forthwith unless held on other lawful charges.

Dated, Signed and delivered this 24th Day of March 2022.

Hon. Mr. Justice Fredrick Egonda Ntende
Justice of Appeal

Hon. Lady Justice Catherine Bamugemereire
Justice of Appeal

Hon. Mr. Justice Christopher Madrama
Justice of Appeal