

5

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT MBALE**  
**CRIMINAL APPEAL NO. 068 OF 2018**

*(Coram: Obura, Bamugemereire & Madrama, JJA)*

**OKORI JULIUS alias OTIDI} ..... APPELLANT**

10

**VERSUS**

**UGANDA} ..... RESPONDENT**

*(Appeal from the decision of the High Court of Uganda at Moroto in Criminal Session Case No 32 of 2014 before Wolayo, J delivered on 28<sup>th</sup> July 2016)*

15

**JUDGMENT OF COURT**

The appellant was charged with aggravated defilement contrary to sections 129 (3) (4) (a) of the Penal Code Act Cap 120. It was alleged that the appellant who was aged 18 on the 15<sup>th</sup> of February 2013, in Abuk Village, Oyaro Parish, Abim Town Council, in Abim District had unlawful sexual intercourse with AA, a girl under the age of 14 years.

The learned trial judge found that the victim of the offence was 4 years old on the 18<sup>th</sup> of February 2013 when an examination was conducted on her. Secondly, the examination established that a sexual act had been committed on her. The victim testified not on oath because she was too young. She was able to identify the appellant who is her maternal uncle. The victim narrated to her mother what had happened when she was still bleeding and revealed that it is the appellant who violated her. She identified the appellant as the culprit. The learned trial judge held that the prosecution proved the performance of a sexual act on the victim on 15<sup>th</sup> of February 2013 beyond reasonable doubt and the act was committed by the appellant. The assessors were of the opinion that the prosecution has proved the case beyond reasonable doubt and the trial judge convicted the appellant and accordingly sentenced him to 20 years' imprisonment. He was also required to pay compensation to the victim of Uganda shillings 1,000,000/=.

5 The appellant was aggrieved the Judgment of the High Court and appealed to this court against conviction and sentence on the following grounds:

1. The learned trial judge erred in law and in fact when she convicted the appellant upon defective proceedings.

10

2. The learned trial judge erred in law and fact when she sentenced the appellant to an illegal 17 years and 05 months' custodial sentence which was harsh and excessive.

15 At the hearing of the appeal, the learned Assistant DPP Vicky Nabisenke appeared for the respondent while the learned counsel Mr. Eddy Nangulu appeared for the appellant. The appellant was not present and was in Murchison Bay prison Kampala and had instructed his counsel to file written submissions and dispense with his appearance. The court was addressed in written submissions.

20 The appellant's counsel submitted that there were two material defects in the proceedings of the trial court. The first was that there was an omission on the part of the trial court to obtain and record the appellant's plea to the indictment. Secondly, the trial court conducted the trial of a minor and convicted and sentenced the minor as though he was an adult.

25 In relation to the first defect, the appellant's counsel submitted that an accused person is entitled to a free and fair trial under article 28 (3) (c) of the Constitution which provides that the accused is entitled to adequate time and opportunity to prepare his defence. Secondly section 72 of the Trial on Indictment Act provides that the accused person is  
30 entitled to lead evidence on his behalf and in defence or response to the allegations against him. He submitted that where such rights are restricted or denied, then the trial cannot be said to be free and fair.

The appellant's counsel further submitted that under section 60 of the Trial on Indictment Act (TIA), it is provided that at the commencement of  
35 every trial, the accused person shall be placed at the bar unfettered and the indictment shall be read over to him/her and explained or interpreted by the interpreter of the court and the accused person shall be required to plead instantly to the indictment. He submitted that in the circumstances, the trial commenced on 11<sup>th</sup> July 2016 and the major issue

5 in contention was whether the accused person was competent to take plea and whether he could be tried as an adult or as a child. The learned trial judge referred the issue of the appellant's age to the director, Moroto referral hospital and the matter was adjourned to 13<sup>th</sup> July 2016.

10 The court resumed on 16<sup>th</sup> July 2016, but could not proceed because the report on the age of the appellant was not ready and the matter was further adjourned to 20<sup>th</sup> July 2016. On 20<sup>th</sup> July 2016, the matter was adjourned to 21<sup>st</sup> July 2016. Thereafter, the court noted that the accused was examined and the medical report was ready which confirmed that he was between 21 – 23 years. The court concluded that it meant that the  
15 accused was 18 years in 2013 and could be tried as an adult. Thereafter the trial was adjourned for hearing on 25<sup>th</sup> of July 2016 but it did not proceed on that day when it was further adjourned to 26<sup>th</sup> July 2016. The case was again adjourned without trial to 28<sup>th</sup> July 2016. Finally, on 28<sup>th</sup> July 2016, when the matter was called for hearing, the trial commenced  
20 with the evidence of PW1 and the trial was carried on until it was concluded without taking the plea of the appellant. The appellant's counsel contended that the said omission fundamentally affected the trial and was a defect that rendered the entire trial illegal and the judgment and sentence null and void.

25 In the premises, the appellant after making reference to some authorities submitted that the entire trial was defective. That the learned trial judge erred in law and fact when she proceeded to convicted and sentence the appellant without ever recovering his plea to the indictment on the 13<sup>th</sup> of September 2013.

30 The appellant's counsel submitted that the second defect was that of conducting the trial of a minor as though he was an adult contrary to the law. He submitted that according to the charge sheet which was sanctioned on 28<sup>th</sup> February 2013, the particulars show that the appellant was recorded as a person of the age of 16 years after assessment of the  
35 available information including the confirmation of the appellant that he was a pupil at Agago refugee camp primary school. Further, during the trial, the learned trial judge was informed by the appellant that he was 19 years on 28<sup>th</sup> July 2016 which meant that on 15<sup>th</sup> February 2013, he was 16 years at the time of the alleged commission of the offence. At the  
40 commencement of the trial, three years after detention of the appellant,

5 the issue of his age came up and the trial judge ordered a medical examination of the appellant. According to the court record, at the time of commencement of trial on 28<sup>th</sup> of July 2016, there was no evidence on the court record regarding the age of the appellant.

10 The learned trial judge just stated that the medical report is ready and went on to conclude that the appellant was 18 years on the date of the commission of the crime. Medical evidence shows that an x-ray was conducted which determined that the appellant was aged 21 to 23 years of age. The x-ray report was inconclusive regarding the exact age of the appellant. The appellants counsel submitted that the approximations by  
15 the doctor were designed conveniently to ensure that the appellant was found to be an adult. Further, the appellant's counsel submitted that it is common knowledge that radiology and x-ray examinations are conducted by radiologists/stenographers who are not medical doctors or consultants. The examining officer was therefore not competent to give  
20 scientific findings stemming from x-ray reports that he did not execute.

Instead of attaching the x-ray report, the medical consultant attached literature on anatomy and textbooks on radiology. The report of such a nature is supposed to detail the exact parts of the body that were  
25 examined, the scientific findings and the approximate deductions from each of those findings in relation to the general age of the appellant. In the circumstances, the learned trial judge ought to have inquired into other important information including the school records of the appellant since it was known that he was a student of a primary school. The trial court ought to have considered the medical evidence against the original  
30 investigations by the police at the point of arrest. The court and the medical doctor ought to also have appreciated that the appellant had been in custody since 15<sup>th</sup> of February 2013 and due to the circumstances of the tension and probable hardship of custody, one would look older than they actually are. However, the report was not alive to the  
35 circumstances. The appellant's counsel submitted that the learned trial judge erred in law and fact when without sufficient evidence of adulthood, she conducted a trial of the appellant as an adult yet he was indeed still a minor. Additionally, the appellant's counsel relied on section 88 of the Children (Amendment) Act 2016 where it is provided that in determining

5 the criminal responsibility of a child, a presiding officer shall consider  
the age of the person at the time the offence was allegedly committed.  
Secondly subsection 3 requires the court to determine the age of the  
child based on the full assessment of available information giving due  
10 consideration to official documentation including the birth certificate,  
school records, health records, statements certifying the age of the child  
or medical evidence.

The second ground of appeal deals with sentence which we shall  
consider because it can only be due for consideration if the first ground  
of appeal is answered in the negative.

15 In reply to the as ground 1 of the appeal, the respondent's counsel  
opposed the ground and submitted that originally there was no record of  
any plea taking process having been carried out by the trial judge.  
However, when the matter was brought to the attention of the registrar,  
the record was retrieved and it was noted that the plea taking process  
20 had already been typed but was omitted from the record. In the  
supplementary, it has been established that the actual trial commenced  
on 5<sup>th</sup> of July 2016 when the indictment was read and explained to the  
appellant whereupon he denied committing the offence. In the premises,  
the respondent's counsel submitted that the proceedings were not  
25 defective.

On the question of the age of the appellant, the respondent's counsel  
contended that the appellant's counsel relied on the recommended age  
and the charge sheet. He submitted that the learned trial judge was very  
alive to the questions surrounding the appellant's age. When the trial  
30 commenced, the learned trial judge noted that the indictment indicated  
that the appellant was 16 years old in 2013 and she accordingly referred  
to him to the director of Moroto referral hospital for medical examination.  
The appellant was examined and the medical report indicates that at the  
time of examination in 2016, he was aged between 21 – 23 years meaning  
35 that he was 18 years old in 2013. Further the medical examination report  
was admitted as agreed evidence by consent of the prosecution and  
defence counsel and marked exhibit P2. Neither the appellant nor his  
counsel raised any objections as to admissibility of the report and no  
challenge was raised its contents or the expertise of the doctor who

5 made the report. The respondent's Counsel contended that it is now an appeal many years later that the appellant's counsel wants to put it into the issue and especially in relation to the expertise of the doctor who carried out the examination. He submitted that this amounted to testifying from the bar. The appellant's counsel constituted himself into  
10 a medical expert and submitted that the examining doctor was not qualified in radiology and bone anatomy and his findings were inconclusive. Appellant's counsel submitted that the medical report obtained at the time of the trial indicated that the appellant's age was between 21 – 23 years thus making him 18 years old at the time of  
15 commission of the offence. He was therefore old enough to stand trial and be sentenced as an adult.

### **Consideration of ground 1 of the appeal.**

We have carefully considered ground 1 of the appeal and a single sheet of the record of proceedings shows that on 5<sup>th</sup> of July 2016, the accused  
20 was present when one Amalo appeared for the state and Mr. Ogire represented the accused on state brief. Thereafter it is recorded that the accused stated that he denied the charge. The typed record indicated that the indictment was read and explained to the accused person and the court entered a plea of not guilty. Thereafter the case was fixed for  
25 hearing on 11<sup>th</sup> July 2016. Indeed, the record of proceedings indicates that on 28<sup>th</sup> July 2016, proceedings commenced.

We therefore find that the appellant took a plea to the indictment in terms of section 60 of the Trial on Indictment Act, and the proceedings were not defective on that ground. The proceedings for the trial commenced after  
30 his plea of not guilty was entered on the court record and the burden remained in the prosecution prove the offence to requisite standard.

On the second issue, and on 11<sup>th</sup> July 2016, the court observed that the accused was 16 years in 2013. She referred the matter to the director of the Moroto referral hospital to ensure that the appellant is medically  
35 examined to ascertain his exact age as at the date of the hearing. The medical report exhibit P2 indicates as follows:

From history clinical findings and radiological findings, age range (21 – 23) Years.

5 These findings were presented to the trial judge on 21<sup>st</sup> of July 2016. This is what the record reveals:

Court: The accused was examined. The medical report is ready.

It confirms he is between 21 to 27 years.

10 Court: This means; he was 18 years in 2013. He will therefore be tried as an adult.

State: I pray for adjournment to call witnesses.

Court: For hearing on 25<sup>th</sup>/07/2016.

15 The report which was admitted on the 21<sup>st</sup> of July 2016 clearly shows that the appellant was between 21 years and 23 years old. If one took the 21 years as the apparent age according to the medical examination, and subtracted three years that the appellant had spent on remand since February 2013, it would mean that the appellant was about 17 years and some months at the time of commission of the offence. As a matter of fact, the appellant was arrested by the 19<sup>th</sup> of February 2013. The medical report shows that he was examined on the 20<sup>th</sup> July 2016. This is a period of three years and five months commencing on 15<sup>th</sup> February 2013 when the offence was committed. When you subtract 3 years and 5 months from 21, you get 17 years and 7 months. When this is considered together with the information on the charge sheet which showed that the appellant was 16 years together with his testimony that showed that he was 19 years on the date of his testimony on 28<sup>th</sup> July 2016, (suggesting he was 15 years and 7 months at the time of commission of the offence), the appellant was a minor or was probably a minor at the time of commission of the offence in February 2013. This is supported by the prosecution and the defence evidence and the matter ought to have been resolved in favour of the accused. Further there was no need to presume the age of the appellant and the evidence on record was sufficient.

30 Section 107 of the Children Act imposes a duty on the trial judge to inquire and assess from available evidence the age of a trial. It provides that:

35 107. Inquiry as to age of person appearing to the court to be below eighteen years of age.

5 (1) Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence and it appears to the court that he or she is under eighteen years of age, the court shall make an inquiry as to the age of that person.

10 (2) In making the inquiry, the court shall take any evidence, including medical evidence, which it may require.

15 Clearly the record only shows an order to conduct a medical examination more than three years after the offence and no further hearing was conducted inclusive of establishing from other sources the age of the appellant. Section 2 of the Children's Act, cap 59 defines a child as a person below the age of 18 years.

20 Clearly there was non-compliance with the provisions of the Children's Act with regard to the detention and trial of the appellant. The non-compliance with the law started with the charging of a child in a court of law in that the appellant was supposed to be remanded in a remand home for children. First of all, section 91 (5) (a) of the Children's Act provides that the remand of a child (as defined) in custody shall not exceed six months in the case of an offence punishable by death. The appellant was kept on remand for over three years. Further section 99 of the Children Act and subsection (3) provides that where owing to the seriousness of the case, the case is heard by a court superior to the Family and Children's Court, the maximum period of remand for a child shall be six months after which the child shall be released on bail. Where in a case to which section 99 (3) of the Children Act applies, the case is not completed within 12 months after the plea has been taken, the case shall be dismissed and the child shall be discharged and shall not be liable to any further proceedings for the same offence. The above provisions apply to a child in conflict with the law who is charged with a capital offence. The initial charge sheet clearly stated that the appellant was 16 years old but the Children's Act was not followed.

35 Additionally, section 104 (3) of the Children Act provides that, in any proceedings where a child is involved, the High Court shall have regard to the child's age and the provisions of the law relating to the procedure of trials involving children. Under section 107 of the Children's Act, after



5 the High Court makes inquiry about the age of the child, the court shall take any evidence, including medical evidence which it may require.

In the circumstances of this appeal, it is clear that the learned trial judge did not properly calculate the age of the child based on the medical report because the medical report itself showed that the child could have been  
10 slightly over 17 years of age but not 18 at the time of commission of the offence. The fact that a range of ages was given was problematic and the doubt had to be resolved in favour of the child in light of other evidence.

In the circumstances of this appeal, the proceedings were defective and were conducted in breach of the Children's Act. In the premises, we allow  
15 ground 1 of the appeal.

Having allowed ground 1 of the appeal, it is unnecessary to proceed with ground 2 of the appeal. We would quash the conviction of the appellant and set aside the sentence. The appellant was charged in February 2013. He was convicted in 2016. The appeal came for hearing in November 2022.  
20 He has spent a total of nine years in custody. In the premises, it would be futile and patently unjust to order a retrial as the period the appellant spent on detention exceeded that allowed even if he was tried afresh as if he was a minor at the time of commission of the offence. The appellant shall be set free unless he is held on any other lawful grounds.

25 Dated at Mbale the 18<sup>th</sup> day of January 2022 2023

  
Helten Obura

Justice of Appeal



30 Catherine Bamugemereire

Justice of Appeal

  
Christopher Madrama

Justice of Appeal