

THE REPUBLIC OF UGANDA

IN THE HIGHCOURT OF UGANDA AT KAMPALA

CRIM.REV.NO.157 OF 1976

Uganda v. Oloya s/o Yovani Omeke

JUDGEMENT

Criminal law - Sentencing - Corporal Punishment imposed on accused whose age was 16 years Corporal punishment to be imposed only on a male person under the age of 16 years s. 191(3) M.C.A. - Duty of court to ascertain age of accused where there is doubt.

Evidence - Burden of Proof - Burden lies on prosecution to prove case beyond reasonable doubt - Accused not to be convicted on the weakness of the defence but on the strength of prosecution case - Duty of court to look at evidence as a whole.

Evidence - Evidence of child of tender years - Court to ascertain whether child understands nature of oath - if child is refused swearing - court should record that factor
- where child is possessed with enough intelligence to understand duty of telling truth his evidence should be taken - court to warn itself that such evidence requires corroboration
- court to record clearly that voire dire is done.

The accused aged 16 years, was charged with the offence of failing to prevent a fire from spreading c/s 311(c) of Penal Code. He pleaded not guilty but was later convicted and sentenced to corporal punishment of 4 strokes in accordance with s. 191(3) of M.C.A.

There had been a big bush fire blazing from the direction of a road and to save his own premises the accused set another fire which spread and damaged the complainant's house. The complainant testified that he had actually seen the accused setting the other fire and the prosecution called another witness, P.W.2, aged 7 years, to give an eyewitness account of how the accused started the fire. There was no proper voire dire nor was there any direction concerning corroboration of the evidence of a child of tender years carried out. The trial magistrate's notes stated: P.W.2 Ojo s/o Otuba, aged 7 years a child of tender years tested and found does not understand the nature of oath but he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of telling the truth. His evidence is therefore received not on oath."

The trial magistrate also based his decision on the fact that the accused did not produce evidence to show that he took reasonable steps to stop the spread of the fire.

Held: 1. Where the court is confronted with a child of tender years called to give evidence it should question the child to ascertain whether he or she understands the nature of an oath and if the court does not allow the child to be sworn it should

record whether in its opinion the child is possessed of sufficient intelligence to justify reception of the evidence and understands the duty of telling the truth and where the child is a prosecution witness the court should also direct itself that

the child's evidence requires corroboration. The court record must make clear that such a voire dire has been held.

2. The investigation into the meaning of an oath need not be a lengthy one but it must be made and when made it must be recorded down. The investigation should proceed the swearing and the evidence and should be directed to the particular question whether the child understands the nature of an oath rather than to the question of his general intelligence.

3. It is manifest that religious belief is fundamental to the understanding of an oath and if the court is satisfied on this issue the child can be sworn, but, if the court is not satisfied that the child understands the nature of an oath it remains the duty of the court to ascertain not only that the child is of sufficient intelligence to justify reception of the evidence but also that the child understands the difference between truth and falsehood.

4. A finding that the child was sufficiently intelligent to give evidence is not enough and an omission to go further to the issue of whether the child understood the difference between truth and falsehood could be fatal to a conviction in a case where the child's evidence was vital.

5. In the instant case the trial Magistrate's note concerning P.W.2 was not enough and as he did not record his investigation properly, there was nothing to enable this court to say whether the child was in fact competent to give unsworn evidence.

6. It is a cardinal principle of the Criminal law that the burden of proving the charge beyond reasonable doubt is on the prosecution and the accused ought not to be convicted on the weakness of the defence but on the strength of the prosecution case.

7. It is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. In the instant case the trial magistrate ignored the fact that he had to look at the evidence as a whole.

8. Under section 191(3) of M.C.A. Corporal punishment can only be imposed on a male person under the age of sixteen years.

9. It is of necessity that the court should make a specific finding as to the age of the boy. In arriving at his finding the magistrate should consider any available

10. evidence, which may come from any source, e.g. the boy himself, his parents, medical evidence.

11. In the instant case the age was given as 16 years and not below and if the trial magistrate entertained any doubt about his age he should have called for evidence to prove it.

12. A sentence of corporal punishment on a boy who is not below 16 is clearly illegal.

Conviction quashed and sentence set aside.

Dated this 17th day of February 1977

SAIED,CJ

Legislation Considered:

Magistrates' Courts Act, 1970 (Act 13/70), s.191(3) Cases Cited:

1. Davda v. Rep., [1965] E.A. 201
2. Fransio Matovu v. R., [1961] E.A. 260 (C.A.)
3. Gabriel c/o Maholi v. R., [1960] E.A. 159
4. ' Kibongeny Arap Kolil v. R., [1959] E.A. 92
5. Okale v. Rep., [1965] E.A. 555
6. Oloo s/o Gai v. R., [1960] E.A. 86
7. Uganda v. Muhamed Rusenge, [1971] M.B. 156.