

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA,
HOLDEN AT KAMPALA,
CRIMINAL DIVISION.

HCT-00-CR-SC-0488-2023

UGANDA=====PROSECUTOR

VERSUS

M.B.A (The juvenile) =====JUVENILE OFFENDER

BEFORE HON. LADY JUSTICE MARGARET MUTONYI, JHC.

RULING OF COURT.

Introduction.

M.B.A a juvenile, was indicted for aggravated defilement contrary to **Sections 129(3) and (4)(a) of the Penal code Act, Cap 120** laws of Uganda where it was alleged that on the 25th day of January 2023 at Musigula Zone in the Kampala District, he had sexual intercourse with N.P, a girl aged 12 years.

Legal representation.

The learned Senior State Attorney Caroline Tabaro appeared for the state and Counsel Winnie Adukule Meuter appeared for the Accused.

Procedural Flaws in this case.

M.B.A was stated to be **18 years** from the original charge sheet.

The charges were read and explained to him on 8th February 2023.

Section 122 of the Magistrates Courts Act provides for adjournments and **section 122(2)** specifically provides for how long an adjournment should take and in case the accused is to be remanded, where he should be detained depending on his age

It provides that:

“Where a hearing is adjourned under this section, the court shall appoint a time and place for the resumption of the proceedings; and in the

meantime the court may subject to section 75(1) ,(grant of bail) suffer the accused person to go at large, or, may ,by warrant ,remand him or her in some prison , remand home, or other suitable place ,or may release him or her upon entering into a recognisance with or without sureties , at the discretion of court, conditioned for his or her appearance at the time and place to which the hearing or further hearing shall be adjourned; but no such adjournment shall be for more than thirty clear days, or if the accused person has been committed to prison or other place of security ,for more than fifteen clear days, the day following that on which the adjournment is made being counted as the first day".

The section mentions a remand home, prison or some suitable place. This means that at the time of remanding a suspect, the magistrate must be satisfied that he or she is remanding the suspect in a suitable place for that person.

Adult suspects are remanded in adult prisons while juvenile offenders are remanded in Children's Remand homes.

The function of magistrates who are the very first persons before whom suspects appear in our courts of judicature whether they are charged with minor or capital cases like in the instant case is more than acting as mere arbiters or umpires in a game where they have to ensure that no side, that is the prosecution or defense commits fouls.

They must be in direct control and direction of the trial while applying the recognized rules and procedures and ensure that justice is not only done, but is manifestly seen to be done.

Magistrates must strive to ascertain the truth in all cases which come before them.

A magistrate before whom an accused appears and looks to be young is entitled and duty bound to ask questions pertaining to the age of the suspects.

This was not the position in this case inspite of the glaring appearance of the child offender as he still appears to be below 18 years of age.

Section 107 of the Children Act Cap 59, provides for inquiry as to age of a person appearing to the court to be below eighteen years of age as follows;

Section 107(1) reads that *"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."*

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

Masereka Kake Bens, a brother to the juvenile offender produced a child health card in respect of the juvenile offender which clearly indicated he was born on 10th August, 2006. An authentic child health card is medical evidence that can be used to prove the age of the accused, but the trial magistrate ignored it.

I have held before, and do so again, that a magistrate taking plea or reading and explaining the charge sheet to the accused for the first time, has the duty to explain everything contained in the charge sheet including the stated age of the suspect, more so where the suspect looks young and the charge sheet reads eighteen years.

Where the suspect is younger than 18 years and therefore juvenile, they will immediately tell the magistrate that they are below 18 years.

Magistrates must apply the criminal law without fear, or favor, or ill will as the law applies equally to all persons.

However when it comes to juvenile justice, Child offenders have specific laws that apply to them.

It is the function of the magistrate, being the first person charged with dispensation of justice before the courts of judicature which are the courts of law to ensure that no child offender is remanded in an adult prison.

This case is one of the so many other cases where the age of the offender was enhanced to cause the juvenile offender to be remanded in an adult prison which was in total violation of his constitutional rights and a breach of the provisions of the Children Act cap 59 and its amendment.

The preamble to the Children Act is that ;- it is **an Act to reform and consolidate the law relating to children: to provide for care, protection, and maintenance of children ,to provide for local authority support for children: to establish a family and Children court; to make provision for children charged with offences and for other connected purposes.**

Needless to say, the above purpose of the law is to be implemented by all the stake holders involved in the administration of justice regardless of whether the child is the victim or suspect of crime.

The Children Act defines a child to be a person below the age of eighteen years (**section 2 of the Children Act**) and both the Constitution and the Children Act which was passed to give full effect of the Constitutional provisions prohibit keeping a child offender in lawful custody with adults.

Article 34(6) clearly provides that:

“A child offender who is kept in lawful custody or detention shall be kept separately from adult offenders”.

This constitutional right is reemphasized under **section 89(8) of the Children Act** which provides in Mandatory terms that:

“No child shall be detained with an adult person”.

This applies to any child under lawful detention regardless of the seriousness of the offence.

The law goes ahead to regulate the period a child can spend on remand under **section 91 of the Children Act** as amended in 2016.

Section 91 (5) (a) provides for a remand period of three months for an offence punishable by death (capital offences) much as the maximum for juvenile offenders is three years imprisonment. Those charged with minor offences are to be remanded for 45 days and there after entitled to automatic release on bond.

The accused here has been on remand since 8th February 2023 until this court released him on bond on 23rd August, 2023, that is six months and fifteen days far

and beyond the statutory time of three months as provided under Section 20 of the Children Amendment Act, 2016 which amended Section 91(5a) of the Principal Act. Section 91(3) of the Act emphasizes suitability of the detention place for a child which includes none association with adult detainees.

It provides, "***For the purposes of this section, a place of safe custody shall be a place which the court considers fit to provide good care for the child and assures that the child shall be brought to court when required and shall not associate with any adult detainee***"

M.B.A has been in an adult prison from the time he was first remanded thereby associating with adult detainees.

This court however has noticed the contradiction between the provision in section 99 (3) and section 20 of the Children Amendment Act 2016 which amended section 91(5a) particularly in respect of the remand period of children charged with serious offences triable by the High Court.

If this court is to apply the general principles of statutory interpretation using the principle of intentionalism, the intention of the amendment was to reduce the period on remand in cases of a capital nature to three months and non-capital nature to 45 days.

Section 99(3) of the Children Act is therefore in contradiction with the amendment which this court treats as an oversight of the legislature.

The maximum statutory period on remand for juveniles charged with capital offences is therefore three months as that was the intention of the amendment.

Perusal of the proceedings of the lower court indicates that on 7th March, 2023 the juvenile offender who had been erroneously remanded for more than 15 days as provided for under Section 122(2) of the Magistrates Courts Act informed the trial magistrate that he was 16 years old but in spite of this information and the apparent underage appearance of the juvenile offender, the magistrate further remanded him for one more month in an adult prison, ignoring his statutory obligation under Section 107 of the Childrens Act supra.

Section 88 (4) and (5) of the Children Act as amended in 2016 further protects the rights of a juvenile offender not to be detained in an adult facility. It provides that:

- 4). "Specialized protection for children under this Act shall apply to all children below the age of 18 years."
5). "A person shall be presumed to be a child if he or she claims or appears to be younger than 18 years old pending a conclusive determination of his age by court."

The import of the above section is that court has the mandate to look at the accused, use whatever means is available including just looking at the accused and once court forms an opinion that he looks young, handle him as such pending final determination of his age.

The law is in mandatory terms. He shall be presumed to be a child if he claims and or appears to be young.

I believe a magistrate is an expert of experts and can differentiate between an adult who is claiming to be a child and a child who has been declared an adult.

In the instant case, the Magistrate presumed the juvenile offender to be an adult by remanding him in an adult prison instead of remanding him in a children's facility pending determination of his age.

All the above show that all the procedural laws pertaining to child offenders were flawed by the stakeholders in the criminal justice system, thereby violating his constitutional human rights as a child offender.

The provisions of the law pertaining to juvenile justice expects the magistrate to be very keen at the time a suspect appears before him or her to avoid violation of the children's constitutional rights and flouting of the law by the prosecution.

M.B.A's rights were violated right from the time he was arrested.

The State Attorney who arraigned him before the court for reading and explaining the charge also never bothered about his physical looks or appearance.

It is a common practice where the suspects are warned that they need not say anything because the court lacks jurisdiction.

The juvenile offenders keep quiet and find themselves in adult prisons where they start complaining they are below 18 years.

The duty of a magistrate who is the first judicial officer to interface with an accused persons in capital offences or any other offence is to administer justice in accordance with the law.

Failure of a magistrate to detect the lies of the prosecution about the age of a juvenile offender at the first appearance in court is a breach of his or her judicial duty of administering justice.

Juveniles who commit crime seem to be at the mercy of the prosecution.

It suffices to note that all stake holders in the criminal justice system are expected to apply the laws pertaining to children as they are, without perverting justice because the procedure and language used is supposed to be child friendly.

In view of the above and having been satisfied that the accused person was a juvenile at the time the offence was allegedly committed, and he was detained in an adult prison for more than six months which in court's view amounts to psychological torture and gross abuse of the rights of a child offender, it is directed that he be discharged immediately of the offence as his trial is a nullity as provided under section 11(2) of the Human Rights (Enforcement) Act, 2019.

Dated at Kampala this 8th day of September 2023.

Hon Lady Justice Margaret Mutonyi, JHC.



Criminal Division.

Ruling delivered in the presence of:

1. The juvenile.
2. The juvenile's cousin brother and surety No. 38687 Cpl Masereka Kake Bens.

Court Clerk - Mr. Akatwijuka Emmanuel



Festo Nsenga –
Deputy Registrar

08/09/2023 – 3:20 p/m