THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 150 OF 2010

SSENDYOSE JOSEPH :::::::::::::::::::::::::::: APPELLANT

V E R S U S

UGANDA :: RESPONDENT

(Appeal from the Conviction and Sentence of His Lordship Moses Mukiibi, J at the High Court of Uganda at Masaka dated 30th July, 2010: Criminal Session Case No. 120 of 2005)

CORAM: HON. JUSTICE REMMY KASULE, JA
HON. JUSTICE RUBBY OPIO AWERI, JA
HON. JUSTICE KENNETH KAKURU, JA

JUDGEMENT OF THE COURT

The appellant was indicted with the offence of defilement contrary to **Section 123(1) of the Penal Code Act**. He was convicted of the said offence by His Lordship Hon. Justice Moses Mukiibi, J on 30th July, 2010 and sentenced to twelve years imprisonment. Hence this appeal.

The appeal is against both conviction and sentence, and is based on two grounds of appeal which are set out in the memorandum of appeal as follows:-

1. ***That the learned trial judge erred in law and fact when he sentenced the Appellant to 20 years imprisonment which is deemed to be harsh and excessive given the obtaining circumstances.***

2. ***That the learned trial judge erred in law and fact when he failed to adequately evaluate all the material evidence adduced at the trial and hence reached an erroneous decision.***

At the hearing of this appeal Mr. Henry Kunya learned counsel appeared for the appellant on state brief and Ms. Josephine Namatovu, Senior State Attorney, appeared for the respondent.

Appellant's counsel argued ground number 2 first and then ground number 1 second. We shall follow the same order in resolving the same.

The brief background to this appeal is that the appellant was indicted of the offence of aggravated defilement of one Doreen Babirye. It was alleged that on 15th day of

March 2003 at Kyabi Trading centre, Lugusulu sub-county, Sembabule District the appellant had unlawful sexual intercourse with the said Doreen Babirye who was below the age of 18 years at the time.

That the victim's mother had left her briefly behind the house of one Mukankusi Annet as she went to collect banana leaves from her garden. Later she heard the victim crying. She returned only to find the appellant inside a house holding the victim on his laps. The victim was facing the appellant.

According to PW1 Nakawuki Resty, the mother of the victim, when the appellant saw her he got frightened. He put the child down.

At the material time, the child Doreen Babirye was aged one year and seven months. The child was dressed in a T-shirt with buttons between the thighs. The said buttons were open between her thighs. When she later examined the child she saw ***"whitish water***" near her private parts. The private parts were swollen. The matter was reported to Police and the victim was examined by a medical doctor at the request of the Police.

PW3 Dr. Muhumuza Elly, the medical doctor examined the victim and prepared a medical report which was exhibited in Court. He also testified on oath.

In his examination-in-chief he stated as follows:-

> *"She was a child of about one year and seven months. When I examined her she was breast feeding. I examined her private parts she had a vaginal discharge coming from vagina and around it. It looked like semen. Her hymen was intact but bruised. The labia minora was bruised. The injuries were approximately a day old. The hymen was not torn but it was red and swollen. Something had rubbed against it. The labia minora had similar injuries".*

The medical report exhibit P1 is consistent with the above testimony. The witness examined the victim one day after the incident. In cross-examination PW3 stated that the bruising of the victim was caused by a blunt object like penis and that it was a blunt trauma.

The learned trial judge took time to evaluate the prosecution evidence. He was satisfied that although the

victim did not testify there was sufficient evidence upon which he could safely convict the appellant.

He found the evidence of prosecution witnesses credible and consistent. He believed it. He did not find the defence credible and he rejected it.

We have not found any reason to differ from the judge's findings. Contrary to the submissions of counsel for the appellant, we find that the learned trial judge exhaustively analysed the evidence and applied the correct principles of law before coming to the conclusion that the prosecution had proved beyond reasonable doubt that the appellant had committed the offence.

Ground 2 of this appeal therefore fails.

Ground one of the appeal is in respect of sentence.

It was submitted by counsel for the appellant that the sentence of 20 years was harsh and excessive in the circumstances of this case. Counsel for the state submitted that the sentence was neither harsh nor excessive and was justified in the circumstances.

We have noted that the appellant was 23 years in May 2010 when he testified in Court. The Offence was alleged

to have been committed on 15th March 2003. This means at the time he committed the offence he was between 16 and 17 years old. In fact the learned trial judge put his age at 16 years at the time of the commission of the offence at Page 20 of his judgment.

The learned judge went on to state that the appellant had been on remand for a period of 7 years, 4months and 10 days.

Learned counsel for the respondent Ms. Namatovu explained to court that appellant had jumped bail. That he had been re-arrested.

The court record does not indicate when the appellant was granted bail and when he jumped it. The record however indicates that on 5th April 2005 when the case came up for hearing the Director of Public Prosecutions (DPP) entered a *nolle prosequi* as the appellant had not turned up for trial and was said to be at large. No satisfactory evidence is on record to show that indeed the appellant had jumped bail. All the record indicates is that the appellant failed to turn up on the day the case was called for hearing. There are a host of possible reasons why an accused person on bail may fail to turn up for trial

on the day a case is called for hearing. It is therefore not conclusive that the appellant had jumped bail.

What the record indicates is that on 23rd July 2009 the appellant was in court for trial, apparently before another Judge in another criminal session. On 28.8.2009 he was remanded in custody as that was the date to which his trial had been adjourned. He has been in custody ever since.

With all due respect to the learned trial judge, the learned Principal State Attorney Mr. Alex Ojok and Mr. Kikirangoma learned counsel for the appellant at that time of the trial of the appellant, having realized that appellant was a child at the time the offence was allegedly committed they did not bring into play the provision of **The Children Act (Cap 59)**.

The appellant clearly was a child in 2003 when he was arrested and charged with the offence of defilement. The provisions of **Sections 13 and 14** of **The Children Act** provide as follows:

> *13 (1) There shall be a court to be known as the family and children court in every District, and any other lower government unit*

designated by the Chief Justice by notice in the Gazette.

(2).....

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.

Part 10 of **The Children Act** relates to children charged with criminal offences. It sets out the procedure to follow whenever a child is arrested and charged. For emphasis we have set out below provisions of **Section 89** of the said Act that are relevant to this particular case.

"***89. Arrest and charge of Children.***

(1) .....

(2) .....

(3) As soon as possible after arrest, the child's parents or guardians and the secretary for children's affairs of the local government council for the area in which the child resides shall be informed of the arrest by the police.

(4) The police shall ensure that the parent or guardian of the child is present at the time of the police interview with the child except where it is not in the best interests of the child.

(5) Where a child's parent or guardian cannot be immediately contacted or cannot be contacted at all, a probation and social welfare officer or an authorised person shall be informed as soon as possible after the child's arrest so that he or she can attend the police interview.

(6) Where a child is arrested with or without a warrant and cannot be immediately taken before a court, the police officer to whom

the child is brought shall inquire into the case and, unless the charge is a serious one, or it is necessary in the child's interests to remove him or her from association with any person, or the officer has reason to believe that the release of the child will defeat the ends of justice, shall release the child on bond on his or her own recognisance or on a recognizance entered into by the parent of the child or other responsible person.

(7) Where release on bond is not granted, a child shall be detained in police custody for a maximum of twenty –four hours or until the child is taken before a court, whichever is sooner.

(8) No child shall be detained with an adult person.

Section 2 of The Children Act defines a child as any person below the age of eighteen years.

Clearly the above provisions of laws were not complied with in respect to the appellant. The appellant in his unrebutted evidence in chief states as follows:-

"Nakawuki (PW1) came where I was playing Mweso. She was in company of Lukwago. He arrested me. Lukwago was not a LC1 official Lukwago told me I had defiled a child....

We went to the Chairman LC1. Nakawuki told the Chairman that I had defiled her child.....

I was made to sit on one motor cycle and we proceeded to Sembabule police station.

.....At Sembabule police station I was made to sit down next to the counter. The police started kicking me. Then I was locked up in police cells..... I was not taken to any hospital for treatment".

We find that the above evidence was not challenged in court. The constitutional and legal rights of the appellant were violated and denied. We find that he was at all times required to be treated in accordance with the **Children Act**.

Section 90 of the same act provides for the procedure and conditions for grant of bail to children and **Section 91** provides for the procedure for remand. There is no indication on record whatsoever that the above provisions of law were followed in this particular case. There is no explanation why the appellant remained in custody for all those years.

Defilement being an offence punishable by death (before the 2007 amendment of the Penal Code) the appellant was properly tried and convicted by the High Court.

However having convicted the appellant the learned trial judge should have sent the appellant to a Family and Children Court for sentencing as required by law. He did not.

In the case of **Taremwa Asaph versus Uganda, Court of Appeal Criminal Appeal No. 9 of 2008 (unreported)**.

The appellant in that appeal was 17 years at the time of the alleged 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".

The above case is similar to this appeal before us. We agree that since the offence was alleged to have been committed at the time when the appellant was a child the appellant ought to have been punished as a child, in accordance with provisions of the **Children Act**.

This is because the guilty mind that committed the alleged offence was of a child and the punishment being imposed relates to that offence at that time.

We agree that the correct procedure would have been for the Judge to send the appellant to the Family and Children Court for sentencing under the provisions of **Section 94** of that Act.

Section 94 (1) provides 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.

The above provision of the law settles this issue. By providing that a Family and Children Court may sentence a child convicted of an offence punishable by death to three years in respect of any child, which offence is not triable by that court means that the High Court has to remit the convicted child to a Family and Children Court for sentencing. This was the holding of the **Supreme Court in Birembo Sebastian & another versus Uganda; Civil Appeal No. 20 of 2001** (unreported).

Ordinarily therefore this case should have been remitted to the Family and Children Court for sentencing. However,

in this particular case the appellant has been in prison for more than 3 years.

Three years imprisonment is the maximum sentence the appellant could have served under Section 94 (1) (g) of the Children Act (Cap 59). Regrettably he has been in prison much longer.

The learned trial judge therefore had no jurisdiction to impose punishment on the appellant.

The sentence imposed by the learned trial judge was therefore illegal in law and it is accordingly set aside.

We hereby order the immediate release of the appellant.

In view of the provisions of **The Children Act, Cap 59**, the appellant should never have been on remand for all those years. This was a blatant violation of his constitutional rights.

It appears that such cases are not uncommon in our judicial system. We direct the Registrar of this Court to bring to the attention of all Courts and the DPP this judgment and request that necessary measures be put in place to remedy injustice that has resulted or may result from such other cases. We so order.

Dated at Kampala this.20th day of.December. 2013.

.....

REMMY KASULE
JUSTICE OF APPEAL

.....

RUBBY OPIO AWERI
JUSTICE OF APPEAL

.....

KENNETH KAKURU
JUSTICE OF APPEAL.