

REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA DISTRICT REGISTRY

CRIMINAL REVISIONAL CAUSE NO MSK 00 CR CV 0017 OF 1999
(Arising from Original Masaka Criminal Case No. 0199 of 1999)

UGANDA

PROSECUTION

VERSUS

ROBERT SERUGO

ACCUSED

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

REVISIONAL ORDER

1. This file was placed before me for directions or other orders by the Chief Magistrate with the following remarks.
"The accused was charged with the Defilement c/s 123 (1) of the Penal Code. Particulars of age of the accused as per charge sheet is 18.
On 23.4.99, the prosecution adduced Police Form 24 that the accused was 16 years. The Magistrate released accused without any further amendments of the Charge Sheet and this was the point of contention. The O.C. Prosecution then produced another P.F. 24 reading the age of accused to be eighteen years and is seeking a cancellation of the accused's bail. Cases like this one are dominant in F.C.C. where on proof of under age accused are usually released without any amendment of the Charge Sheet causing an outcry of unfair play by the prosecution on grounds of lack of jurisdiction by the F.C.C."
2. I decided to deal with it under the revisionary jurisdiction of the High Court over magistrates' courts. The brief facts of this case as can be gleaned from the record are that the accused was charged with defilement contrary to Section 123 (1) of the Penal Code Act on 29th March 1999. He was produced in court on the 31st March 1999 and this charge was read to him. The charge sheet stated his age to be eighteen. Accused was remanded into custody until the 14th April 1999. When he appeared in court on that date, the accused told the magistrate that he was 16 years old. The magistrate ordered that the accused be taken for medical examination to ascertain his age.
3. On the 23rd April 1999, the accused appeared in court. The prosecution told court, "It has been ascertained he is 16 years old. Here is medical form." The court made the following decision.
" There being no remand home near or any other place to detain juveniles provided in Masaka District or any where near this court, and after looking at the medical form as brought in by prosec. After subjecting the boy to examination as directed, I am inclined to release the child offender on court bond in own recognisance in the terms of 50.000/= not cash."
4. The accused, now on bail, appeared before the Chief Magistrate on 21st June 1999. The Prosecution complained in the following words,
"My complaint is that the accused is eighteen years of age. My Police file is clear and has a PF 24 which verifies eighteen years of age. I do not know how the accused was released because there is even no amended charge sheet. The last minute in my file shows he is on remand."

5. Without hearing the accused the Court made the following order,
 "The charge sheet on file is dated 29.3.99. It is not signed by the Magistrate who read the charges. Neither is there an amendment of the charge of accused was under age. The pros is not mentioned either. Amendment of Capital to lesser charges is in practice authorised by the RSSA. It is lacking. Refer file to the Magistrate who released accused to handle. I conclude
 accused was released when court had no jurisdiction to release him on bail because offence is triable by High Court and accused has not clocked 360 days. In absence of amendment I advise bail be canceled and accused subjected to RSSA to recommend amendment."
6. The following day the file was placed before the Magistrate who released the accused on bail. He made the following note on the file, declining to follow the advice of the Chief Magistrate. " I released
 the accused on the strength of the medical form on file saying he was 16 years of age. This was a result of my order for medical examination after the accused claimed he was under age. Accused answered to his bail once and he was re-arrested. Subjecting the accused to further investigation on his age by this court does not look proper. Since I made the order to release, I became functus officio as far as that order is concerned and changing it would be a result of revision only. In the circumstances I am forwarding this file again to Chief Magistrate for onward transmission to H/Court as U/S 233 (3) M.C.A. 1970 for revision or any other orders. In the meantime I extend accused's bail to"
7. When the matter came for hearing before me the Learned Resident Senior State Attorney, Mr. Simon Khauka, submitted the record showed the prosecution contradicting its own position, since it was the prosecution which had ascertained the age of the accused to be 16 years. Mr. Simon Khauka had no objection to the release of the accused on bail, in the lower court, once it was ascertained he was below eighteen years of age.
8. At the conclusion of the hearing, I affirmed the decision of the magistrate made on the 23rd April 1999, releasing the accused on bail. I deferred the reasons for my decision. I now proceed to provide my reasons.
9. Section 3 of the Children Statute defines a child as a person below the age of eighteen years. Section 91 of the same statute sets out what the courts must do when a child appears before it charged with any offence. It provides:
10. "(1) Where a child appears before a court charged with any offence, the magistrate or person presiding over the court shall inquire into the case and unless there is a serious danger to the child, release the child on bail- (a) on a court bond
 on the child's own recognisance; (b) with sureties, preferably the child's parents or guardians who shall be bound on a court bond, not cash.
 (2) If bail is not granted, the court shall record the reasons for refusal and inform the applicant of his right to apply for bail to a Chief Magistrate's court or to the High Court."
11. In near absolute terms this provision grants a child appearing before a court on any charge a right to be released on bail, on the most relaxed terms. Refusal of bail, is provided for, only when it is for the safety of the child! The clear intent of the section is that a child should not suffer pre trial incarceration, unless it is for his safety only. It further directs the court, in event of refusal of bail, to inform the applicant that he or she can apply for bail again before the Chief Magistrate and or the High Court. The clear intention of the legislature is for the child to be afforded bail.
12. Section 108 of the Children Statute deals with cases where the age of the accused may be uncertain but may possibly be below eighteen years. It empowers any court to which such an accused is brought to inquire into the age of the accused, taking any evidence for this purpose including medical evidence. Section 109 deems the age as found by the court to be correct for those proceedings even if it turns out that such was actually not correct. I shall set out both sections below for clarity.

13. Section 108. "(1) Where a person, whether charged with an offence or not is brought before any court otherwise than for the purpose of giving 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."
14. Section 109. "(1) An order or judgement of the court shall not be invalidated by any subsequent proof that the age of the person has not been correctly stated to the court and the age presumed or declared by the court to be the age of that person shall be deemed to be his true age for the purposes of the proceedings.
(2) A certificate signed by a medical officer as to the age of a person under eighteen years shall be evidence of that age."
15. Although the magistrate to whom the accused stated that he was 16 years of age did not refer to Section 108 and 109 of the Children Statute, the steps he took appear to have been in compliance with the provisions of the said sections. He directed that the accused be medically examined. The prosecution did this. It returned with the results of such examination, including Police Form 24, completed by a medical officer at the behest of the prosecution, carrying out the instruction of the court. This form qualifies in my view for purposes of the inquiry in question to be a certificate as to the age of a person signed by a medical officer, which under Section 109 (2) of the Children Statute, is evidence of that age.
16. The magistrate was duty bound under Section 108 referred to above, to hold an inquiry when there was reason to suggest that the person before him was below eighteen years of age. He held the inquiry. There was before him evidence that the person before him was 16 years. This evidence was produced by the prosecution in form of a certificate to the age of that person before him. He acted on that evidence and admitted the accused to bail. In my view, he had no alternative other than to release the accused on bail, once it was established that the accused was below eighteen years of age. Ascertainment of that age to be below eighteen years, kicked Section 91 of the Children Statute into operation.
17. As I have noted above in paragraph 11 the court before who a child appears charged with any offence, is directed to release the child on bail, unless the child's safety requires that bail be refused. It was not suggested that this was the case here. Though the magistrate stated that he was constrained to release the accused on bail because there was no remand home, that was somewhat at variance with the law. Remand into children's home is only to be considered where it is unsafe to grant the child bail. Remand is not to be resorted to unless the child's safety demands it. There is no other consideration for remanding a child into custody.
18. For the above reasons I am unable to fault the order made by the magistrate admitting the accused to bail. The magistrate had jurisdiction to admit the accused to bail once he ascertained that the accused was sixteen years of age. Perhaps, as to the concern expressed that this was done without amending the charge sheet to reflect the accused's age as sixteen and not eighteen as initially stated, this was not a material irregularity. Jurisdiction is a matter of law. Jurisdiction in this particular case to grant bail is not available because of the content of the charge sheet. Jurisdiction is available based on the age of the accused as found by court. The record is clear as to what occurred. No confusion should have arisen at all from the failure to amend the charge sheet. After making his finding as to the actual age of the accused, the court may make an order directing that the charge sheet be amended to reflect its findings as to the age of the accused. This amendment need not be initiated by the Resident State Attorney or the Director of Public Prosecutions.

Dated, Signed and Delivered this 18th day of August 1999.

FMS Egonda-Ntende
Judge