

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

HCT-00-CR-JSC-0483-2021

UGANDA=====PROSECUTOR

VERSUS

W.J =====JUVENILE OFFENDER

BEFORE HON. LADY JUSTICE MARGARET MUTONYI, JHC.

RULING OF COURT.

1).Introduction.

WJ a juvenile, was indicted for aggravated defilement contrary to sections 129(3) and (4)(a) of the Penal code Act laws of Uganda where it was alleged that on the 10th day of April 2020 at Bulindo village in Wakiso District, he performed a sexual act with N.N a girl aged 12 years. The case came up for plea taking on 1st November 2023 but before taking the plea, counsel for the juvenile offender raised an issue of violation of the Child's Constitutional rights which she wanted court to address first.

2). Legal representation.

The learned Senior State Attorney Tabaro Carolyn appeared for the state while Counsel Adukule Winfred M appeared for the Juvenile.

3). Submission of counsel on the alleged violation of the juvenile offenders constitutional and human rights.

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Counsel for **WJ** submitted that the child first appeared in court on the 24th day of April 2020 and the charges of aggravated defilement were communicated to him. The charge sheet indicated that he was 16 years of age. He was subsequently remanded at Kitale Government prison for adults.

She observed that Kitale was crossed out and replaced with Naguru remand home but for reasons best known to the Prison authorities, the child was remanded at Kitale Government Prison where he has been for the last three years, six months and six days.

She moved court under section 11(2) of the Human Rights (Enforcement) Act because the rights and freedoms of this child provided for under section 89(8) of the Children Act, Article 44(c) of the Constitution and Article 120 (4) and (5) of the Constitution as amended in 1995 were violated.

She submitted, all the protection that was supposed to be accorded to the child was never done by all the actors in the criminal justice system which led to gross violation of the child's rights.

She prayed that this honorable court finds that the proceedings in this case file be declared a nullity as provided for under the law.

The learned senior state Attorney, who had the privilege of having the police file and copy of the charge sheet that clearly indicated that the offender was a juvenile, left it to court to decide.

Court released the juvenile offender on his own recognizance pending this ruling.

4).The issues for courts resolution.

1).Whether the child's human and constitutional rights were violated?

2). Whether the violation renders his trial a nullity?

5). RESOLUTION OF ISSUES.

I will resolve the issues in their chronological order starting with ***whether the child's human and constitutional rights were violated.***

It is trite law that any accused person whether adult or juvenile, has a right to a fair hearing which right is clearly stipulated under **Article 28 of the Constitution** as follows:

(1)“ In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

(2) Nothing in clause (1) of this article shall prevent the court or tribunal from excluding the press or the public from all or any proceedings before it for reasons of morality, public order, or national security as may be necessary in a free and democratic society,

(3) Every person who is charged with a criminal offence shall-

a). be presumed innocent until proved guilty or until that person has pleaded guilty.

b) be informed immediately, in a language that the person understands, of the nature of the offence.

8) No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed, and many other rights under this article that are not applicable to this case.

Article 34(6) provides for rights of children who are in conflict with the law as follows: ***“A child offender who is kept in lawful custody or detention shall be kept separately from adult offenders”.***

It suffices to note that the fundamental and other human rights and freedoms of individuals and groups as enshrined in chapter four of our Constitution shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.

The judiciary which is the custodian of Justice charged with upholding and protecting the Constitutional and human rights of the people derives its mandate from Article 126 of the Constitution which provides in part that:

(1) “Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people.

(2) In adjudicating cases of both a civil and criminal nature, the court shall subject to the law, apply the following principles-

a) Justice shall be done to all irrespective of their social or economic status,

b) Justice shall not be delayed.....”

In the case under review, perusal of the lower court proceedings reveal a lot of injustice and gross violation of the child’s rights and discrimination under the law right before the Court.

The child WJ was charged with aggravated defilement where the learned state Attorney sanctioned the charge sheet that clearly described WJ as M/J aged 16 years and victim NN was 12 years. In her

statement of offence, she stated the offence was aggravated defilement c/s 129(1) (3) and (4) (a) of the Penal Code Act.

He was arraigned before court on 24/04/2020.

In spite of being a juvenile he was in court alone with no parent or social and probation officer

According to the court minute, he was in court with the court clerk, prosecution and Magistrate.

Section 89 of the Children Act requires the police to inform the parents of the child arrested to be present when interviewing the child. Consequently they would be present in court or if they cannot be traced, a probation and social welfare officer stands in with the child suspect.

On 24/4/20 the record indicates that the magistrate stated;

“Let the charge sheet be read and explained to the accused in Luganda”

According to Article 28(3) (b) of the Constitution, the magistrate was supposed to read and explain to him the nature of the offence. This explanation involves the section of the law that was breached, the maximum penalty and the particulars of the offence.

It is absurd that the child in this case if at all the magistrate knew her responsibility was informed that the offence was punishable by death according to the charge sheet and indictment when he was finally committed.

The Learned state Attorney should ensure that the charge sheet involving a child offender indicates the offence and section 94 of the

children Act which provides for orders that the family and children court can make.

The law is very clear, High court sits as a family and children court in matters pertaining to capital offences against Juvenile offenders and the maximum penalty is provided under section 94(1) (g) of the Children Act.

Failure to explain the statutory penalty violated the right to the child offender provided under **Article 28 (3) (b)**.

Section 129 (4) (a) of the Penal Code Act prescribes death as the maximum sentence. Had the judicial officer explained to the child the charge or indictment in accordance with the law, the charge sheet/indictment should have been amended to reflect the correct section of the penalty for juvenile offenders.

A juvenile offender should not be alarmed with a death penalty which is not permitted under the law by indicating in on the charge sheet/ indictment.

On the same day he appeared before court, the magistrate did not inform him of his right to apply for bail as provided under Article 23 (6) of the Constitution and under section 90 of the Children Act. Unlike the adult offenders, the family and children Court can release a child on bail who is charged with a capital offence unless it is in the best interest of the child that he or she should be remanded.

The record indicates that he was remanded in Naguru Remand home and was to be in court for mention of his case on 6th May 2020.

There is no minute that he was produced in court on that date. The next minute was on 2nd September 2020 where the JO was not produced. It is not known how the date was given.

The learned Magistrate made an order that a production warrant should be issued via zoom since he was a juvenile but no prison or remand home was mentioned. He was to appear via zoom on 7th October 2020 after a month yet he was not on bail.

Nothing happened on 7/10/2020.

On 27/10/2020, the court clerk. One Akullu Eunice appeared before the magistrate and the state prayed for a production warrant. All these time, there is no mention of where the juvenile offender was remanded from and no production warrant was prepared on record. The case was adjourned to 19/11/2020. The state Attorney was indisposed and case adjourned to 27th November 2020.

On 27th November 2020 by God's grace Counsel Winnie Adukule appeared for the child offender.

The learned state attorney who was always praying for a production warrant that was never extracted, and issued, shamelessly informed court that the juvenile offender has absconded, and that court should decide on the matter.

These are 7 (seven months) of non-appearance before court by the child and the magistrate is not bothered.

Counsel Adukule promptly informed court that the juvenile has never been admitted at Naguru Remand home.

The learned magistrate HW Acio Joan then made an order that "In the premises the prosecution is directed to find out where this child is, since

normally it's the police that takes juveniles remanded to the remand home. Matter adjourned to 11/01/ 2021.

The adjournment was for more than a month contrary to the law.

The court did not show any responsibility at all, yet it had a remand warrant on record addressed to Kitalya prison.

The cancellation of Kitalya and putting Naguru Remand home was not counter signed and this court treats it as a forgery to make it appear as if the court did the right thing.

My conclusion is based on the fact that after all this flawed proceedings involving a child, the court after making its order to the prosecution to establish where the child was, never bothered at any one moment to find out whether the child's whereabouts was established. She knew exactly where the child was because he was remanded at Kitalya adult prison.

From 11/1/2021, the child was never produced in court and adjournments were as usual until 16th September 2021 after one year four months and 22 days that the learned state Attorney and Magistrate purported to commit the juvenile offender for trial by the High Court in his absence.

It is worthy producing the proceedings on the day of committal verbatim.

"16/9/2021,

Accused person on zoom,

Ms Ninsima for state.

Rebecca CC. (Court clerk)

Pros. Inquiries complete. I pray for the accused person be committed to the high court for trial.

Court. Accused committed to the High court for trial on convenient date”.

The procedure adopted for committal was not only flawed but unconstitutional. The defense counsel MS Winifred Adukule who was on record as counsel for the juvenile was not informed of the subsequent dates that were known between the state, clerk and magistrate.

The details of the zoom proceedings are not indicated on record. All adjournments here were in breach of the law.

Section 122 of the Magistrates Courts Act provides for adjournments and **section 122(2)** specifically provides for how long an adjournment should take.

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 recognizance 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 also mentions 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 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.

In this case, the court was so passive as the child remained incarcerated with adults in an adult facility. Kitalya Prison.

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

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) of the Act provides for a remand period of three months for capital offences which attracts a maximum period for juvenile offenders of three years imprisonment. Those charged with minor offences are to be remanded for 45 days and there after the offenders are entitled to automatic release on bond.

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"***

The law further provides for duration of criminal cases for juvenile offenders.

Section 99 of The Children Act provides that:

- 1) "Every case shall be handled expeditiously and without unnecessary delay.***

2)

3) Where, owing to its seriousness, a case is heard by a court superior to the family and Children court, the maximum period of remand for a child shall be six months, after which the child shall be released on bail.

4) Where a case to which subsection (3) applies is not completed within 12 months after the plea has been taken, the child shall be discharged and shall not be liable to any further proceeding for the same offence”.

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 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.

Section 99 further provides for duration of cases involving children.

Section 99(4) of the Children Act provides for discharge of a child twelve months after plea taking if the trial is not completed. This section was

intended to put into effect the right to a fair hearing under Article 28 of the constitution which right includes a speedy trial.

It is my view that the intention of the legislature cannot be interpreted to mean, that cases before plea taking can take longer than twelve months. This section takes care of capital cases against juveniles that take more than twelve months before trial as well.

It suffices to note that all stake holders in the criminal justice system are expected to uphold and protect the human and constitutional rights of children in conflict with the law as stipulated under Article 20(2) of the constitution supra.

The office of the DPP and the court must apply the laws pertaining to children as they are without perverting justice because the procedure is very clear.

Another glaring violation that this court observed was discrimination between the offender and alleged victim. The summary of the case actually disclosed sexual mischief between the boy and the girl. The girl went to the home of the juvenile offender and according to the summary, she was discovered missing from home at around 19:00 hours and returned at 22:00 hours. When the mother asked her, she did not answer until she was dragged to police. She then disclosed that she had been with the juvenile offender and had engaged in unprotected sex. Her younger brother revealed that she had always gone to the juvenile offenders room and he used to send her chapatti as gift through him.

There was clear evidence that she was sexually involved with the juvenile offender on several occasions. It was a child to child sexual encounter.

This is a classic case where the prosecution should have followed the procedure provided for child to child sex since both the victim being 12 years and sexually active with the juvenile offender needed counselling.

Section 129A of the Penal Code (amendment) Act provides that ***"Where the offender in the case of any offence under section 129 is a child under the age of twelve years, the matter shall be dealt with as required by Part V of the Children Act."***

(2) Where an offence under section 129 is committed by a male child and a female child upon each other when each is not below the age of twelve years of age, each of the offenders shall be dealt with as required by Part X of the Children Act"

Part X of the Children Act, Cap 59 under Section 89 provides for the arrest and charge of children. It is to the effect that ***" where a child is arrested, the police shall under justifiable circumstances caution and release the child."***

In the instant case, the boy was treated like an adult. The procedure pertaining to children involving themselves in sexual relations provided under the law was not followed which in my view amounts to discrimination against the male child which further violated to his right to a fair trial as a child involved in child to child sex.

In view of all the above, it is very clear that the juvenile offender, JW's right to a fair hearing which right includes a right not to be remanded in an adult prison with adults was violated.

2. Whether the violation renders his trial a nullity.

Section 2 of the Human Rights (Enforcement) Act, 2019 defines non-derogable rights and freedoms to mean rights and freedoms listed in Article 44 of the Constitution.

These rights include the right to a fair hearing under Article 44(c).

A fair hearing to a child offender who is kept in lawful custody or detention includes the right to be kept separately from adult offenders as provided under Article 34(6) of the Constitution and a speedy hearing as stipulated under sections 91 as amended under section 20 of the Children Amendment Act, 2016 which amended section 91(5) (a) of the Principal Act by substituting for "six months" the words three months and in subsection (5)(b) by substituting for "three months" the words "forty five days" and section 99 of the Children Act.

These sections of the Children Act put into effect Article 28 of the Constitution that provides for a right to a fair hearing in as far as juvenile criminal justice is concerned.

WJ, was denied mandatory bail after he spent three months in custody in spite of his particulars indicating clearly that he was a juvenile offender of 16 years.

He was remanded in Kitalya Government for over three and a half years without trial breaching his right to a fair and speedy trial as provided for under Section 99 of the Children Act where any trial before the High Court involving a child should not last more than twelve months.

Section 11 of the Human Rights (Enforcement) Act, 2019 provides for derogation from non-derogable rights and freedoms. Section 11(2) provides that;

"Whenever, in any criminal proceedings –

- a) *It appears to the judge or magistrate presiding over a trial*
- b) *It is brought to the attention of the competent court, or*
- c) *The competent court makes a finding, that any of the accused person's non-derogable rights and freedoms have been infringed upon, the judge or magistrate presiding over the trial shall declare the trial a nullity and acquit the accused person".*

The violation of the child offender's non derogable to a fair hearing as enshrined under Article 44(c) is so apparent that no competent court can purport to proceed with his trial. Such a trial would amount to perpetuation of a miscarriage of justice and promoting procedural irregularity in criminal juvenile justice. This High Court would also be relegating its general supervisory powers over magistrates court as it would be condoning gross judicial negligence as the judicial officer who presided over this case in the lower court acted with extreme departure from the ordinary standard of care as a judicial officer. Her conduct was very reckless and affected the life of WJ who ended up maturing from an adult prison and serving far and beyond what he would have served had the case been proved against him.

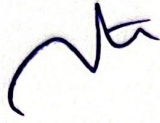
In view of the above violations of his non-derogable right to a fair hearing his trial is hereby declared a nullity as provided under section 11(2) of the Human Rights (Enforcement) Act, 2019.

He is acquitted and should be released immediately unless held over some other lawful charges.

The second issue is resolved in the affirmative.

It is directed that this ruling be served on the Commissioner General of prisons to ensure that juveniles are not detained in adult prisons and the grade one magistrates.

Dated at Kampala this 20th day of November 2023.



Hon Lady Justice Margaret Mutonyi, JHC.

Criminal Division.