THE REPUBLIC OF UGANDA

 IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: ODER - JSC, TSEKOOKO -JSC, KAROKORA - JSC,

KANYEIHAMBA - JSC AND MUKASA-KIKONYOGO - JSC)

CRIMINAL APPEAL NO. 43 OF 1999

***BETWEEN***

CHRISTOPHER BYAGONZA:::::::::::::::::::::::::::::::::::::::::APPELLANT

AND

UGANDA:::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::RESPONDENT

(Appeal from the decision of the Court of Appeal at Kampala (Kato, Mpagi-Bahigaine and Berko JJ.A) dated 19.2.99 in Criminal Appeal No. 25 of 1997).

REASONS FOR THE COURT’S ORDERS.

The appellant, Christopher Byagonza, was tried and convicted by the High Court on an indictment which charged him with the offences of murder, attempted murder and aggravated robbery. He was sentenced to death in respect of the offences of murder and aggravated robbery and seven years imprisonment for the attempted murder. The sentences in respect of the aggravated robbery and attempted murder were suspended. He appealed to the Court of Appeal against both conviction and sentence. The appeal was unsuccessful. He has now appealed to this Court.

According to the prosecution evidence as accepted by the trial Court and the Court of Appeal, the appellant was the maternal uncle of Peter Bright (the deceased in this case) and three other children of Gerald Byaitaka (pw4) and Lydia Kabagenzi (pw5). On the morning of 9-6-91, the parents of the four children went to Church, leaving them at home. The appellant went to the home where he found the children and asked them if they knew him. The children answered that they did. The appellant removed a radio belonging to the father of the children, (pw4), put it in a bag and went away with it. He returned to the house and hit the deceased with an axe. The deceased fell down unconscious. The appellant tied the hands and legs of the deceased with banana fibres and put him in a bed in the children's bedroom. The appellant came out and hit Andrew Sabiti (PW2), another son of Byaitaka, with an axe on the side of his head near the ear. The appellant got some pieces of cloth and used them to gag Andrew Sabiti with it and took him to the bedroom of his father and covered him with clothes. One of Byaitaka's children, Vincent Musana (PW3) who had gone to church with the parents returned home earlier than them. He went to the children's bedroom and found the deceased with both legs and hands tied with banana fibres and lying on top of the baby who was called Immaculate Nema. He untied his legs and hands and asked him to wake up, but he did not respond. Musana next entered his father's room and found Andrew Sabiti on his father's bed, covered with a mattress. PW3 removed the mattress and brought Sabiti out. He found that Sabiti had been gagged in the mouth and nose. He removed the gag. PW3 asked Sabiti what had happened. As a result of what Sabiti told him PW3 returned to the church and informed his parents of what he had found at home.

The parents returned home with PW3 and found the deceased already dead. Sabiti had swollen face and blood was oozing through his nose and ears. Their father, PW4, rushed Andrew Sabiti and Immaculate Nuema to hospital. Nema was treated and discharged. Andrew Sabiti was kept in hospital for one week. The matter was reported to the local R.C. On 14.6.91 R.C. Bagaba Apolo pointed out the appellant to P/C No.22379, Mwine Patrick (PW1), who arrested and took the appellant to Kabarole Police Station. The appellant was eventually charged with the offences for which he was tried and convicted.

In his defence the appellant testified that on 9.6.91 he was at his home weaving a mat. At 3.00 p.m. he bathed and went to the trading centre to buy meat which he took to his wife. Whilst he was at home one Joseph Byaruhanga went there to inquire about a tape measure which he had lent the appellant. He went out with Byaruhanga and did not return home until it was dark. The following day he learnt about the death of Peter Bright and the attack on Andrew Sabiti (PW2) from a letter which Baitaka (PW4) had written to the appellant's stepfather, one Joseph Kikoni. The appellant borrowed a bicycle and went to the hospital and visited Andrew Sabiti (PW2). He asked Sabiti how he was, Sabiti replied that he was in a bad condition. After seeing another patient at the hospital he went home. He did not see Baitaka (PW4) on that day. He informed his mother that Andrew Sabiti (PW2) was not alright. He stayed at home, carrying on with his normal duties until Thursday when he went to Kazinga to visit a friend one Kahwa Deogratious. While he was at Kazinga he was arrested and taken to Fort Portal Police Station and detained there.

He admitted that Baitaka (PW4) was his brother in-law as Butaika was married to his sister Lydia Kabagenzi (PW5). He did not have any problem with Baitaka and his family whom he used to visit. He also knew Peter Bright (the deceased), Musana (PW3) and Sabiti (PW2). He denied taking away the radio from the house. His defence was thus a total denial and an alibi.

The learned trial Judge, believed the prosecution evidence rejected the appellants alibi and convicted him as charged.

The appeal is based on two grounds which are that:

1. The learned Justices of the Court of Appeal erred in law when they confirmed the appellant's conviction and sentence without properly ascertaining his age.
2. The learned Justices of the Court of Appeal erred in law when they confirmed the appellant's conviction and sentence without properly complying with section 104 of the trial on Indictment Decree and section 95 of the child merits statute.

At the hearing of the appeal Mr. Bwengye appeared for the appellant and Mr. Michael Wamasebu, Principal State Attorney, appeared for the state respondent. We heard both counsel and came to the conclusion that the appeal had no merit and we dismissed it, reserving our reasons for doing so. We now proceed to give those reasons.

From the outset, Mr. Bwengye informed the Court that the appellant's prayer in this appeal is not that the conviction should be quashed. It is that the sentence should be set aside. Those were his client's instructions. The learned counsel then took both grounds of the appeal together. He essentially repeated the submissions which had been made for the appellant under the third ground of appeal in the lower court. That ground is identical to the first ground in the present appeal. The learned counsel contended that although the appellant said in his testimony that he was 22 years, he was not medically examined before his testimony. The age of the appellant could have been proved by production of his birth certificate or evidence from his parents or anybody who was present at his birth, or by medical evidence. No such evidence was adduced by the prosecution. In the circumstances the appellant may have been under 18 years of age at the time of the crime. The Court of Appeal therefore erred to have upheld the death sentence, especially as the appellant's medical examination carried out on the orders of the Court of Appeal turned out to be inconclusive.

Secondly Mr. Bwengye criticised the learned Justices of Appeal for not having complied with the provisions of section 104 of the Trial on Indictment Decree.

The learned Principal State Attorney supported the sentence of death imposed on the appellant. He submitted that there was ample evidence that the appellant was over 18 years old at the time of the commission of the crime. The evidence came from the appellant who said that he was 22 years old when he testified on oath. That was on 10.1.94. The offence having been committed on 9.6.91, it meant that the appellant was 19 years on the date of the offence. In the circumstances, it was unnecessary for the Court of Appeal to order for medical examination of the appellant as to his age.

With regard to section 109 of the Children Statute, 1996, Mr. Wamasebu contended that it is irrelevant because the statute was enacted long after the offence in this case had been committed. In any case, the provisions of that section are to the effect that the presumption of age by a court is conclusive evidence of a person's age and that a certificate signed by a medical officer as to the age of a person under eighteen years of age shall be evidence of that age.

It is clear that the appeal in this case is essentially against the sentence of death only. It is not against the convictions of the appellant which the trial Court made and the Court of Appeal, rightly in our view, upheld.

Halsbury's Laws of England, Fourth Edition, Vol. 17, paragraph 42, states what we agree with to be the correct position of the law on proof of age. It states:

"Age may be proved by various means, including the statement by a witness of his own age and the opinion of a witness as to the age of another person, but when age is in issue stricter methods of proofs may be required. In these cases, age may be proved by the admission of a party; by the evidence of a witness who was present at the birth of the person concerned; by the production of a certificate of adoption or birth, supplemented by evidence of identifying the person whose birth is there certified, by the oral or written declarations of deceased persons; and in civil proceedings, by the statement in writing of a person who could have sworn to the fact. In certain criminal and other cases in which the age of a person is material, the age will be presumed or deemed to be what appears too the court to be his age at the relevant time after considering any available evidence. ”

So far as they are relevant, the provisions of section 104 of the Trial on Indictment Decree 1971, say:

"1) Sentence of death shall not be pronounced on or recorded against a person convicted of an offence, if it appears to the Court that at the time when the offence was committed he was under the age of eighteen years but in lieu thereof the Court shall order such a person to be detained in safe custody pending an order made by the Minister under sub-section (2) of this section in such place and manner as it thinks fit and the Court shall transmit the court record, or a certified copy thereof, together with a report under the hand of the presiding Judge containing any recommendation or observations on the case he may think fit to make to the Minister

2)…………………………………………………….

1. ) "

In the instant case when the appellant was put to his defense, he elected to give sworn testimony. His counsel at the trial, Mr. Mugamba, led the appellant in examination in­chief. The relevant part of the record of proceedings at the trial reads as follows.

" Mr. Mugamba: My client will give a sworn statement but has no witnesses.

Court: It is now 1.00 p.m. we adjourn to 3.00 p.m. for further hearing

Sgd: M. Kireju

JUGDE 10-1-94

***10-1-94:***

***Accused - Parties Assessors - Mr. Gamukama -***

***In the dock. As before. Present. Court Clerk.***

Mr. Mugamba: Calls the accused to the witness box. Byagonza Christopher

22 years Casual Labourer, Katambi Village, Gombolola Karambi, Bulahya County. Catholic Sworn."

The appellant then proceeded to give his testimony in his own defense.

As the record shows, it was the appellant who, led by his defense counsel in examination -in - chief, stated his age to be 22 years on the day he testified. This is one of the legally acceptable methods of proving age according to the passage in Halsbury's Laws of England we have referred to in this judgment. In the light of what the appellant said about his age, it appears that the trial Court had no grounds for doubting that the appellant was over the age of eighteen years at the time the offence was committed. Consequently, the age of the appellant was not an issue at his trial. On the evidence available before the learned trial Judge, there was nothing to prevent her from imposing the death penalty on the appellant after convicting him as charged. There was nothing

which made it appear to the learned trial judge that at the time when the offence was committed the appellant was under the age of 18 years. The provisions of section 104(1) of the Trial on Indictment Decree was, therefore, inapplicable to the case.

It was on the appeal to the Court of Appeal that the age of the appellant was made an issue. The issue was raised in ground 3 of the appeal in that Court, which said:

"The learned trial Judge erred in law in sentencing ' the appellant to death without ascertaining his age."

The Court of Appeal considered that ground of appeal and, in a purported following of the Supreme Court decision in: Moses Kayondo vs Uganda, Criminal Appeal No. 11 of 1992, ordered that the appellant be medically examined to ascertain his age for purposes of compliance with section 104 of the Trial on Indictment Decree 1971 and section 95 (sic) of the Children Statute, 1996. This was on 19-2-1999. Then on 19-8-1999, the appellant was produced before the Court of Appeal apparently together with a report of the medical examination for which the Court of Appeal had ordered. The record of proceedings on that date indicates what happened. It reads:-

"Court: We dismissed this appeal on 19-2-99, but we adjourned it for the appellant's age to be determined medically so as to comply with section 104 of T.I.D. and section 95 of the Children’s Statute 1996. The appellant was medically examined and medical report dated 3-3-99, indicates that he is above the age of 21 years. In our view, the report is vague as it fails to indicate the approximate age at the time he was examined.

Since the appellant himself at the trial stated his age to be 22 years, we take it that when he committed the offence in 1991, he was over the age of 19 years. The learned trial Judge was therefore, correct in passing the sentence of death upon the appellant."

The instant case is distinguishable from Moses Kayondo vs Uganda (supra). In that case, the appellant was convicted of murder contrary to section 183 of the Penal Code and sentenced to death. His appeal to this Court against the conviction was dismissed. On its own motion, the Court decided to order for medical examination of the appellant to

ascertain his age. This was done because of what the appellant had said about his age in his testimony in defence at his trial. The Court said:

"The appellant stated that he was 20 years of age at the time of giving his evidence which was 21st October 1991. The incident was over two years before that date namely 21st October, 1991.

The appellant's age was not put in evidence. It may be that the appellant was under 18 years of age at the time of the offence.

It may also be that he has understated his age. We therefore, adjourn the appeal for the appellant's age to be considered so that section 104 of the ***Trial on Indictments Decree*** may be complied with. The Registrar shall have the appellant examined and brought back when examination is completed on 2nd January, 1999."

The medical evidence following the examination of the appellant in that case showed that he might have been under 18 years of age at the time the offence was committed. Consequently, the Court set aside the sentence of death and ordered that he be detained in Luzira Prison pending the order of the Minister under section 104 of the T.I.D.

The instant case is distinguishable from the Moses Kayondo case (supra) in the following respects. Firstly, the appellant in the latter case stated that he was 20 years of age at the time of his trial for an offence which had taken place two years previously. The Supreme Court was, therefore, justified in thinking that Kayondo might have been under 18 years of age at the date of the offence. The period of two years was too narrow to exclude that possibility. In the instant case the appellant's evidence clearly indicated that he was over 19 years of age at the time of the offence. Secondly, the medical evidence in the Kayondo case, indicated that the appellant there might have been under 18 years of age. In the instant case, the medical evidence was to the effect that the appellant was above the age of 21 years. In the end the Court of Appeal in the instant case fell back on the original evidence that the appellant was 22 years at the time of his trial and on that basis, concluded that the appellant was over the age of 19 years at the time the offence was committed.

In the light of the evidence which was available before it and the trial Court, we consider that it was unnecessary for the Court of Appeal to order for medical examination of the appellant in the instant case.

Section 109 of the Children Statute, 1996, which must be the section the Court of Appeal had in mind, is about presumption of age and proof of age by medical evidence in Court proceedings under that Statute. It does not appear to be relevant to this case. In any case, the statute was enacted in 1996. This was long after the appellant had been tried and convicted in this case on 28-1-1994.

In the circumstances, we are unable to say that the Court of Appeal was wrong in upholding the sentence of death passed on the appellant by the trial Court. There is no merit in both grounds of appeal.

For these reasons, we dismissed the appeal.

Before we leave this case we are compelled to express our unhappiness about the manner in which the prosecution failed to have the appellant medically examined before his committal for trial by the High Court. Medical examination of accused persons during investigation of criminal cases is absolutely necessary for purposes of ascertaining their age, their mental condition and to ascertain any bodily injury where they claim to have been tortured. In the past, Police Form 24 was routinely completed by the Police and taken to medical officers who examine accused persons. We have not been informed that Police Form 24 has been abolished. Yet no medical examination of accused persons ever seems to take place any more. The present is one of numerous cases in which the accused person was not medically examined. There is absolutely no explanation why it was not done. This dismal state of affairs must be brought to the attention of the authorities concerned.

The Registrar is accordingly directed to draw the attention of the DPP to this judgment.

Dated at Mengo this 7th Day of April 2000

A.H.O ODER

JUSTICE OF THE SUPREME COURT

J.W.N. TSEKOOKO

JUSTICE OF THE SUPREME COURT

A.N. KAROKORA

JUSTICE OF THE SUPREME COURT

G. W. KANYEIHAMBA

 JUSTICE OF THE SUPREME COURT

L. E. M. MUKASA-KIKONYOGO

JUSTICE OF THE SUPREME COURT