

UGANDA / JUDGMENT

Kajubi Farouk alias Kinene Joshua v Uganda (Criminal Appeal No. 0417 of 2019) [2025] UGCA 189 (16 March 2025) [2025] UGCA 189

COURT

Court of Appeal of Uganda

BEFORE

Buteera, DCJ, Luswata, JA, Kihika, JA

CASE / FILE NUMBER

Criminal Appeal No. 0417 of 2019

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Richard Buteera, DCJ, Eva K. Luswata, JA, Oscar J. Kihika, JA)

CRIMINAL APPEAL NO. 0417 OF 2019

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BETWEEN

KAJUBI FAROUK alias KINENE JOSHUA: ::::::::::::::: APPELLANT

AND

UGANDA RESPONDENT

(An appeal against the decision of Okwanga Vincent Tonny, J, delivered on 8th December 2019 at Kampala in High Court Criminal Session Case No.0a66 of 2017)

JUDGMENT OF THE COURT

Introduction

¹ The Appellant was charged with the offence of murder contrary to Sections 188 and 189 of the Penal Code Act. He was indicted, convicted and sentenced to 40 years' imprisonment inclusive of the period spent on remand. It was stated in the indictment that Kajubi Farouk alias Kinene Joshua on the 28th day of July 2016, between Kireka in Wakiso District and Bugiri District, with malice aforethought, unlawfully killed Kayizzi Solomon. 25

The facts of the case as we have gathered from the Record are that on 28th July 2016, a special hire driver called Simon Kayizzi (hereinafter the deceased) was reported as missing from his work

⁵ station at Kireka. Subsequently, on 12th August 2016, the Appellant was arrested by (PW6) D/CPL Kwalisiima and charged for his murder. The police commenced investigations during which the Appellant led them to his house and a search was conducted. Certain items were discovered during that search, in particular: ATM Cards, resident identity card in the deceased's name, one resident ID Card in the name of Kinene Joshua, three payment receipts to Mirembe Foundation Kireka "8" and a Gaggaa Bus ticket issued in the deceased's name on 29/07/2016, a blue cap with letter G on the front and, two Airtel subscription receipts.

- 3] Later on in the course of inquiries, the deceased's body was recovered from Bugiri and was identified by the deceased's relatives through photographs which they showed to the Bugiri Police. From the recovered items, telephone numbers were extracted and investigations showed that they belonged to the Appellant. Telephone print outs of the Appellant's number and the deceased's number were obtained by (PW6) D/CPL Kwalisiima Amon and it was discovered that the two men had been in communication with each other, for some time including the day that the deceased passed on. The Appellant's phone and that of the deceased were both found to be in Bugiri on the fateful day. It was the prosecution case that the Appellant and another young man hired the deceased from Kireka and lured him to Bugiri where they killed him.

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- 4] The Appellant denied the charges and raised an alibi that on the date the deceased disappeared, he had travelled to Arua and remained there until the evening of 20th July, 2016. The trial Judge

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agreed with the prosecution's evidence and convicted the Appellant $\$S$ who he sentenced to a term of 36 years and nine months' imprisonment

5 The Appellant being aggrieved with the decision of the High Court lodged an appeal premised on five grounds set out in the memorandum of appeal as follows: -

- The learned trial Judge erred in law when he unfairly i. conducted the trial of the Appellant who was a minor by \$28th\$ July 2016, and thereby wrongly convicted and sentenced him without complying with the provisions of Sections \$94(1)(g)\$ and \$100(3)\$ of the Children's Act.
- The learned trial Judge erred in law and fact when he ii. convicted the Appellant of murder of Kayizi Solomon without resolving the conflicting prosecution evidence whether the said Kayizi Solomon was dead or otherwise alive somewhere.
- The learned trial Judge erred in law and fact when he iii. based on inadmissible and unreliable telephone print outs, tendered by a layman PW6 D/CPL Kwalisima Amon, to convict the Appellant.
- iv. The learned trial Judge erred in law and fact when he based the conviction of the Appellant on very weak and ordinary circumstantial evidence regarding his conduct before and in the aftermath.
- The learned sentencing Judge erred in law and principle \$v.\$ when he imposed an ambiguous or vague, illegal, and

manifestlg excessiae 40 gears' imprlsonrment on the Appellant, a minor andJirst offender.

Representation

6] At the hearing of the appeal, the Appellant was represented by Mr. Mohammed Mbalire, on State brief, while the Respondent was represented by Ms. Ahimbisibwe Winfred, an Assistant Director of Public Prosecutions. Both counsel filed written arguments before the hearing of the appeal. We relied on those arguments and authorities supplied and those obtained by the Court to decide this appeal.

7] Counsel argued grounds 1,2 and 5 separately, and ground 3 and 4 jointly.

Ground one

Submissions for the Appellant

20 25 30 8l Mr. Mohammed Mbalire submitted that at the time the Appellant committed the offence, he was below 18 years old and during his testimony stated that he was born on 14th July, 2000. Counsel referred to page 37 of the Record of the proceedings, specifically the evidence of the Appellant in cross - examination where he stated that while in police custody, he informed Police that he was 16 years and 1 month old, but they still detained him in an adult prison. Counsel further referred to the defence of the Appellant where he testified that he was 19 years

and 3 months'old. Counsel submitted then that he gave his evidence on 25th October 2019 which implies that he was 16 years and 1 month old at the time the offence was committed on 28th, July, 2016.

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- 9] Mr. Mbairi submitted that according to Section 2 of the Children Act, a person under the age of 18 years is considered a child. Further that although the medical report indicates that the Appellant was 18 years old at the material time, it is trite law that the medical examiner cannot with precision determine the exact age of a person. For guidance, Counsel referred to the case of Kiiza Samuel vs Uganda, CA Criminal Appeal No. 102 of 2008 that was cited with approval in Serubega Joseph vs Uganda, CA Criminal Appeal No. 0147 of 2008 where this Court found that although the PF24 indicated the Appellant was of the apparent age of 18 years, his testimony that he was 17 years at the time he committed the offence was never challenged by the prosecution.
- 20 o ²⁵ 30 10] Mr. Mbalire contended further that once the trial Court makes a finding that the Appellant is a child, it ought to remit the case to the Family and Children Court for appropriate orders in accordance with Section 100(3) of the Children Act. In addition, he contended that the trial Judge did not make an inquiry into the age of the Appellant in line with Section 107 of the Children Act given that his age was in controversy. Conversely, the prosecution did not challenge the Appellant's evidence that he was aged 16 years and 1 month on the day of his arrest. Counsel therefore, considered it an error for the Judge not to have evaluated the evidence regarding the Appellant's age and wrongly relied on the PF24. He argued that the Judge should have at least weighed it against other pieces of evidence like the birth certificate that he ignored. For guidance, counsel referred to the decision in Okethi Okale & Another vs Republic [1965] 555 EA where it was held

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- ⁵ that the prosecution case should not be considered in isolation, but in relation to the rest of the evidence presented in the defence of the charge.
- 11] Mr. Mbalire in addition submitted that PF 24 cannot be used as conclusive proof that the Appellant was an adult on the material date the offence was committed. That it was still incumbent upon the trial Judge to direct the parties to adduce evidence to formally prove or disprove the contents of facts already tendered in Court, in line with Section 66(3) of the Trial On Indictment Act (TIA Act). That in fact, the Court had other options to establish the age of the Appellant for example, by examining the concerned medical officer to explain what factors he used to arrive at the apparent age of 18 years. In his view, the trial Judge exercised his discretion unfairly to come to the conclusion that as shown in the (PE2), PF24, the Appellant was an adult yet there was contrary evidence that the Appellant was in fact a minor. 15 20 10

- 12l In conclusion, Appellant's counsel prayed that this ground of appeal succeeds and the Court invokes Section 9a(1 and 99(3) of the Children Act to release the Appellant, considering the period he has spent in custody of the State.

2s Submissions for the Respon{e4t

13j By way of introduction, Ms. Ahimbisibwe Winfred referred to the duty of the 1"t Appellate Court which is to reconsider all material evidence that was laid before the trial Court and making allowance for the fact that it has neither seen nor heard the witnesses. The Appellate Court can then arrive as its own conclusion on that evidence and in so doing, consider the evidence on any issue in its

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- ⁵ tota-lity and not in isolation. For guidance, counsel cited Rwabugande Moses vs Uganda, SC Criminal Appeal No. 25 of 20t4.
- 14j Ms. Ahimbisibwe submitted that the Appellant was examined on 22"d August 2016, on PF24 and found to be aged 18 years. That the document was admitted as PE2 in line with Section 66(3) of the TIA which provides that any fact or document admitted or agreed in a memorandum at the trial, shall be deemed to have been duly proved. Counsel submitted that the trial Judge did not doubt the contents of PF24 which clearly stated the age of the Appellant and admitted the same. Counsel then buttressed her submissions with an extract from the Halsbury's Laws of England,4tt Edition, Yol 77, Paragraph 41 and part of the decision of this Court in Sekito Alex & Others vs Uganda, CA Criminal Appeal No. 078 of 20l9 which contain a comprehensive guide on how age can be proved. 10 20
- 15l Ms. Ahimbisibwe concluded that the Appellant was correctly tried as an adult for it did not appear to the Court that he was below 18 years and as such, there was no need for the Court to conduct an inquiry into his age as outlined in Section 107 of the Children Act. She prayed the court finds no merit in this ground of appeal, and dismissed it.

Analysis and decision of Court

16l We have carefully studied the record, considered the submissions for either side, as well as the law and authorities cited to us, and those not cited but which we find relevant to this matter. We are alive to the duty of this Court as a first appellate Court to review

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the evidence on record and reconsider the materials before the trial Judge, including the decision of the trial Court, and come to our own decision. See: Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions S. I 13-10. We do agree and follow the decision of the Supreme Court in *Kifamunte Henry vs Uganda*, SC Criminal Appeal No. 10 of 1997, where it was held that on a first appeal, this Court has a duty to;

> " ... review the evidence of the case and to consider the materials before the trial Judge. The appellate court must then make up its own mind not disregarding the judgement appealed from, but carefully weighing and considering it."

As to the above stated duty of the first appellate Court, we shall proceed to resolve the appeal.

- 171 In grounds one and five, the Appellant contends (inter alia) that he was wrongly tried and sentenced at a time when he was a minor and as a result, the trial Judge imposed an illegal sentence that did not comply with the provisions of the Children Act. That submission raises both issues of law and fact. We shall consider them first.
- 181 Section 1a (1) (a) of the Children Act provides that jurisdiction to try child offenders is vested in the Family and Children Court. However, according to Section 93 of the same Act, a child indicted for a capital offence, whether as a sole offender or when charged jointly with adults, is to be tried by the High Court. The only requirement is that the High Court must take cognizance that the offender is a child and thus entitled to the requisite constitutional

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⁵ sale guards and sentencing as provided for under the Children Act. It is provided in Section 104(3) of the Children's Act that:

> "In any proceedings before the High Court in which a child is involved, the High Court shall have due regard to the child's age and to the provisions of the law relating to the procedure of the trials involving children."

According to Section 54(f)(g) of the Children's Act, a child convicted of an offence punishable by death, shall serve a maximum sentence of three years.

- 191 Further, the Children Act imposes a duty on the trial Court to ascertain whether it is a child being tried for a capital offence, and after doing so, accord them due process of the law. It is provided under Section 107(1) and (2) of the Children Act that; o ¹⁵
- (1) Where a person, whether charged with an offence or not, is brought before the Court other 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.

- 201 Mr. Mbalire submitted that since the Appellant was 19 years and 3 months at the time he testified in Court on 25th October 2019, the reasonable implication is that he was 16 years and 1 month at the time the offence was committed on 28th July, 2016. Counsel submitted further that although the medical report indicated that the Appellant was 18 years, that record should not be taken to be a precise determination of the Appellant's exact age at the time he offended. That should there have been doubt as to his age, such

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- ⁵ doubt should have been resolved in his favour and his sentencing referred to the Family and Children Court which had jurisdiction at the time. Ms. Ahimbisibwe submitted in response that the Appellant was examined on PF24, an admitted document, where it was recorded that he was found to be 18 years. It did not appear to Court that the Appellant was below 18 years so as to trigger an inquiry into his age. 10
- 211 The Children's Act requires that where necessary, the trial Court should inquire into an accused person's age. Several authorities have given various ways of doing so. We take for example the authorities referred to by counsel. According to Halsbury's Law of England, Fourth Edition, (supra),

"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 proof 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 those birth is there certified by the oral or written declarations of deceased persons who could have sworn to the fact. In certain criminal or other cases in which the age of a person is material, the age will be presumed or deemed to be what appears to the court to be his age at the relevant time after considering all available evidence."

221 It was recorded in the charge sheet dated 31st August 2016 that the Appellant was at that time aged 19 years. It appears that at the trial, his age was not made a point of contention and on 25th March 2019, before hearing begun, PE2 the Medical Examination Report of the Appellant, was admitted without contest. It was recorded

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there that he was of the approximate age of 19 years. The Judge $\$ \{S\}$ equally did not place much attention to the Appellant's age and did not raise issue of it at all in his judgment. However, when sentencing the Appellant, he commented on his age. He stated as follows:

"However, from the medical examination Report on Police *Form 24 received in Court Exhibit PE2, there is clear evidence* that the convict was aged 18 (eighteen years) as of \$22/08/2016\$, the date of such medical examination. I am therefore satisfied that the convict was clearly an adult by the time he committed this offence on \$27/07/2016\$ "

He thereby proceeded to sentence the Appellant as an adult.

231 That conclusion appears to be at variance with the evidence. At the commencement of the defence on 25th October 2019, the Judge 20 recorded the Appellant's antecedents as follows: -

"Kajubi Farouk M/A, 19 years 3months male adult, resident of Kireka zone 'B' Kira Municipality Wakiso"

The Appellant went on to testify that: -

"I was born on 14th July, 2000. I went to primary one in 2005"

During allocution, the Appellant repeated that: -

"I am 19 years, 4 months and some days"

24] If that testimony was true, then it is expected that the Appellant was aged about 16 years at the time of commission of the offence on 28th July, 2016. The claim that he should have been tried and sentenced as a child would then be valid. Under **Section 107 of the Children Act**, a trial Judicial officer is expected to inquire into

- 5th the age of an accused person standing trial if they appear to Court as being aged under 18 years. In this case, the Appellant stated his age to be below what was stated in the charge sheet and PE2. In our view, that should have alerted the Judge to inquire into his actual age, perhaps through the different means suggested by the authorities we have cited. He did not do so and took the age stated in PE2, as the conclusive evidence of the Appellant's age. In our view, that was not a correct decision. 10
- 25] The prosecution relied on the evidence of PF24, the medical examination form on which the apparent age of the Appellant was indicated as 18 years. The charge sheet which was generated on 31st August, 2016 indicated that the Appellant was 19 years old. However, the Appellant on several occasions informed Court that he was not 18 years at the time the offence was committed. According to the Record, on 1st October 2019, the Court recorded his age as 19 years and three months. During his cross examination, the Appellant repeated that he was born on 14th July 2000, and finally during the allocution proceedings, he stated that he was 19 years, 4 months and some days. We note that during the trial, the prosecution raised no objection to the Appellant's testimonies. It is our view then that those statements ought to have triggered the trial Judge into conducting an inquiry of the actual age of the Appellant. 15 20 25
- 261 The age of a minor undergoing criminal prosecution is a question of law and the burden remains on the prosecution to prove the Appellant's actual age. In the case of *Liiza Samuel vs Uganda*, Criminal Appeal No. O102 of 2008, this court held as follows: 30

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"Approximate age" and "Apparent age" are simply *estimates....the burden of proving beyond reasonable doubt* that the Appellant was 18 years at the time the offence was committed was upon the Respondent. The prosecution failed to do so. There is doubt as to whether he was a minor or an adult at the time the offence was committed. This doubt should be resolved in favour of the Appellant."

In this case it was not proved that the Appellant had at the time \$27]\$ of the alleged offence attained the age of 18 years. That being the 15 case, his prosecution and sentencing should have been done in accordance with the provisions of the Children Act. See **Birembo Sebastian & Nyonzima Mariko vs Uganda, SC Criminal Appeal No. 20 of 2001**. This Court in **Ssendyose Joseph vs Uganda, Criminal Appeal No. 150 of 2010** gave directions on what a trial 20 court should do after confirming that a convict is confirmed to be a minor, and considering the time spent on remand. It was held that:

> "In circumstances such as this, where the Appellant had served more than 3 years of custodial sentence, the *maximum detention period allowed under Section 94 (1)* (*g*) *of the Children Act, Cap 59, he ought to be released* forthwith, without the case being referred to the *Children's Court for sentencing.*"

28] In this case, the Appellant was placed in lawful custody on \$12^{th}\$ 30 August, 2016. That being so, at the time he was sentenced on 9th December 2019, he had spent 3 years and 4 months on remand. He has since then continued to remain in custody serving his sentence for a period exceeding three years.

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- ⁵ 29] We accordingly find that the Appellant is serving a sentence longer than one he would serve if he had been sentenced in accordance with the Children Act. Exercising our powers under the Section 11 of the Judicature Act, we set it aside and for the reasons we have stated above, the Appellant is hereby set free unless he is being held on other lawful charges. 10
- 301 We accordingly find merit in grounds one and five of the appeal and they succeed. Those two grounds would resolve the entire appeal and we find no reason to consider the other grounds of appeal.
- 311 This appeal succeeds in the terms given. 15

Dated at Kampala this . of 202F w

RICHARD BUTEERA, HIEF JUSTICE 25 EVA K. L TA JUSTIC F APPEAL 30 t/ OSCAR J. JUSTICE O IKA-DEPUTY

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