IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE HELD IN CAPE COAST ON THURSDAY THE 24TH OF JANUARY, 2024, BEFORE HIS LORDSHIP JUSTICE JOHN-MARK NUKU ALIFO "J"

CRIMINAL APPEAL F22/26/2023

AUGUSTINE CRENSTIL ARTHUR - APPELLANT

VRS

THE REPUBLIC - RESPONDENT

APPELLANT-PRESENT

DANIEL GOTIBAH AMOSAH ESQ. FOR THE APPELLANT

LUCY BOISON ESQ. (SA) HOLDING THE BRIEF OF CLARA MENSAH-AGBOH ESQ. (SA) FOR RESPONDENT

JUDGMENT

This is a Criminal Appeal against the Judgment of the Circuit Court dated delivered by Her Honour Dorinda Smith Arthur (Mrs.) on the 7th of October 2020. The Appellant was arranged before the trial court and charged on one count of defilement, contrary to Section 101 (2) of the Criminal Offenses Act 1960(Act 29).

The appellant pleaded guilty simpliciter to the charge at the trial and was convicted on his own plea and sentenced to serve 10 years imprisonment with Hard Labour.

GROUNDS OF APPEAL

Being aggrieved by the conviction, Appellant files the present appeal on the following grounds;

1. The Trial Judge erred in convicting the appellant before determining his age when the same was stated on the charge sheet.

2. That the sentence is harsh and excessive having regard to the fact that he is a young offender, that he pleaded guilty simpliciter and was remorseful.

BRIEF FACTS

The facts of the case as presented by the Prosecution is as follows;

Complainant Barikisu Mustapha is a Trader living at Jackson Street, a suburb of Cape Coast with the survivor Rashidatu Mustapha, a class 5 pupil aged 13 years old. A1 now the Appellant; Augustine Crentsil Arthur alias Kabil aged 17 years is a student and lives at Bakaano, Cape Coast. On 2nd October 2020, there were mourners in the complainant's house for a funeral wake keeping. At about 9:00 pm, survivor who was among those people in the house suddenly disappeared and came back later in the night.

On the 3rd of October 2020 at about 9:30 pm, the Appellant and A2 called Baba went to the house of the complainant and lured the survivor to board their tricycle and quickly sent her to Appellant's brother's room near Cape Coast Municipal Building. In the said room, A1 pounced on the survivor who was then seated on the bed. He raised her dress and removed her pants, managed to pull his Jeans trousers down to his knee level and inserted his erected penis into her vagina and had sexual intercourse with her until ejaculation.

Afterwards, Appellant dressed up but warned survivor not to dress up and that he was going to buy food for her. Immediately Appellant went out, A2 also went in and met the survivor with her dress on but no pants on and he undressed himself, held his erected penis into the survivor's vagina and had sexual intercourse with her until ejaculation. Later, Appellant came in and threw the survivor out of the said room, locked it and slept. Meanwhile, two of Appellant's friends A3 Faiza and A4 Aboagye were also waiting outside. The two also dragged the survivor onto a nearby bench and had sexual intercourse with her in turns. Survivor who was in severe pains could not go home but spent the night on the said bench with A3 and A4.

On the 4th of October 2020 at about 6:30 am, Appellant came out of his room and met the survivor, gave her GHS10.00 and asked her to go home. Survivor went to her grandmother's house at Aquarium and later at about 3:00 pm went home and narrated her ordeal to the complainant of what happened to her in the hands of Appellant, A2, A3 and A4 on both the 2nd

and 3rd of October 2020. Survivor then led her parents to the said room of A1, and met him with a different girl. They arrested and handed him over to the Metro Police. On the 5th of October 2020, the case was referred to DOVVSU Cape Coast for further investigation. A police Medical Report form was issued to her to send the survivor to any government medical hospital for examination, treatment, endorsement and report back to the Police.

The accused was re-arrested and charged with the offence and arranged before the Trial Court for prosecution.

The accused was tried and found guilty of the offence of defilement by the Trial Court and sentenced accordingly.

Dissatisfied with the sentence, the Appellant, on the 9th of May, 2023, filed a Petition of Appeal which can be found on pages 7 and 8 of the Record of Appeal.

The Appellant`s grounds of Appeal are as follows:

(1) *That the Trial judge erred in convicting the Appellant before determining his age when same was stated on the charge sheet.*

(2) *That the sentence is harsh and excessive having regard to the effect that he is a young offender, that he pleaded guilty simpliciter and was remorseful at the trial.*

This Court is therefore duty bound to consider in its entirety the appeal records before it and substitute this Court as the trial court in arriving at its own findings of whether to uphold or dismiss the appeal partly or entirely.

1. THE TRIAL JUDGE ERRED IN CONVICTING THE APPELLANT BEFORE DETERMINING HIS AGE WHEN SAME WAS STATED ON THE CHARGE SHEET

ARGUMENTS OF COUNSEL FOR THE APPELLANT

In his written submission, Counsel for the Appellant argues the trial judge failed to consider the age of the Appellant as stated on the charge sheet and convicted the Appellant before determining Appellant's age.

According to Counsel, should the Court have considered the age of the Appellant as disclosed on the charge sheet, it would have noticed that the Trial Court's jurisdiction over the matter was ousted as the Appellant who was the only person charged and arranged before the Court, was a juvenile.

Counsel further argues that the Juvenile Justice Act, 2003 (Act 653) provides for a procedure to follow when dealing with matters involving juveniles which the Trial Court ignored, leading to a miscarriage of justice.

Counsel quoted Justice S.A. Brobbery's ***'Practice and Procedure in the Trial Courts and Tribunals of Ghana'*** as well as decided cases including **Tuarley Vrs. Ababio (1962)GLR 411; Boyefio Vrs. NTHC Properties Limited (1996-97) SCGLR 531 at 546 and Jonah Vrs. Kulendi & Ors (2013-2014) 1 SCGLR 272** to support his assertions that where an Act of Parliament or any other enactment provides for a special procedure to be used in resolving disputes, it is that procedure alone that must be

followed unless there is an exception expressly made or by necessary implication.

ARGUMENTS OF COUNSEL FOR THE RESPONDENT

Counsel for Respondent referenced to Section 1(1) of Act 653 and argues in support of the Appellant that per the charge sheet before the Trial Court, the Appellant's age at the time he committed the offence was age 17. The Appellant therefore ought to be tried under Act 653. Counsel argues further that as the Appellant's accomplices to the crime were at large and their ages were not disclosed to the honourable Court, it could not have been said that the Appellant has waived his right to be tried as a juvenile offender assuming the ages of the any of the accomplices were known and disclosed to have been over 18 years.

An appeal as understood from legal texts be it Civil or Criminal is by way of rehearing. This means, the appellate Court is entitled to examine or review the entire record of proceedings including the judgment, decision or the order appealed against. See the cases of **Apaloo Vrs. The Republic [1975] 1 GLR 156 CA; Tuakwa Vrs. Bosom [2001-2002] SCGLR 61; Dexter Jonson Vrs. The Republic [2011] 2 SCGLR 601; Henry Kwaku Owusu Vrs. The Republic [2016] 98 GMJ 95 SC and Quarcoopome Vrs. Sanyo Electric Trading Co. Ltd & Anor. [2009] SCGLR 213.**

After the review of the entire records, it behooves on the appellate Court to make its own findings or come to a different conclusion from the trial Court.
It was eruditely stated by the venerable Dotse JSC in the **Dexter Johnson** case **(supra)** at pages 669-670 as follows: ***"What is therefore meant by an appeal being by way of rehearing is that the appellate court has powers to either maintain the conviction and the sentence or set it aside and acquit and discharge or increase the sentence".*** I fully endorsed this position in this judgment which I cannot depart from by way of the principle of stare decisis.

Before I will go into the merits of the appeal, I wish to state the ingredients of the offence of Defilement of a Child under 16 years under section 101 (2) of the Criminal Offences Act, 1960 (Act 29) as amended. The ingredients are:

(a) That the victim is under the age of 16 years.
(b) Someone had sexual intercourse with him/her.
(c) That person is the accused.

See: **Republic Vrs. Yeboah [1968] GLR 248**

The basic or fundamental rule in all criminal prosecutions is that a person charged with an offence is presumed innocent until he is proved guilty or he has pleaded guilty in a Court of competent jurisdiction. Article **19(2)(c) of The 1992 Constitution** captures it thus;

"A person charged with a criminal offence shall……be presumed innocent until he is proved or has pleaded guilty."

In its simple form, it means that irrespective of the nature of the crime, how it was committed or whether a person was caught in an act, the accusation, remains a mere

allegation until evidence has been produced to prove that he is guilty. The forum for proving the guilt of the accused is in Court. It is during the trial that the issue of "the burden of proof" becomes relevant. In criminal trials, the term refers to the duty to provide sufficient evidence at the trial to convince the Court of the existence or otherwise of a fact. Under the **Evidence Act, 1975 (NRDC 323),** there is however no mention of the term "burden of proof". Rather the terms used are, the "burden of producing evidence" and the "burden of persuasion".

In order to secure the conviction of an Accused Person in a Criminal Trial, the Prosecution has the burden of proof, in other words, it is duty-bound to prove by the adducing sufficient evidence in proof of all the essential elements of the offence beyond reasonable doubt. This duty is set down in law under **Section 11(2) And 13 (1) of the Evidence Act, 1975 (NRCD 323)** as follows:

"11 (2) In a Criminal action, the burden of producing evidence, when it is on the prosecution as to a fact which is essential to guilt, requires the prosecution to produce sufficient evidence so that on the totality of the evidence a reasonable mind could find the existence of the fact beyond a reasonable doubt." And,

"13 (1) In a Civil or Criminal action, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt."

A conviction secured on the back of the failure of the Prosecution to dutifully discharge its statutory burden of proof will be deemed irregular, unreasonable, unlawful and unconstitutional.

Generally, an accused person is not required to prove his innocence. He is not required to do anything. The only thing he is required to do is to raise a reasonable doubt as to his guilt. **Section 11(3) of the Evidence Act, 1975**, reads;

"In a criminal action the burden of producing evidence, when it is on the accused as to any fact the converse of which is essential to guilt, requires the accused to produce sufficient evidence so that on all the evidence a reasonable mind could have a reasonable doubt as to guilt".

Section 13(2) of the Evidence Act also reads;

"Except as provided in section 15(3), in a criminal action the burden when it is on the accused as to any fact the converse of which is essential to guilt, requires only that the accused raise a reasonable doubt as to his guilt."

Section 22 of Act 323 also reads;

"In a criminal action, a presumption operates against the accused as to a fact which is essential to guilt only if the existence of the

basic facts that give rise to the presumption are found or otherwise established beyond reasonable doubt, and, in the case of a reputable presumption, the accused need only raise a reasonable doubt as to the existence of the presumed fact."

However, under Section 171 of the Criminal Procedure Code, 1960 (Act 30) where the accused pleads guilty simpliciter as in this case, the Prosecution would be deemed to have discharged its burden and the Trial Court will proceed to convict the accused on his own plea and sentence or make orders against him, unless there shall appear to it sufficient reasons to the contrary.

DISCUSSIONS AND ANALYSIS

Section 1 of Act 653 states that *"for purposes of the Act a juvenile is a person under eighteen years who is in conflict with the law."* It further states that *"a juvenile shall be dealt with in a manner which is different from an adult, except under exceptional circumstances under section 17."*

To appreciate and understand Section 1, one must read on to Section 17 of the Act which is reproduced below;

Section 17—Exclusive Jurisdiction and Transfer.

(1) A Court of summary jurisdiction other than a juvenile Court shall not hear any charge against or dispose of any matter which affects a person who appears to the Court to be a juvenile, if the Court is satisfied that.

(a) The charge or matter is one in which jurisdiction has been conferred on juvenile Courts; and

(b) A juvenile Court has been constituted for the place, district or area concerned, and where the Court is satisfied, the Court shall make an order transferring the charge or matter to the juvenile Court.

(2) Notwithstanding subsection (1), where for any reason a juvenile Court is not constituted for a place, district or area concerned, a Court of summary jurisdiction may deal with an application for bail concerning a juvenile if it is in the best interest of the juvenile to do so.

(3) A charge made jointly against a juvenile and a person who has attained the age of eighteen years shall be heard by a Court of summary jurisdiction other than a juvenile Court.

(4) A charge against a juvenile for an offence which if committed by an adult would be punishable by death shall be heard by a Court of summary jurisdiction other than a juvenile Court.

It must be preliminarily stated that a Court's jurisdiction to entertain a matter is directed by how its jurisdiction is invoked based on the facts before the Court.

The law is that where the issue of the Court's jurisdiction is raised, it is an issue touching on the competence of the Court, rather than the rights of the parties in the subject matter of litigation. Therefore, an objection to the

jurisdiction of a Court touches on the rights of the parties to approach the Court to decide the matter before it. See **Aboagye Frimpong Vrs. Madam Mary Mensah (2012) JELR 63767 (CA).**

It is important at this juncture make this emphatic statement that for any Court to determine a matter, be it Civil or Criminal the preliminary test it must pass in a self-assessment is to first to ask itself whether it has jurisdiction to determine the case or whether its jurisdiction has been properly invoked.

The invocation of a Court's jurisdiction can be substantive or procedural. On one hand, if the procedure set down is not followed, then it means the jurisdiction of the Court has not been properly invoked to determine the matter. On the other hand, if a substantive law ousts the jurisdiction of a Court to determine a matter, then the Court will be bereft with power to determine the case.

The jurisdiction of a Court is essentially its authority to decide on a case. See the case of **Acheampong Vrs The Republic (1997 – 1998) GLR 26 SC** where Brobbey JSC held as follows:

''The jurisdiction of a Court is the authority of a Court to entertain or decide a case. It contains the limits or extent of the power of the Court.''

Additionally in the case of **Kuminipah Vrs. Ayirebi (1997-1998) I GCR 268 SC. Amuah Sakyi JA** (as he then was) noted on the subject of jurisdiction as follows:

"Jurisdiction means the power or authority to adjudicate where it is lacking any judgment or order emanating from the Court is a nullity and a person affected by it is entitled to ignore it".

Jurisdiction is the authority which a Court possesses to determine matters which are been litigated before it. This means, whatever decision the court would give can be set aside on appeal or by the Court suo moto or upon an application by any of the parties or may be quashed by the grant of certiorari.

See: **Yeboah Vrs. J.H. Mensah [1998-99] SCGLR 49**

Edusei (No. 2) Vrs. Attorney General [1998-99] SCGLR 753

Jurisdiction can thus be compared to the blood in human beings. This is because, without blood, the person cannot survive. It is in this direction that in the case of **Bimpong Buta Vrs. General Legal Council [2003-2004] 2 SCGLR 1200**, the Supreme Court held in holding 1 per Sophia Akuffo JSC (as she then was) as follows:

"Jurisdiction is always fundamental issue in every matter that comes before the Court, and even if it is not questioned by any of the parties, it is crucial for a Court to avert its mind to assure a valid outcome".

The issue of jurisdiction of a Court in litigation is so crucial that it can be raised at any time and even on the first on appeal to the Supreme Court. When an issue of jurisdiction is raised, it is an issue that touches on the fact that a cause of action has accrued or the competence of the Court to hear the matter rather than the rights of the parties.

A Court will have jurisdiction to entertain a case on the following grounds:

(a) If the Court is properly constituted as regards the qualification of the coram.

(b) The subject matter in dispute is within the jurisdiction of the Court and there is no feature of it which prevents the Court from excising its jurisdiction.

(c) *That the case came before the Court initiated by the due process of law upon fulfilment of any condition precedent to the exercise of jurisdiction. Jurisdiction can therefore be a matter of strict law and or fact.*

See: **Aboagye Frimpong & Anor. Vrs. Rome [2013] 58 GMJ 131 CA**

Jurisdiction is likened to the substructure of the whole adjudication process be it in Criminal or civil action on to which the superstructure all other procedural or substantive matter lay. Where the substructure collapses the entire edifice is destroyed, see the cases of **Republic Vrs. High Court (Human Rights Division) Accra, Ex Parte Akita (Mancell – Egala & Attorney General Interested Parties) [2010] SCGLR 374**

A Court cannot behave like an octopus stretching its eight tentacles, here and there to grasp jurisdiction not constitutionally meant for it either through statute or practice and procedure.

See: **New Patriotic Party Vrs. Attorney General (31st December Case) [1993-94] 2 GLR 35 SC.**

Therefore, where a Court realises on its own motion that it has no jurisdiction over a case, or its attention is drawn to its lack of jurisdiction over a case, it must decline to hear it on its merits and no discretion arises here. See: **The Republic Vrs. Nii Adama Thompson & Ors. [2014] 73 GMJ 1 SC**

I have already indicated above, an appeal is by way of rehearing and the appellate Court is to examine the entire evidence on record and decide whether the conviction or the acquittal or the sentence is justified in law.

In the present case before this Court, age determination of an accused per the facts (in this regard, the charge sheet before the trial Court) is very vital for the Court's assumption of jurisdiction over the matter and also safeguarding the rights and

benefits of juveniles in conflict with the law to benefit from the special protections they are entitled to under Act 653.

Per the combined effect of Section 1 and Section 17 of Act 653, except where a juvenile has been charged jointly with an adult or where charged with an offence punishable by death, the juvenile must be dealt with in accordance with the Juvenile Justice Act, 2003.

Even though the Act does not state whether the child's age is to be determined at the time of the alleged offence or at the time he or she appears before the Court, this Court is inclined to believe that where it appears to the Court that a person before it is a juvenile, it is mandatory for the Court to conduct an inquiry to determine the age of that person in accordance with section 19 (1) of Act 653 and subsequently refer the case to a Juvenile Court for trial.

Section 19(1) of the **Juvenile Justice Act 2003** states that:

"Where a person, whether charged with an offence or not, is brought before any Court otherwise than for the purpose of giving evidence and it appears to the Court that the person is a juvenile, the Court shall make inquiry as to the age of the person."

As both Counsel for Appellant and Respondent rightfully said, the Charge Sheet before the Trial Court had the age of the Accused stated as 17 as of the date the charges were leveled against him. Even though it was apparent on the face of the Charge Sheet that there were other accused persons in the matter whose ages were not even determined, they were not charged with the Appellant as they were at large at the time the Appellant was arranged before the Court.

As it was the case that the Appellant was not charged with any adult, the Trial Court ought to have considered whether it had jurisdiction to entertain the action by a preliminary investigation or enquiry into the age of the Appellant where it was in

doubt of his age, particularly where the age has been disclosed on the Charge Sheet which forms the basis of the jurisdiction of that Court.

Nowhere did the Record of Appeal show that the trial court enquired into the age of the Appellant before taking his plea. Should the court not be interested in enquiring into the age of the Appellant especially where the Charge Sheet recorded same as 17 years, it ought not to have assumed jurisdiction over same without the determination of the age of the Appellant as provided in 19 (1) of Act 653.

Section 19 of Act 653 provides as follows:

"Where a person, whether charged with an offence or not, is brought before any Court otherwise than for the purpose of giving evidence and it appears to the Court that the person is a juvenile, the Court shall make inquiry as to the age of the person".

On the other hand, if the Trial Court after considering the age of the Appellant, doubted same, it ought to have conducted an enquiry into the same and if upon satisfying itself that the Appellant was indeed not a juvenile, it could then proceed to try the case but where it found otherwise, it ought to remit the case to the court seized with jurisdiction, in this case the Juvenile Court.

Counsel for the Appellant argues that as per the Charge Sheet, Appellant who was not jointly charged with a person above 18 years ought not to have been tried at the Circuit Court as the jurisdiction of any court of summary jurisdiction is ousted where an accused person is a juvenile and for that matter.

As rightly and forcefully argued by Counsel for the Appellant, Section 17 Act 653 gives exclusive jurisdiction to the juvenile Court in offences committed by a juvenile except where the juvenile is charged jointly with a person above 18 years or has committed and offence punishable by death; in both cases a court of summary jurisdiction shall have jurisdiction to hear the matter. Section 2 of the Children's Act

1998 states that *"…the best interest of the child shall be the primary consideration by any court, person, institution or other body in any matter concerned with a child."*

By the disclosure of the age of the Appellant on the Charge Sheet, ipso facto, the trial judge ought not to assume jurisdiction over the case but to refer same to a juvenile court for determination.

For the Trial Court to have assumed jurisdiction over the matter, conducted trial into same before passively enquiring into the age of the accused at the time after he pleaded guilty, the Court was grossly in error of law. I therefore find that the Trial Court has no jurisdiction to try the matter and the entire trial is therefore a nullity. In consequence, this ground of appeal succeeds.

2.THE SENTENCE IS HARSH AND EXCESSIVE HAVING REGARD TO THE FACT THAT THE APPELLANT IS A YOUNG OFFENDER, THAT HE PLEADED GUILTY SIMPLICITA AND WAS REMORSEFUL

ARGUMENT BY COUNSEL FOR APPELLANT

Counsel for Appellant, as expected of a party who files his grounds of appeal, went further to argue ground two of his appeal basically on the premise that should ground one of this appeal fail based on this Court's finding that the jurisdiction of the Trial Court was properly exercised and the trial was proper, the sentence albeit imposed by the Trial Court was excessive having regard to the fact that the Appellant is a young offender, he pleaded guilty, simpliciter and was remorseful.

It is acknowledged that Counsel for Respondent did not bother to delve into the second grounds of appeal even though she indicated that she was going to argue the first and second grounds together.

LEGAL ANALYSIS

This Court notes the Juvenile Justice Act, Act 653 deals with not only juveniles but young offenders. Section 19 (4) of Act 653 provides that *"Where it appears to the Court that the person brought before it has attained the age of eighteen years, that person shall for the purpose of this Part be deemed not to be a juvenile and shall be subject to the Code"* .

Should this Court even go by the age of 19 years the Appellant gave the Trial Court at the pre-sentencing hearing any Court other than the Juvenile Court has the right to exercise jurisdiction over the young person.

Assuming without admitting that the Appellant was 19 years at the time he committed the crime or at the time he was arraigned before the Trial Court, the Trial Court as a court of summary jurisdiction could hear the matter and sentence him appropriately under Section 101 (2) of Act 29 as defilement is a serious offence with minimum of 7 years imprisonment and a maximum of twenty five years without an option of a fine. See C**riminal Procedure and Practice In Ghana, 2nd Edition at page 438 by Sir Dennis Dominic Adjei JA.** It is the law that the protection from imprisonment under Section 32 and Section 46 (1) (d) (3) and (8) of Act 653 only avails juveniles.

However, I agree with the argument of Learned Counsel for the Respondent in her summation on page 13 of her written submission when she stated that the failure of the Trial Judge to consider the age of the Appellant and follow the mandatory requirements and procedure in trying

the juvenile offender (Appellant) makes the conviction erroneous in law as a substantial miscarriage of justice was occasioned. She added that by that extension the sentencing is rendered moot as same does not have a leg to stand on.

From the rendition above, this court will not expend intellectual fuel on the second ground of appeal as same is rendered moot as the first ground of appeal succeeds.

Borrowing the sagacious words of Apaloo CJ in the case of **Yiadom I Vrs. Amaniampong (1981) 2 GLR. 8,** "It would we (I) think, be a waste of mental effort and thoroughly pointless," to do so.

It is the law that a Court has no power to confer on itself jurisdiction in matters where the relevant statute or procedure has not conferred such power on the Court.

See: **Frimpong Vrs. Nyarko (1998-99) SCGLR 734**

Republic High Court, Accra Ex Parte Attorney General (Delta Foods) Interested Party [1999-2000] 1 GLR 255 SC

In the case of **Harlley Vrs. Ejura Farms (Ghana) Ltd. [1977] 2 GLR 179**, The full Bench of the Court of appeal held per Taylor J (as he then was) at page 215 as follows *"In these Courts, we dispense justice in accordance with three and only three yardsticks; statute law, case law and the well-known practice of our courts".*

It is therefore my judgment that the Circuit Court 1 Cape Coast had no jurisdiction to try the Appellant being a juvenile at 17 years as stated on the Charge Sheet.

I am amazed the Police Prosecutor as well as the Investigator did not draw the attention of the trial judge to the fact that the age 19years mentioned by the Appellant in the pre-sentencing hearing was in conflict with the age of 17 years the prosecution had ascertained or procured in their investigation and consequently put in the facts supporting their the Charge. That is most unfortunate. This Court also notes that from the Records of the Appeal the Appellant was not represented by Counsel which phenomenon should have put the trial judge no notice to be more careful in trying the case before her.

It must be stated clearly without any equivocation that the rules and procedure of the court and proceedings in court cannot be conducted anyhow without regard to the practice and procedure of the court. Any such practice will erode or undermine

the integrity of the adjudication process. There is always a reasonable policy consideration behind every rule of procedure in proceedings. Therefore, any attempt to circumvent them can lead to bizarre results.

See: **Bielbiel Vrs. Dramani [2010] 34 MLRG 72 SC.**

Learned Counsel for the Respondent gave a very intellectual account of the policy consideration behind Juvenile Justice Procedure, when in her

submission which basically supported this appeal made reference to the importance of juvenile justice delivery in Ghana`s criminal justice system.

Counsel made reference to paragraph 2 of page 5 of Introduction to the Juvenile Justice Bench Book written by the Judicial Training Institute (JTI) on behalf of the Judiciary in Ghana to serve as a guide to the Juvenile Court panel members in the performance of their duties.

"The main object of the Act 653 is to provide for an alternative criminal justice system to protect the rights of children in conflict with the law and also to provide for young offenders in accordance with international standards based on the United Nations Convention on the rights of the child and the United Nations (UN) Standards Minimum Rules for administration of Juvenile Justice. The underlying principle of the Act 653 is that a juvenile offender must be dealt with a manner which is different from an adult except under (See 17(3) and (4) of Act 653. A juvenile offender for purposes of the Act 653 is defined as person under eighteen (18) years who is in conflict with the law. (See 1 (1) of Act 653) ".

I must commend the boldness and professionalism of the Learned Counsel for Respondent for not fighting the indefensible when she humbly conceded that the

Appellant has been convicted by the Trial Circuit Court which had no jurisdiction to try him and that it is only fair and in the interest of justice to allow this appeal.

This show of legal ingenuity and forthrightness is worth of note and highly commendable. In the case of **Francis Yirenkyi Vrs. The Republic (2016) DLSC 3148** the Supreme Court acknowledged the concessions made by the Honourable Attorney General and stated *"it therefore follows that, the practice of lawyers making concessions in court when the circumstances demand, should rather be encouraged when made in good faith, but not otherwise"* also in the case of **Amidu (No.3) Vrs. The Attorney General, Waterville Holdings (BVI) & Woyome (No.2) (2013-2014) 1SCGLR 606,** the Supreme Court stated at page 634 of the Report as follows: "*Before us in this Court, and during this review application, the current Attorney General, Hon. Mrs. Marietta Brew Appiah Oppong has taken a stance which we consider as very principled and worthy of commendation. The position taken by the first Defendant/Respondent is that of acceptance and avoidance".*

Just as in the two authorities cited above Counsel for Respondent conceded and made this profound statement at page 9 of her Written Submission worthy for quoting "*If the trial judge had followed the procedure in determining the age of the Appellant she would have been able to determine whether or not the Appellant was a juvenile and remit him to a Court clothed with jurisdiction to try him. This breach of a fundamental procedure occasioned a travesty of justice."*

CONCLUSION

I have indicated above the non-compliance in respect of the procedure by the prosecution in this case when the trial failed to conduct an enquiry into

the age of the Appellant when the facts state his age as 17 years and after conviction he stated his age as 19years. Such non-compliance is fundamental and goes to the root of the matter as to the jurisdiction of the Court.

It is also a point of law which can even be raised by the Court itself or the Prosecution when the Appellant was unrepresented for such serious crime. This can be used to dispose the appeal without going through the entire proceedings since it borders on the jurisdiction of the Court to hear the case.

See: **Attorney General Vrs. Faroe Atlantic Co. Ltd. [2005-2006] SCGLR 271**

The law has also been settled by several authorities that where the rules of Court or procedure has prescribed a particular mode of seeking relief or particular mode of invoking the jurisdiction of the Court, failure to follow the procedure to initiate or conduct the proceedings in accordance with the prescribed mode is not only an irregularly but raises an issue that goes to the jurisdiction of the Court.

See: **Edusei (No. 2) Vrs. Attorney General (supra)**

Boyefio Vrs. Nthc Properties Ltd. [1996-97] SCGLR 531

Republic Vrs. Chraj Ex Parte Richard Anane [2007-2008] SCGLR 340.

For the above reasons, I am of the view that the conviction of the Appellant by the Circuit Court 1 Cape Coast has occasioned substantial miscarriage of justice under Section 31 of the Courts Act, 1993 (Act 459) and same must be set aside which I hereby set same aside.

Section 31 (1) of Act 459 provides *"subject to subsection (2) of this section an appellate Court on hearing any appeal before it in a criminal case shall allow the appeal if it considers that the verdict or conviction or acquittal ought to be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment in*

question ought to be set aside on the ground of a wrong decision of any question of law or fact or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal."

What amount to miscarriage of justice has been defined as follows *"…to deprive an accused person of the protection given by essential steps in criminal procedure amount to a miscarriage of justice and leaves the Court no option but to quash the conviction".*

See: **Agbettoh Vrs. Commissioner Of Police (1963)2 GLR 413 SC.**

Under Section 30 (a) (i) of Act 459, an Appellate Court has power to order for a retrial after a conviction or acquittal has been set aside. In this case, the Appellant has been in prison custody since 7th October 2020. The question which therefore needs to be answered is, whether it will be fair, just, and also be in consonance with equity and good conscience to order for the retrial of the Appellant.

Having combed the entire criminal justice system in this country for an answer, the case of **Kwaku Vrs. The Republic [1978] GLR 279** is

instructive. It was held in holding 3 as follows *"A retrial must be ordered only if the appellant suffered no punishment between the date of conviction and the determination of his appeal. But where as in this case, the appellant had suffered punishment by serving a portion of the sentence imposed by the Trial Court, it would be unjust in the circumstances to order for retrial".*

This is good law and though a High Court decision is not binding on me, I rely on **Kwaku Vrs. The Republic (supra)** and affirm it in this judgment. See also, **Forson Vrs. The Republic [1976] GLR 138**

I conclude my delivery with seasoned words of Dotse JSC in the case of **Mass Projects Ltd. Vrs. Standard Charted Bank & Anor. [2014] 69 GMJ 39 SC** at page 62 where he stated *"if the people of Ghana from whom justice emanates and is only administered on their behalf by the judiciary, by reference to Article 125 (1) of the*

Constitution 1992, cannot have justice in the law Courts, then people might lose confidence in the Courts or the judiciary, and thereby be tempted to take the law into their own hands. If this happens, then it may be a recipe for chaos, disaster, and confusion. The Courts do exist to stem the tide against people taking the law into their own hands".

I am emboldened by the analysis the above discussions to uphold the appeal which I hereby do. The appeal therefore succeeds in its entirety and the Appellant is acquitted and discharged.

(SGD)
JOHN-MARK NUKU ALIFO 'J'.
HIGH COURT JUDGE
CAPE COAST