

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL CASE No. 0131 OF 2016

UGANDA **PROSECUTOR**

VERSUS

ANDAMA SWALE **ACCUSED**

Before Hon. Justice Stephen Mubiru

SENTENCE AND REASONS FOR SENTENCE

The convict was indicted for the offence of Aggravated defilement c/s 129 (3) and (4) (c) of the *Penal Code Act*. The particulars of the indictment stated that on the 9th day of October 2015 at Rimbe Trading Centre in Yumbe District, he had unlawful sexual intercourse with a one Anifa Sida, a girl below the age of 18 years, while being a person in authority over her.

The convict appeared before this court on 30th November 2016, where his counsel on private brief, Mr. Ben Ikilai, informed court that he had successfully concluded a plea bargain with the prosecution. The court then allowed the State Attorney, Mr. Emmanuel Pirimba, to introduce the plea agreement. The court proceeded to ascertain that the convict had a full understanding of what the bargain meant and its consequences, the voluntariness of his consent to the bargain and appreciation of its implication in terms of waiver of some of his fundamental constitutional trial rights specified in the first section of the plea agreement. The Court being satisfied that there was a factual basis for the plea, and having made the finding that the convict made a knowing, voluntary, and intelligent plea bargain, and after he had executed a confirmation of the agreement, went ahead to receive the agreement to form part of the record.

The court then took his plea to the indictment whereupon a plea of guilty was entered. The court then invited the learned State Attorney to provide court with the factual basis for the guilty plea, whereupon he narrated the following facts; the accused was a teacher at teacher at Alaba Primary School in Yumbe where the victim was a pupil in primary six. On 9th October 2015,

Independence day, at around 8.00 pm, the accused met the victim at Rimbe Trading Centre whereupon he dragged her into a nearby bush and proceeded to have sexual intercourse with her. Before that date, the accused had attempted to entice the victim into a love relationship which advances she rebuffed.

Following the sexual intercourse, the victim returned home but did not inform anyone about the defilement. When it was later discovered that she was pregnant, she was asked who was responsible for the pregnancy and she revealed it was the accused. The case was reported to the police, the accused was arrested and he together with the victim was subjected to medical examination. The accused was found to be of sound mind and of the apparent age of 23 years and the victim was found to have been 17 years old and pregnant. Both medical forms Police Forms 3 and 24 were submitted to court as part of the facts. The accused recorded a statement at the police where he admitted having committed the offence. The charge and caution statement too was submitted as part of the facts.

Upon ascertaining from the accused that the facts as stated were correct, he was convicted on his own plea of guilty for the offence Aggravated defilement c/s 129 (3) and (4) (c) of the *Penal Code Act*. In justification of the sentence of seven years' suspended sentence proposed in the plea agreement, the learned State Attorney adopted the aggravating factors stipulated in the plea agreement. In his submissions in mitigation of sentence, the learned defence counsel adopted the factors stipulated in the plea agreement and added that the convict is remorseful and has been so right from the time of arrest. In his *allocutus*, the convict prayed for lenience on grounds that he is a student teacher at the National Teacher's College in Arua and is willing to take care of the child, produced as a result of the defilement.

According to section 129 (3), the maximum penalty for the offence of Aggravated Defilement c/s 129 (3) and (4) (c) of the *Penal Code Act*, is death. However, this punishment is by sentencing convention reserved for the most egregious forms of perpetration of the offence such as where it has lethal or other extremely grave consequences. Since in this case death was not a very likely or probable consequence of the act, I have discounted the death sentence.

When imposing a custodial sentence on a person convicted of the offence of Aggravated Defilement c/s 129 (3) and (4) (c) of the *Penal Code Act*, the *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* stipulate under Item 3 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule, that the starting point should be 35 years' imprisonment, which can then be increased on basis of the aggravating factors or reduced on account of the relevant mitigating factors.

Although the manner in which this offence was committed did not create a life threatening situation, in the sense that death was not a very likely immediate consequence of the act such as would have justified the death penalty, they are sufficiently grave to warrant a deterrent custodial sentence. At the time of the offence, the accused was 23 years old and the victim 17 years old. The age difference between the victim and the accused was 6 years. He abused a fiduciary relationship and took advantage of a primary school pupil, turning her into a child mother and causing her to drop out of school.

I have considered the decision in *Kato Sula v Uganda, C.A. Crim. Appeal No 30 of 1999*, where the Court of Appeal upheld a sentence of 8 years' imprisonment for a teacher who defiled a primary two school girl. In *Bashir Ssali v Uganda, S.C. Crim. Appeal No 40 of 2003*, the Supreme Court, on account of the trial Court not having taken into account the time the accused had spent on remand, reduced a sentence of 16 years' imprisonment to 14 years' imprisonment for a teacher who defiled an 8 year old primary three school girl. The girl had sustained quite a big tear between the vagina and the anus. In *Tujunirwe v Uganda, C.A. Crim. Appeal No 26 of 2006*, where the Court of Appeal in its decision of 30th April 2014, upheld a sentence of 16 years' imprisonment for a teacher who defiled a primary three school girl. In light of the sentencing range apparent in those decisions and the aggravating factors mentioned before, I have considered a starting point of fifteen years' imprisonment.

As a general, though not inflexible, rule, a reduction of one third has been held to be an appropriate discount for an accused person who readily pleads guilty at the first opportunity (see: *R v Buffrey (1993) 14 Cr App R (S) 511*). Similarly in *R v Buffrey 14 Cr. App. R (S) 511*, the Court of Appeal in England indicated that while there was no absolute rule as to what the discount should be, as general guidance the Court believed that something of the order of one-

third would be an appropriate discount. In light of the convict's plea of guilty, and persuaded by the English practice, because the convict before me pleaded guilty, I propose at this point to reduce the sentence by one third from the starting point of fifteen years' imprisonment to a period of ten years.

The seriousness of this offence is mitigated by the factors stated in mitigation by his counsel and his own *allocutus*, which are; he is a first offender, he is still a young man and a student teacher capable of reform and becoming a useful member of society, he has his siblings to look after and is willing to take care of the child produced as a result of the offence he committed. The severity of the sentence he deserves has been tempered by those mitigating factors and is reduced from the period of fifteen years, proposed after taking into account the aggravating factors, now to a term of imprisonment of eight years.

It is mandatory under Article 23 (8) of the *Constitution of the Republic of Uganda, 1995* to take into account the period spent on remand while sentencing a accused. Regulation 15 (2) of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, requires the court to "deduct" the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. This requires a mathematical deduction by way of set-off. From the earlier proposed term of eight years' imprisonment, arrived at after consideration of the mitigating factors in favour of the accused, the accused having been charged on 3rd March 2016 and has been in custody since then, I hereby take into account and set off the nine months as the period the accused has already spent on remand. I therefore find the proposed sentence of seven years' imprisonment to be appropriate.

However, it has been proposed in the plea agreement that the sentence be suspended. It is a principle in penology that a court must not impose a sentence that is more severe than is necessary to achieve the purposes of sentencing. The original purpose of suspended sentences was to provide for a more serious punishment than a fine for first-time offenders who were not considered a danger to the community and which would avoid the negative effects of imprisonment. For that reason, the seriousness of some offences (such as crimes involving violence against the person, including sexual assaults) might also be seen as justifying offenders

convicted of these offences serving an immediate term of imprisonment in all cases, or in all but those involving exceptional circumstances.

In considering and making an order to suspend a custodial sentence, circumstances personal to the offender and the objective features of the offence need to be taken into account (see *Dinsdale v R (2000) 202 CLR 321*). A suspended sentence is a sentence of imprisonment imposed on an offender which is not activated immediately. It involves the court imposing a term of imprisonment on a convict and ordering that all or part of the term of imprisonment be held in suspense for a specified period ('the operational period'). The term of imprisonment may be either wholly suspended, in which case the offender does not serve any additional time in prison and is released into the community, or partially suspended, in which case the offender serves part of the sentence in prison and is then released into the community.

The only condition of a suspended sentence order is that the convict does not commit another offence, which is punishable by imprisonment during the operational period of the order. The offence does not need to be the same type of offence that the convict received the suspended sentence for. A convict upon whom a suspended term of imprisonment is imposed will have the imprisonment reinstated if he or she commits another offence during the operational period. However, provided the offender does not commit an offence during the operational period, there are no restrictions placed on his or her time or resources after sentencing. For this reason while a suspended sentence is treated at law as a harsher punishment than non-custodial orders, such as community-based orders and fines, it may be seen as less punitive. An offender who receives a suspended sentence is often seen as having escaped the punishment that he or she deserves for committing the offence, and as being treated much more leniently than others convicted of similar offences but ordered to immediately serve their sentence in prison.

However it could be argued that in some cases providing for an offender's rehabilitation and discouraging him or her from committing further offences may be more important considerations than making the punishment fit the gravity of the offence. One of the perceived advantages of a suspended sentence is its potential for special deterrence because the consequences of committing another offence are known to the convict and are certain.

Suspended sentences allow the court to recognise the seriousness of the offence and denounce the convict's behaviour by imposing a prison term; yet enable the court at the same time to respond to the individual circumstances of the convict. There are a number of factors that may cause a court to decide that a suspended sentence is desirable. These include factors such as an convict's good prospects of rehabilitation, the convict's personal circumstances, such as the possible adverse effects of an immediate sentence of imprisonment on the convict's family, and others. The factors leading to a decision to suspend will vary depending on the nature of the offence committed, and the individual circumstances of the convict.

In the instant case, being a convicted sexual offender is a significantly grave and disadvantageous situation for the future career of the convict as a school teacher. His conduct though from the moment of arrest up to the time of conviction is demonstrative of a remorseful person. At the police station, in his charge and caution statement, he readily admitted the offence. He did not wait for his case to be tried in the usual criminal sessions of this court but through his advocate immediately sought for an opportunity to be indicted and plead guilty to the indictment. He did this despite the fact that there were overtures, as intimated by the State Attorney, from the family of the victim having lost interest who had approached the state with a view to causing a withdrawal of the indictment, hence a real prospect of his prosecution being frustrated. In my view, rather than set free an obviously guilty person in a future criminal session of this court for lack of co-operation by disinterested witnesses, as has happened in a significant number of cases before in this circuit, Justice is better served by an arrangement which denounces the convict's behaviour by imposing a prison term but at the same time allows for his rehabilitation. I therefore consider this to be an exceptional case for the imposition of a partially suspended sentence.

For that reason, I accordingly sentence the convict to seven years' imprisonment. The convict is to immediately serve part of the term imposed by remaining in prison custody until 31st December 2016. The rest of the sentence is suspended for a period of three years, with knowledge of the convict that when he is released into the community, he risks having the rest of the seven year term of imprisonment restored if he commits any offence punishable by a term of imprisonment, during the three-year period ('the operational period').

Having been convicted and sentenced on his own plea of guilty, the convict is advised that he has a right of appeal against the legality and severity of this sentence, within a period of fourteen days.

Dated at Arua this 8th day of December, 2016.

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Stephen Mubiru

Judge.