

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL CASE No. 0186 OF 2014

UGANDA **PROSECUTOR**

VERSUS

AWEKONIMUNGU CHARLES **ACCUSED**

Before: Hon Justice Stephen Mubiru.

SENTENCE AND REASONS FOR SENTENCE

When this case came up on 15th December 2016, for plea taking at the beginning of the criminal session, the accused was indicted with the offence of Aggravated Defilement c/s 129 (3) and 4 (b) of the *Penal Code Act*. It was alleged that during the month of October 2013 at Jupanyondo East village in Zombo District, the accused performed a sexual act with Charity Awekonimungu, a girl aged 16 years, when he was infected with the (HIV) Human Immune Deficiency Virus. When the indictment was read to him, the accused pleaded guilty.

The court then invited the learned State Attorney, Mr. Emmanuel Pirimba, to present the facts of the case, whereupon he narrated the following facts; the victim was 16 years old and a student at Paidha Secondary School. The accused enticed the victim into a love affair during October 2013. Around 30th October 2013, the accused took the victim to his home at Jupanyondo East village within Paidha Town Council and lived with her for one week during which he had sexual intercourse with her frequently. One day the victim's sister visited the home of the accused and upon finding the victim living with the accused, alerted their father who reported the case to the police and the accused was arrested. Shortly thereafter the victim developed several abdominal complications. She was admitted to Paidha Health Centre III and subsequently to Nyapea Hospital in Zombo District. The accused was medically examined and the findings recorded on Police Form 24 A. He was found to be of the apparent age of 20 years and HIV positive. He was of normal mental status. The victim was examined and Nebbi General Hospital and found to be

16 years old. Her hymen was ruptured and the probable cause was male sexual penetration. There were signs of an abortion at four weeks. Both Police Forms 24A and 3a were tendered as part of the facts. The accused having confirmed those facts to be true, he was convicted on his own plea of guilty for the offence of Aggravated Defilement c/s 129 (3) and 4 (b) of the *Penal Code Act*.

Submitting in aggravation of sentence, the learned State attorney stated that; the maximum penalty for the offence is a sentence of death, the victim was a school girl who dropped out of school as a result of the offence, her life was put under threat of death when she undertook an unsafe abortion and at the same time exposed to the risk of contracting HIV. Although the convict is a first offender, incidents of offences of this nature were on the rise and the convict therefore deserves a deterrent sentence.

On his part, Counsel for the accused on State Brief, Mr. Onencan Ronald, prayed for a lenient custodial sentence on grounds that the convict is a first offender who has readily admitted his guilt thereby saving court's time, he is remorseful and did not intentionally expose the victim to HIV since he was unaware of his sero-status before the act. He has been on remand for three years and was only 20 years old at the time he committed the offence. He therefore is still a young man capable of reform and was almost of the same age as the victim for which reasons he deserves a lenient sentence. In his *allocutus*, the convict prayed for a lenient sentence because he is weak. He prayed for a custodial sentence of not more than seven years which he can serve and return to society.

The offence for which the accused was convicted is punishable by the maximum penalty of death as provided for under section 129 (3) of the *Penal Code Act*. However, this represents the maximum sentence which is usually reserved for the worst of the worst cases of Aggravated Defilement. I do not consider this to be a case falling in the category of the most extreme cases of Aggravated Defilement. I have not been presented with any of the extremely grave circumstances specified in Regulation 22 of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* that would justify the imposition of the death penalty.

Death was not a very likely immediate consequence of the offence and I have for that reason discounted the death sentence.

Where the death penalty is not imposed, the next option in terms of gravity of sentence is that of life imprisonment. However, none of the relevant aggravating factors prescribed by Regulation 22 of the Sentencing Guidelines, which would justify the imposition of a sentence of life imprisonment, are applicable to this case. They include; where the victim was defiled repeatedly by the offender or by an offender knowing or having reasonable cause to believe that he or she has acquired HIV/AIDS, or resulting in serious injury, or by an offender previously convicted of the same crime, and so on. In the case before me, although the accused was HIV positive at the time he committed the offence, there is no evidence to suggest that he knew at the time or had reasonable cause to believe that he had acquired HIV/AIDS. Similarly, the sentence of life imprisonment too is discounted.

Although the circumstances did not create a life threatening situation, in the sense that death was not a very likely immediate consequence of the action such as would have justified the death penalty or a sentence of life imprisonment, they are sufficiently grave to warrant a deterrent custodial sentence. The starting point in the determination of a custodial sentence for offences of Aggravated defilement has been prescribed by Regulation 33 to 36 and Item 3 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* as 35 years' imprisonment. According to *Ninsiima v Uganda Crim. Appeal No. 180 of 2010*, these guidelines have to be applied taking into account past precedents of Court, decisions where the facts have a resemblance to the case under trial. A Judge can in some circumstances depart from the sentencing guidelines but is under a duty to explain reasons for doing so.

Since in sentencing the convict, I must take into account and seek guidance from current sentencing practices in relation to cases of this nature, I have considered the case of *Agaba Job v Uganda C.A. Cr. Appeal No. 230 of 2003* where the court of appeal in its judgment of 8th February 2006 upheld a sentence of 10 years' imprisonment in respect of an appellant who was convicted on his own plea of guilty upon an indictment of defilement of a six year old girl. In the

case of *Lubanga v Uganda C.A. Cr. Appeal NO. 124 of 2009*, in its judgment of 1st April 2014, the court of appeal upheld a 15 year term of imprisonment for a convict who had pleaded guilty to an indictment of aggravated defilement of a one year old girl. In another case, *Abot Richard v Uganda C.A. Crim. Appeal No. 190 of 2004*, in its judgment of 6th February 2006, the Court of Appeal upheld a sentence of 8 years' imprisonment for an appellant who was convicted of the offence defilement of a 13 year old girl but had spent three years on remand before sentence. In *Lukwago v Uganda C.A. Crim. Appeal No. 36 of 2010* the Court of appeal in its judgment of 6th July 2014 upheld a sentence of 13 years' imprisonment for an appellant convicted on his own plea of guilty for the offence of aggravated defilement of a thirteen year old girl. Lastly, *Ongodia Elungat John Michael v Uganda C.A. Cr. Appeal No. 06 of 2002* where a sentence 5 years' imprisonment was meted out to 29 year old accused, who had spent two years on remand, for defiling and impregnating a fifteen year old school girl.

I have considered the aggravating factors in this case being; the fact he enticed the victim out of school, repeatedly defiled the victim over a period of one week, the victim conceived and undertook an unsafe abortion resulting into abdominal complications by reason of which she was admitted to hospital. An offender who commits an offence in such circumstances and causing such repercussions deserves a deterrent punishment. Accordingly, in light of those aggravating factors, I have adopted a starting point of thirty years' imprisonment

From this, the convict is entitled to a discount for having pleaded guilty. The practice of taking guilty pleas into consideration is a long standing convention which now has a near statutory footing by virtue of regulation 21 (k) of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*. As a general principle (rather than a matter of law though) an offender who pleads guilty may expect some credit in the form of a discount in sentence. The requirement in the guidelines for considering a plea of guilty as a mitigating factor is a mere guide and does not confer a statutory right to a discount which, for all intents and purposes, remains a matter for the court's discretion. However, where a judge takes a plea of guilty into account, it is important that he or she says he or she has done so (see *R v Fearon [1996] 2 Cr. App. R (S) 25 CA*). In this case therefore I have taken into account the fact that the convict readily pleaded guilty, as one of the factors mitigating his sentence.

The sentencing guidelines leave discretion to the Judge to determine the degree to which a sentence will be discounted by a plea of guilty. As a general, though not inflexible, rule, a reduction of one third has been held to be an appropriate discount (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 thirty years to a period of twenty years' imprisonment.

The seriousness of this offence is mitigated by a number of factors. In my view, the fact that the convict is a first offender and a relatively young person at the age of twenty three years, with the age difference between him and the victim being only four years, he deserves more of a rehabilitative than a deterrent sentence. The severity of the sentence he deserves for those reasons has been tempered and is reduced further from the period of twenty years, proposed after taking into account his plea of guilty, now to a term of imprisonment of seventeen 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 17 (seventeen) years' imprisonment arrived at after consideration of the mitigating factors in favour of the convict, he having been charged on 22nd November 2013 and has been in custody since then, I hereby take into account and set off the three years and one month as the period the accused has already spent on remand. I therefore sentence the accused to thirteen (13) years and eleven (11) months' imprisonment, to be served starting today.

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 23rd day of December, 2016.

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Stephen Mubiru

Judge.