THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL CASE No. 0140 OF 2016

UGANDA ……..…….…… PROSECUTOR

VERSUS

ODIPIO BOSCO alias PAULO ……..…… 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 as a juvenile with the offence of Aggravated Defilement c/s 129 (3) and 4 (d) of the *Penal Code Act*. It was alleged that on 18th May 2016 at Ariko "A" village in Arua District, he had unlawful sexual intercourse with Oguaru Sharon, a girl under the age of 18 years while knowing that she was mentally unsound. When the Court conducted an age assessment within the provisions of section 107 of the Children Act, the available medical and other evidence was inconclusive. The court therefore directed that the accused be subjected to another medical examination whose results were presented on 20th December 2016, certifying that he was above the age of 18 years old. The court then proceeded to read and explain to him the indictment in the Lugbara language. He pleaded guilty to the indictment.

The court then invited the learned State Attorney, Mr. Emmanuel Pirimba, to present the facts of the case, whereupon he narrated the following facts; at the time of commission of the offence, the complainant and the accused were resident on the same village in Ariko "A" village in Arua District. The victim was 15 years old and of unsound mind. She was living with her mother. On 18th May 2016, the victim was left at home while her mother went to a quarry site. In her absence, the accused came and led the victim to a eucalyptus plantation where he had sexual intercourse with her. On 20th May 2016, while washing her private parts, the mother noticed a slippery substance coming for her private parts and became suspicious. Upon asking the Victim,

she implicated the accused as the person who had had sexual intercourse with her, the day the mother had gone to the quarry site and that the act had taken place in the eucalyptus plantation. The victim's mother was informed who in turn reported to the area L.C.1. who mobilized all the youth on the village including the accused. The victim was asked to identify her assailant and she identified the accused. The case was reported to Arua Police Station. Both the accused and the victim were medically examined at the Arua Police Health Centre III and the corresponding police forms were submitted as part of the facts. The accused was found to be of normal mental status and of the apparent age of 18 years. The victim was found to be of 14 to 15 years old. She was mentally unsound with brain damage sustained at the age of one year as a result of cerebral malaria. The victim led the police, L.Cs and her parents to the scene of crime in the eucalyptus plantation. The accused was accordingly charged. 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 (d) 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. 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. He should have protected the victim rather than abused her sexually.

On her part, Counsel for the accused on State Brief, Ms. Winifred Adukule, prayed for a lenient custodial sentence on grounds that the convict is a first offender, remorseful and has been on remand for seven months. At the age of 18 years, he is still a young man capable of reform and was only three years older than the victim for which reasons he deserves a lenient sentence. In his *allocutus*, the convict prayed for a lenient sentence because would like to return to school where he was at the level of primary six.

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. Only one aggravating factor prescribed by Regulation 22 of the Sentencing Guidelines, which would justify the imposition of a sentence of life imprisonment, is applicable to this case, i.e. the victim being mentally challenged. However, for reasons stated later in this sentencing order, I do not consider the sentence of life imprisonment to be appropriate in this case.

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 *Ninsiima v Uganda Crim. Appeal No. 180 of 2010*, where in its judgment of 18th day of December 2014, the Court of Appeal reduced a sentence of 30 years' imprisonment for aggravated defilement of an 8 year old girl, contrary to Sections 129 (3) (4) (a), to a sentence of 15 years' imprisonment. The reasons given were that the sentence was manifestly harsh and excessive considering that the appellant was aged 29 years, a first offender, had spent 3 years and 4 months on remand, a

person with family responsibilities and with dependants to support. In in *Babua v Uganda, C.A Crim. Appeal No. 303 of 2010,* a sentence of life imprisonment was substituted with one of 18 years' imprisonment on appeal by reason of failure by the trial Judge to take into account the period of 13 months the appellant had spent on remand and the fact that the appellant was a first offender. The Court of Appeal however took into account the fact that the appellant was a husband to the victim's aunt and a teacher who ought to have protected the 12 year old victim.

In another case, *Owinji v Uganda C.A. Crim. Appeal No. 106 of 2013,* in its judgment of 7th June 2016, the Court of Appeal reduced a 45 year term of imprisonment to 17 years' imprisonment. In sentencing the appellant the trial Judge considered the fact that the appellant was a first offender and that he had spent 3 ½ years on remand. These were the only mitigating factors he considered. As to the aggravating factors, the trial Judge found the appellant to have used threats and violence against the victim, he was a relative to the victim, there was an age difference of 25 years between the appellant's age of 37 years and the victim's tender age of 12 years. The trial Judge found no remorsefulness in the appellant. Subjecting the sentencing proceedings to fresh scrutiny, the Court of Appeal was of the view that the youthful age of the appellant, thus the possibility that he can reform in future, his being an orphan with a family of seven children whom he supports, should have been considered as mitigating factors in favour of the appellant. It was further of the view on the aggravating side, the trial Judge should also have considered the degree of injury physical and otherwise, that the victim suffered and the degree of pre-meditation that the appellant employed so as to ravish the victim. Having considered the law and past Court precedents, it came to the conclusion that the sentence of 45 years imprisonment was too harsh and excessive. It set aside the sentence of 45 years imprisonment and substituted it with one of seventeen years' imprisonment.

I note that the sentences above were meted out after a full trial, and may not be directly applicable to the one before me where the accused pleaded guilty. I however have considered the aggravating factor in this case being the fact the accused took advantage of a mentally challenged victim. Accordingly, in light of that aggravating factor, I have adopted a starting point of fifteen (15) 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 fifteen years to a period of ten 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 eighteen years, with the age difference between him and the victim being only three 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 ten years, proposed after taking into account his plea of guilty, now to a term of imprisonment of five 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 an 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 5 (five) years' imprisonment arrived at after consideration of the mitigating factors in favour of the convict, he having been charged on 31st May 2016 and has been in custody since then, I hereby take into account and set off six months as the period the accused has already spent on remand. I therefore sentence the accused to four (4) years and six (6) 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.

……..
Stephen Mubiru
Judge.