THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL CASE No. 0056 OF 2012

UGANDA ……..…….…… PROSECUTOR

VERSUS

OLEGO BUTIGA MOHAMED ……...… ACCUSED

Before: Hon Justice Stephen Mubiru.

SENTENCE AND REASONS FOR SENTENCE

This case first came up for plea taking on 15th July 2016, when the accused pleaded not guilty to the indictment and the case was set down for the commencement of hearing on 8th August 2016. On that day, the accused and his counsel on state brief, Ms. Olive Ederu indicated to court that the accused intended to enter into a plea bargain. The learned State Attorney prosecuting the case, Ms. Jamilar Faidha had no objection to entering into negotiations for a plea bargain with the accused. The court adjourned to 9th August 2016 but by then the negotiations had not started yet. The case was then adjourned to 10th August 2016 but because of the busy court schedule that day, the case was adjourned further to 11th August 2016.

On that date, the parties reported they had successfully negotiated a plea bargain. The court then allowed the learned State Attorney to introduce the plea agreement and proceeded to ascertain that the accused had a full understanding of what the guilty plea meant and its consequences, the voluntariness of the accused's 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 accused 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 accused was then allowed to take plea afresh 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; on the 1st June 2011, at around 12.00 pm, the victim Fika Zarika who used to stay with her grandfather at Banika village, Keragi Parish, Apo sub-county in Yumbe District was sent by her grandfather Draigi Yusuf to take his phone for charging at Kerali Trading Centre. On her way to the trading centre, she met the accused who offered to give her a lift on his bicycle. On the way home, the accused diverted from the road and rode to Ochongodi village, a neighbouring village to Banika village. On reaching a deserted place, the accused disembarked from the bicycle and pulled the victim into the bush near a mango tree where he had sexual intercourse with her.

Immediately after the sexual intercourse, the two came out of the bush and met a one Swadik Farajala and another and Ayimani who asked them what they had been doing in the bush. The accused fled from the scene on his bicycle and left the victim narrating her ordeal to the two. They handed the victim over to the L.C.1 Chairman who in turn informed the victim's father of what had happened to her daughter. The youth of the area searched for and arrested the accused. He was kept overnight at the house of the L.C.1 Chairman to save him from a mob which wanted to lynch him. The following day he was rescued by the police from Kuru police post who took him to Yumbe Police Station. Both the accused and the victim were medically examined on Police Form 3 and 24 respectively. Both documents were submitted as part of the facts. The victim was found to be 13 years old and her hymen had been ruptured. The accused was found to be 99 years old and was of normal mental status. He was charged with Aggravated Defilement.

Upon ascertaining from the accused that the facts as stated were correct, he was convicted on his own plea of guilty for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*. In justification of the sentence of two years' imprisonment proposed in the plea agreement, the learned State Attorney adopted the aggravating factors stipulated in the plea agreement and added that the victim had suffered psychological torture. To date, she continues to be a subject of taunts from her peers and other members of her local community for having sexual intercourse with a very old man. She has dropped out of school in primary seven and had

relocated from her father's village to that of her mother, to allow the taunts to die down. In her submissions in mitigation of sentence, the learned defence counsel adopted the factors stipulated in the plea agreement and only emphasized that the convict is over 100 years old.

In his *allocutus*, the convict pleaded for lenience since he is 104 years old. He does not have a wife at home yet he was looking after his grandchildren by selling off parts of his land. They had dropped out of school since his incarceration and their fathers, his sons, had migrated to South Sudan in search of employment where they are exposed to the risk of death due to the insecurity in that country. He prayed to be released so that he can see his family again and that his survival in prison to-date has been by the grace of the Officer in Charge of the prison. He vowed not to commit similar acts if released since he had learnt his lesson.

I have reviewed the proposed sentence of two years' imprisonment in light of the *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013.* I have also reviewed current sentencing practices for offences of this nature.

I am faced with the singular duty of determining an appropriate sentence for an extremely old man who committed an equally grave offence. The convict before me, at the age of 104, could easily be the oldest convict ever to be sentenced by any court in Uganda. He could easily be the oldest prisoner in Uganda at the moment. I have not found any precedent of aggravated defilement decided before, where the age difference between the victim and the offender was 86 years. This is indeed a very peculiar case whose sentence must be determined on the basis of its very peculiar facts, since very little guidance can be found in existing sentencing precedents.

I take cognizance of some of the aggravating factors stipulated by Regulation 35 of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013,* that are relevant to this case which include; the fact that the convict committed the offence with a degree of pre-meditation and careful planning and deceit, he had knowledge of the tender age of the victim, he practically defiled his great, great granddaughter. I have also considered the wide age difference between the convict and the victim. I have taken into account the fact that the offence had a devastating psychological impact on the victim who as a result dropped out of school and had to relocate to another village to escape the constant ridicule and public odium.

The manner in which the offence was committed though involved no immediate threat of death or similar grave consequence. Although the maximum sentence for the offence is death, I have not found any circumstances that would justify the death penalty.

In imposing a custodial sentence, Item 3 of Part I of *The* Constitution *(Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013,* prescribes a base point of 35 years' imprisonment. This can be raised on account of the aggravating factors or lowered on basis of the mitigating factors. Regulation 36 of the Guidelines provides for factors which mitigate the offence of aggravated defilement and the relevant ones to this case include; remorsefulness of the offender, the fact that he is a first offender with no previous conviction or no relevant or recent conviction, and his plea of guilty. I am of the considered view that the Sentencing Guidelines do not displace the traditional role of the trial court in bringing compassion and common sense to the sentencing process. Especially in areas where the Sentencing Guidelines are silent, a trial court should not hesitate to use its discretion in devising sentences that provide individualized justice, since it is a cardinal principle of penology that the punishment should not only fit the crime but also the offender.

Since the length of a prison sentence tends to reflect the seriousness of the crime, in light of the aggravating factors in this case one would be justified to propose a long term of imprisonment for the convict. However, whereas younger offenders may reasonably look forward to release after a long term of imprisonment, a high proportion of persons above seventy years subjected to a long custodial sentence may reasonably expect to die before completing their sentence. A relatively long prison sentence is a more severe punishment for someone who is already in their 60s or 70s than for someone in their 20s or 30s. To a person above 70 years, a long custodial sentence could easily be tantamount to a sentence of death. Therefore, given two offenders who are just as likely to reoffend and two offences of the same degree of seriousness, age (or rather, life expectancy) should make a difference. This explains why there is no age neutrality in Uganda's penal system. It flows from the basic precept of justice that punishment for crime should be graduated and proportioned.

On the other hand, beyond the age 70 years, there is a greatly increased likelihood that individuals will have special health and social care needs arising out of physical and / or mental infirmity. Prisons have traditionally been designed for able-bodied people. The values of the

prisoners' social world set a premium on physical strength and endurance, so physical decline creates a heightened sense of vulnerability for a senior prisoner. Age, as well as significant mental or physical ill health, is cited as a possible public interest factor against long custodial sentences for senior citizens. Therefore there is a natural judicial tendency to treat the older person with mercy and leniency. It seems to be based largely on the belief that a certain class of mental health problems (e.g. dementia rather than anti-social personality disorder) is often an important contributory factor in the offending among persons of that age bracket. Age also diminishes the prisoner's ability to cope with the hostility and aggression that characterises much of the behaviour of younger prisoners. Older prisoners tend to have less social support on release than younger prisoners. All these factors combined, a long custodial sentence may have devastating effects on an old convict. No wonder the convict before me attributes his survival this long in prison, to the mercy of the Officer in Charge of the prison.

Despite the natural judicial tendency to treat the older person with mercy and leniency, this tendency has to be balanced against the seriousness of the offence, the risk of re-offending and the previous criminal record of the convict. In my view, physically infirm older offenders, like the one before me, do not represent a very serious threat to society; older offenders released from prison are less likely to reoffend than younger offenders. Recidivism rates among adults tend to be lower in each succeeding age group, and the older someone is at his or her first offence, the less likely that person is to commit repeat offences.

I take cognizance of the fact that the convict before me became a first offender at the age of 99 years. At the risk of sounding sarcastic, in a sense he is the victim of his longevity. He has committed his first offence long after probably all his peers are long dead. What would be the point in imprisoning such an offender who only lives as an anachronistic survivor of his age? A penal system that imprisons such a convict runs the danger of being perceived as ridiculous. It may well be that this offence is a manifestation of the fact that due to his extremely old age, the convict has developed predatory sexual tendencies involving children. However, in absence of a psychiatric report and without evidence of any history of sex offenses involving children, I give the convict the benefit of the doubt that he does not pose a serious risk of predatory sexual violence and therefore is unlikely to re-offend.

Lastly, in a way, extreme old age is a descent into a "second childhood." By analogy, the juvenile penal system does not permit a custodial sentence beyond the period of three years. It is

my view that the courts would do well to treat persons of extreme advanced age, like the convict before me, in similar fashion. The convict has been on remand since 6th June 2011, a period of five years and two months. The sentence he deserves should be sufficient but not greater than necessary to meet the aims of punishment. This is a convict for whom the mere social stigma attached to being a convicted sexual offender, would in my view constitute sufficient punishment. I have also considered Regulation 9 (4) (a) of *The* Constitution *(Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013,* which provides that; "The court may not sentence an offender to a custodial sentence where the offender, is of advanced age." Advanced age for purposes of the guidelines is 75 years.

For the reasons explained above, I reject the term of two years' imprisonment suggested in the plea agreement. I am inclined instead to exercise my discretion not to subject the convict before me to any term of imprisonment. In absence any medical and psychiatric assessment of the convict, I am unable to determine an alternative punishment for him. In my view, that he has been in custody since 6th June 2011, a period of five years and two months, coupled with the social stigma attached to being a convicted sexual offender at his age of 104 years, is punishment enough. I therefore sentence him to "the rising of this court." He is to be set free thereafter unless he is being held for other lawful reason.

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 12th day of August, 2016.

Stephen Mubiru

Judge.