

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**

**CRIMINAL CASE No. 0020 OF 2013**

**UGANDA ..... PROSECUTOR**

**VERSUS**

**KIWALABYE MOHAMMED ..... ACCUSED**

**Before: Hon Justice Stephen Mubiru.**

**SENTENCE AND REASONS FOR SENTENCE**

This case first came up for plea taking on 15<sup>th</sup> July 2016, when the accused pleaded not guilty to the indictment and the case was set down for the commencement of hearing on 19<sup>th</sup> July 2016. On that day, hearing of the case commenced with receipt of the admitted evidence of PW1 Dr. Asea Sam and thereafter the testimony of PW2 Hadijah Noah the victim of the offence, and PW3 Bayo Mubarak a maternal uncle of the victim. Further hearing of the case continued on 22<sup>nd</sup> July 2016 with the testimony of PW4 No. 31186 D/CPL Opio Neri, the investigating officer. It was then adjourned to 26<sup>th</sup> July 2016 for further hearing.

On that day, the accused and his counsel on state brief, Ms. Olive Ederu indicated to court that the accused intended to change his plea from not guilty to guilty under a plea bargain. The learned State Attorney prosecuting the case, Ms. Harriet Adubango, Senior Resident State Attorney, had no objection to entering into negotiations for a plea bargain with the accused. Despite this intimation having come deep into the hearing of the case, the court was cognizant of the principle that an accused is at liberty to change his or her plea at any time before sentence. Therefore there was no harm in allowing that change of plea coming through a plea bargain. The case was then adjourned to 2<sup>nd</sup> August 2016 to enable the parties report to court the progress of the plea bargain.

When the case was called 2<sup>nd</sup> August 2016, the parties reported they had successfully negotiated a plea bargain. The court then allowed the learned Senior State Attorney to introduce the plea agreement and proceeded to ascertain that the accused had a full understanding of what a guilty plea means and its consequences, the voluntariness of the accused's consent to the bargain and appreciation of its implication in terms of waiver of the constitutional 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 inform court the factual basis for the guilty plea, whereupon he narrated the following facts; the accused was a tenant on a commercial building owned by the mother of the victim. The victim and her mother lived in the neighbourhood. During March 2011, the accused enticed the victim into an affair. He then proceeded to have sexual intercourse with her as a result of which the victim conceived. In June 2011, the parents of the victim got to know that she was pregnant. She was taken to hospital where the doctors demanded for police Form 3. The matter thus was reported to the police and the accused was arrested and charged. On being examined, the victim was found to be 15 years old. The accused was examined on PF 24A and found to be 26 years old and of sound mind. On 13<sup>th</sup> July 2011 the accused was tested for HIV at the Arua Regional Referral Hospital and was found to be HIV positive. Both police forms 24A and the Client's slip for the HIV test were tendered 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 of defilement c/s 129 (3) and (4) (b) of the Penal Code Act. In justification of the sentence of five years' imprisonment proposed in the plea agreement, the learned Senior State Attorney argued that the offence attracts a maximum sentence of death, the accused took advantage of the naivety of the victim and introduced her to sexual intercourse at a

very tender age. As a result, the victim became a mother while still a child herself. She prayed for a deterrent custodial sentence since such offences are rampant in the region.

In her submissions in mitigation of sentence, the learned defence counsel argued that the accused was a first offender, is now aged 31 years and is remorseful. That he had readily pleaded guilty, and he did not infect the victim and the child both of whom are HIV negative. The victim now has a child of school going age who needs the support of his father, the accused. The victim and her relatives forgave the accused and since he is remorseful, the duration of the sentence should enable him to return to society and take care of his child. She prayed for a lenient sentence.

In his *allocutus*, the convict pleaded for forgiveness. He said he had spent five years on remand, and being a first offender with a child and another family to look after, he prayed for a lenient sentence to enable him return to society and be able to look after his family and the child he now has with the victim of the offence. He stated that he had readily admitted having committed the offence right from the time of his arrest and had he been tried immediately, he probably would have served his sentence by now. He said he was well behaved in prison, has had several attacks of asthma in prison where medical attention is not readily accessible and that would never commit similar offences again. Since he had been forgiven by the family, he prayed for mercy from court as well.

The victim was not available in court to make her victim impact statement. Her maternal aunt, Ajio Safia explained that the victim is an orphan and that victim's extended family is facing in considerable hardship in providing for the child, the issue of this offence. She prayed that the court releases the accused so that he can look after his child.

The determination of appropriate punishment after the conviction of an offender is often a question of great difficulty and always requires careful consideration. The law prescribes the nature and the limit of the punishment permissible for an offence, but the Court has to determine in each case a sentence suited to the offence and the offender. The maximum punishment prescribed by the law for any offence is intended for the gravest of its kind and it is rarely necessary in practice to go up to the maximum. I do not consider this to be a case that involves

exceptional depravity and I for that reason fully appreciate the reason why the plea bargain agreement would discount the death penalty.

I have reviewed the proposed sentence of five 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. In this regard, 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 8<sup>th</sup> 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 1<sup>st</sup> 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 6<sup>th</sup> 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 6<sup>th</sup> 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, in *Ongodia Elungat John Michael v Uganda C.A. Cr. Appeal No. 06 of 2002* in its judgment of 6<sup>th</sup> February 2006, the court of Appeal upheld a sentence 5 years' imprisonment for the offence of defilement of a fifteen year old school girl by the 29 year old appellant. In that case, the appellant was a special hire taxi driver. On 24<sup>th</sup> September 2001 he was hired by the victim's mother to take them to Rubaga Girls' School. While the victim's mother and her brother were in the headmaster's officer the appellant and the victim struck a friendship. The victim got the appellant's telephone number. On 26<sup>th</sup> September 2001, by prior arrangement the appellant took the victim to a lodge at Nakulabye where he defiled her. She became pregnant and the victim's mother learnt that it was the appellant who was responsible for the pregnancy. On his arrest the appellant readily admitted the offence. He was indicted for defilement and pleaded guilty. He was sentenced to 5 years' imprisonment

In none of the cases I have cited above was an accused convicted and sentenced for Aggravated Defilement where the aggravating factor was that of being HIV positive at the time of the offence. The case whose facts bear the closest similarity to the one now before court is that of *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.

The measure of punishment in any particular instance depends upon a variety of considerations such as the motive for the crime, its gravity, the character of the offender, his age, antecedents and other extenuating or aggravating circumstances, such as sudden temptation, previous convictions, and so forth, which have all to be carefully weighed by the Court in passing the sentence. In matters of punishment for offences committed by a person, there are many approaches to the problem. On one hand is the traditional reaction of universal nature, which is the punitive approach. It regards the criminal as a notoriously dangerous person who must be subjected to severe punishment to protect the society. The other approach is the therapeutic approach. It regards the criminal as a sick person requiring treatment and reform. While the third is the preventive approach which seeks to eliminate those conditions from society which were responsible for causation of the crime.

Under the punitive approach, the rationalization of punishment is based upon retributive and utilitarian theories. Deterrent theory which is also part of the punitive approach proceeds on the basis that the punishment should act as a deterrent not only to the offender but also to others in the community. It is true that sentences which are disproportionately severe should not be passed but that does not mean that the courts should mete out sentences manifestly inadequate since inadequate sentences would fail to produce a deterrent effect on the society at large. Though undue harshness is not required but inadequate punishment may lead to suffering of the community at large.

In this case, I have decided to take the humanist principle of individualizing punishment to suit the person and his circumstances. I have considered the aggravating and mitigating factors

outlined in the plea agreement. I take exception to the fact that the accused before me selfishly exposed an innocent underage girl to a very serious risk of exposure to HIV. It is by sheer luck that she did not contract the disease. She became a mother while still a child herself.

Although the victim and her family have forgiven the accused, he appears remorseful and there is a significant risk of double victimization of the victim in this case, by virtue of incarcerating the father of her child, thereby denying the victim and her child paternal support, yet these are not proper justifications for a sentence that is manifestly inadequate. I therefore decline to release the accused as prayed by the victims by considering the period of remand as adequate punishment. Such a sentence would fail to produce a deterrent effect on the society at large.

Having considered the sentencing guidelines and the current sentencing practice in relation to offences of this nature, and the fact that the convict has already spent five years on remand, I hereby accept the submitted plea agreement entered into by the accused, his counsel, and the Senior Resident State Attorney and in accordance thereto, sentence the accused to a term of imprisonment of five (5) years, to be served starting from 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 2<sup>nd</sup> day of August, 2016.

Stephen Mubiru

Judge.