

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL CASE No. 0026 OF 2014

UGANDA **PROSECUTOR**

VERSUS

ACEMA RICHARD **ACCUSED**

Before: Hon Justice Stephen Mubiru.

SENTENCE AND REASONS FOR SENTENCE

The convict was indicted with one count of Aggravated Defilement c/s 129 (3) and 4 (a) of the *Penal Code Act*. When he appeared for plea taking before this court on 15th July 2016, he pleaded not guilty to the indictment. The case was then fixed for hearing on 2nd August 2016. On that day, there were three prosecution witnesses present in court and just before the assessors were about to be sworn in for the hearing to commence, through his defence counsel on state brief, Ms. Olive Ederu, the accused intimated to court that he wished to change his plea. The indictment was read to him again and he pleaded guilty. He was thereafter convicted on his own plea of guilt after he confirmed the correctness of the facts as read to him. The only disputed fact was the allegation that he used a knife in the sexual assault. The facts were briefly as follows;

On 26th February 2013, the victim's mother went to a nearby market to sell alcohol. The accused was one of the customers buying and drinking her alcohol. At about 8.00 pm, the victim came to her mother to collect some money to buy food items to prepare supper. The mother asked the accused to pay the bill to enable her obtain some money to give to her daughter. The accused said he had left the money at a shop nearby. He asked for the victim to accompany him to that shop to collect the money. The victim's mother accepted and the accused went with the victim. On the way, along a bushy part of the road, the accused grabbed the victim and dragged her into the bush where he proceeded to have sexual intercourse with the victim. He threatened to stab her with a knife if she made any noise.

After the sexual intercourse, the accused left the victim and she took her way home. She was wailing and her mother who was by then looking for her heard her voice and went to her. The victim explained to her mother what had happened. The mother took her to the home of the area councilor. Her hair was full of dry grass and her mouth was swollen.

While at the home of the Councilor, the victim's mother examined her private parts and she found she had some bruises. The victim's parents went to the home of the accused and later reported the matter to her father who advised them to report to the police. The matter was reported to the police and the accused was arrested. The victim was examined on P.F.3A at Arua Police Health Centre III by Dr. Ambayo Richard on 27th February 2013. She was found to be of the apparent age of 13 years. Her hymen was ruptured with fresh tears and she had bruises in her private parts. These features were consistent with sexual intercourse within the past twenty four hours. The accused was examined on P.F.24A at Arua Police Health Centre III by Dr. Ambayo Richard on 28th February 2013. He was found to be aged 25 years with a normal mental status. He was accordingly charged. Both P.F.3A and P.F.24A were received as part of the facts.

In her submissions on sentencing, the learned Senior Resident State attorney, Ms. Harriet Adubango prayed for a deterrent custodial sentence on grounds that the maximum penalty for the offence is death, the offence is rampant in the region, there is need to protect the girl child, it will help the convict to reform and there is need to deter other potential offenders. The victim was aged only 13 years at the time of the offence and will forever be traumatized by the experience. Counsel for the accused, prayed for a lenient custodial sentence on grounds that the convict is only 28 years old and can still be a useful member of society who has his younger siblings and dependants to look after, he is a first offender who has readily admitted his guilt, and has been on remand for three years, is remorseful and has learnt his lesson. In his *allocutus*, the convict prayed for forgiveness since it is his first time to commit an offence. He has been on remand for three and a half years and has learnt his lesson.

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 and I have for that reason discounted the death sentence.

Where the death penalty is not imposed, 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 another case, *Owinji v Uganda C.A. Crim. Appeal No. 106 of 2013*, whose facts bear close similarity to the one before me, in its judgment of 7th June 2016, the Court of Appeal reduced a 45 year term of imprisonment to 17 years' imprisonment. The facts were that the victim aged 12 years lived with her mother. The appellant's residence was near that of the victim's mother. The appellant was a son of the paternal uncle of the victim. On 15.01.2010 the appellant persuaded the victim to accompany him to a Forest to collect some timber and firewood. The two went deep

into the forest. The victim collected some firewood, tied it and put it on her head ready to go home. It is then that the appellant forcefully seized her, put her down, pushed up her skirt, undressed himself and had sex with her. Due to pain the victim screamed, thus attracting the attention of two people, who responded to the direction of the screaming. One of them saw the appellant on top of the victim carrying out the sexual act. On realizing that he had been seen, the appellant threatened the victim with a knife not to tell anyone as to what had happened, otherwise, she was to see the consequences if she ever did so. The appellant also promised to give some money to the victim and then disappeared in the forest.

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 factors in this case being; the degree of injury or harm inflicted on the victim since upon examination she was found to have a ruptured hymen and bruises around the vaginal opening and the inner surface of the upper lip, the victim was of tender age with an age difference of twelve years between her and the convict and the convict knew this very well, she

was threatened with the use of force or violence, and he abused the trust of the victim's mother who allowed her to go with him to pick money for payment of his bill. A person who commits an offence in such circumstances deserves a deterrent punishment. Accordingly, in light of those aggravating factors, I have adopted a starting point of twenty years.

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 twenty years to a period of fourteen years.

In imposing discretionary custodial sentences, there is a requirement that such sentences should be for the shortest term commensurate with the seriousness of an offence. The seriousness of this offence is mitigated by a number of factors. In my view, making allowance for the public expression of remorse by the convict during his *allocutus*, the fact that he is a first offender and a

relatively young person at the age of twenty eight years, with dependant siblings, the severity of the sentence he deserves has been tempered and is reduced further from the period of fourteen years, proposed after taking into account his plea of guilty, now to a term of imprisonment of ten years.

There is an additional mandatory constitutional requirement enshrined in Article 23 (8) of the Constitution to take into account the period spent on remand while sentencing a convict. It provides;

Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.

This provision was applied in *Naturinda Tamson v Uganda C.A. Cr. Appeal No. 13 of 2011* where the Court held that where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spent in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment. It was further emphasized by the Supreme Court in the case of *Kabwiso Issa v Uganda [2001-2005] HCB 20*, when it held that:

Clause (8) of Article 23 of the Constitution of Uganda is construed to mean in effect that the period which an accused person spends in lawful custody before completion of the trial should be taken into account specifically along with other relevant factors before the Court pronounces the term to be served.

The manner of doing this was explained in *Kizito Senkula v Uganda S.C. Cr. Appeal No.24 of 2001*, and *Katende Ahamad v Uganda, S.C. Criminal Appeal No.6 of 2004* where the Supreme Court held that in Article 23 (8) of *the Constitution*, the words “to take into account” do not require a trial court to apply a mathematical formula by deducting the exact number of years spent by an accused person on remand, from the sentence to be meted out by the trial court. This decision was followed by the Court of Appeal in *Zziwa v Uganda Cr. Appeal No. 217 of 2003*, and *Kaserebanyi v Uganda Cr. Appeal No. 40 of 2006*, among other cases, where it was decided that to take into account does not mean a mathematical exercise. What is necessary is that the trial Court makes an order of sentence that is not ambiguous. The Supreme Court was understood

as having made it clear that what is important is clarity by the trial Judge. He or she should explain and be clear that the period spent on remand has been taken into consideration.

That Supreme Court interpretation was before the coming into force of Regulation 15 (2) of The Constitution (*Sentencing Guidelines for Courts of Judicature*) (*Practice*) Directions, 2013, to the effect that the court should deduct the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. This approach requires a mathematical deduction by way of set-off. From the earlier proposed term of ten years, arrived at after consideration of all the aggravating factors evident from the facts of this case and the mitigating factors in favour of the convict, the convict having been charged on 12th March 2013 and been in custody since then, I hereby take into account and set off three years and four months as the period the convict has already spent on remand. I therefore sentence the accused to a term of imprisonment of six (6) years and six (6) months, 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 4th day of August, 2016.

Stephen Mubiru
Judge.