

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CRIMINAL CASE No. 0021 OF 2015**

**UGANDA** ..... **PROSECUTOR**  
**VERSUS**  
**WAIGA SWALI** ..... **ACCUSED**

**Before: Hon Justice Stephen Mubiru.**

**SENTENCE AND REASONS FOR SENTENCE**

This case came up on 20<sup>th</sup> September 2016, in a special session for plea bargaining. The accused was indicted with the offence of Aggravated Defilement c/s 129 (3) and 4 (a) (b) of The *Penal Code Act*. It was alleged that during the evening of 25<sup>th</sup> December 2014 at Jacinto Cell in Arua District, being HIV positive, the accused had unlawful sexual intercourse with Andesuyo Doreen, a girl under the age of fourteen years.

When the case was called, the learned State Attorney, Mr. Emmanuel Pirimba reported that he had successfully negotiated a plea bargain with the accused and his counsel. The court then allowed the State Attorney to introduce the plea agreement and obtained confirmation of this fact from defence counsel on state brief, Mr. Samuel Ondoma. The court then went ahead to ascertain that the accused had 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 whereupon a plea of guilty was entered.

The court then invited the learned State Attorney to narrate the factual basis for the guilty plea, whereupon he narrated the following facts; on 25<sup>th</sup> December 2014, the victim went with her

mother to watch a Christian movie at a Church within Arua Municipality. The victim left her mother at the Church and returned home. There was no one at home except the accused, a neighbor who lived next-door. The accused asked the victim if she was alone at home and he followed her into an unfinished house within the homestead used as a bathing shelter, where she had gone for a short call. He grabbed the victim by the collar, closed her mouth with one hand and wrestled her to the ground and proceeded to have sexual intercourse with her. Another neighbor who had seen the two of them enter into the shelter and was monitoring their movements, saw the victim come out of the shelter after some time. The neighbor asked her what she had been doing with the accused inside the shelter. She told her what had happened. Upon the return of the victim's mother, who in turn reported to Arua Central Police Station. The accused was arrested and he together with the victim were medically examined. The accused was found to be HIV positive and the victim aged between 10 – 11 years. The respective Police Forms 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 Aggravated Defilement *c/s* 129 (3) 4 (a) and (b) of the *Penal Code Act*. In justification of the sentence of thirteen (15) years' imprisonment proposed in the plea agreement, the learned State Attorney adopted the aggravating factors outlined in the plea agreement which are that;- the offence carries a maximum penalty of death, this type of offence is rampant in the region, the victim was aged only 10 – 11 years, the accused was HIV positive and thus exposed the victim to the danger of contracting HIV at such a tender age and the victim was traumatized physically and psychologically.

In his submissions in mitigation of sentence, the learned defence counsel adopted the mitigating factors outlined in the plea agreement which are that; - the accused had spent one year and eight months on remand, he has since his incarceration become almost totally blind, he has two wives and nine children to look after, he is a first offender and was HIV positive, a condition that makes his incarceration very unbearable.

In his *allocutus*, the convict stated that after his arrest and remand, he fell sick and lost his sight. He prayed for lenience. The victim was not available to make a victim impact statement.

I have reviewed the proposed sentence of fifteen 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, *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 aggravating factors in this case are that; the accused was HIV positive at the time of the offence. The victim was an infant. I have also considered the age difference of over 40 years between the accused and the victim. On the other hand, the mitigating factors are that; the accused is 54 years old, has dependants and has also readily pleaded guilty and is a first offender. He has been on remand for one year and nine months.

I have considered the sentencing guidelines, the current sentencing practice in relation to offences of this nature, the mitigating and aggravating factors mentioned before. If there is any offence that inspires the greatest degree of public condemnation and desire to punish, it is sexual violence and abuse of children. When sentencing a person like the convict in this case though, the court needs not only to be backward-looking in fashioning out retributive justifications

addressing the need to censure or punish the offence, but also forward-looking in considering justifications that will stop the convict from future offending by addressing what the court perceives to be the potential risk of future offending. Upon taking a future-looking stance, it is my considered view that the proposed sentence of fifteen years' imprisonment for a now blind sexual offender, who has pleaded guilty and is also a first offender is harsh. Despite the seriousness of the offence and the circumstances surrounding its commission, at his advanced age and physical condition, the risk of future offending by the convict is almost non-existent. For that reason I reject that aspect of the plea agreement entered into by the accused, his counsel, and the State Attorney and instead, sentence the convict to a term of ten (10) years' imprisonment, 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 6<sup>th</sup> day of October, 2016.

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Stephen Mubiru  
Judge.