

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL SESSIONS CASE No. 0054 OF 2017

UGANDA **PROSECUTOR**

VERSUS

CANDIA DENIS **ACCUSED**

Before Hon. Justice Stephen Mubiru

SENTENCE AND REASONS FOR SENTENCE

When this case came up on 12th June 2017, for plea taking at the beginning of the criminal session, the accused was indicted with the offence of Aggravated Defilement c/s 129 (3) and 4 (d) of the *Penal Code Act*. It was alleged that on 13th June 2012 at Abirici village in Arua District, the accused had unlawful sexual intercourse with Deboru Veronica, a girl below the age of 18 years, and under disability. When the indictment was read to him, the accused pleaded guilty.

The court then invited the learned State Attorney, Mr. Emmanuel Pirimba, to present the facts of the case, whereupon he narrated the following facts; The victim is disabled and an orphan. On 13th June 2012, the complainant returned home from a journey at around 5.00 pm and found the victim wrapped in a blanket and upon inquiring from her she told the complainant that she had a severe stomach-ache. The complainant bought some tablets believing that to be true. There was no improvement and on the 16th June 2012 the victim was probed further and that was when she revealed that on 13th June 2012 as she was coming from the well the accused waylaid her around some isolated area, grabbed her by force and dragged her to a nearby bush. While there, the accused removed her dress by force threw her down and proceeded to have sexual intercourse with her. She made an alarm as a result of the pain which caught the attention of a passerby who ran to the scene and found the accused in the act. When he noticed the presence of the woman,

he got off the victim and ran away. That this was the second time she was being defiled by the accused and it was the reason for the stomach pain. The matter was reported to Awindiri Police Post on 17th June 2012 and the accused was traced for arrested and both were subjected to medical examination. The victim was found to be between 14 and 15 years, mentally retarded, lacking concentration but gave a coherent history of the events to the medical doctor. The victim's hymen was found to be ruptured with features suggesting penetration. The examination was done at Arua Regional Referral Hospital on 19th June 2012 by Dr. Angupale George. The accused was also examined at the same hospital on 20th June 2012 and his approximate age was 20 years, he had no fresh injury on his body and his mental condition was normal but he appeared to have psycho-social problems requiring attention with collateral history from the family members. Both Police Forms 24 and 3A were tendered as part of the facts. 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 victim of the offence was mentally unstable. The offence committed by the accused is serious and carries a maximum of death. The offence is rampant in the jurisdiction. The convict is mature and should have protected the disabled victim but instead abused her. This was not the first time and he was deliberately doing it. He deserves a deterrent sentence so that the girl child is protected. He so pray so that the accused may re-think his action.

On his part, Counsel for the accused on State Brief, Mr. Onencan Ronald, stated as follows; the convict is a first offender who has not wasted court's time. He was only 20 years at the time he committed the offense. He has been on remand for five years. He is equally a mentally retarded person. He is a peasant farmer who was helping his father. He prayed for lenience considering his status. In his *allocutus*, the convict stated: the victim also committed a mistake are you taking only me? Have you seen something good for me so far? Is there something good planned for me? I am already carrying the cross. Whatever you have in your heart I will accept. If you release me it will be ok and if you keep me in prison it will be ok.

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. However, none of the relevant aggravating factors prescribed by Regulation 22 of the Sentencing Guidelines, which would justify the imposition of a sentence of life imprisonment, are applicable to this case. They include; where the victim was defiled repeatedly by the offender or by an offender knowing or having reasonable cause to believe that he or she has acquired HIV/AIDS, or resulting in serious injury, or by an offender previously convicted of the same crime, and so on. Similarly, the sentence of life imprisonment too is discounted.

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 *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 factors in this case being; the fact the victim had a mental disability. An offender 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 fifteen 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* where 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 was a relatively young person at the age of twenty years at the time

he committed the offence, he deserves more of a rehabilitative than a deterrent sentence. He is also visibly labouring under a mental disability as well although when examined on 20th June 2012 he was found to be of sound mind. 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 seven 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 7 (seven) years’ imprisonment arrived at after consideration of the mitigating factors in favour of the convict, he having been in custody since June 2012, I hereby take into account and set off the five years as the period the accused has already spent on remand. I therefore sentence the accused to two (2) years’ 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 15th day of June, 2017.

.....
Stephen Mubiru
Judge.
15th June 2015