THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT MOROTO

CRIMINAL SESSIONS CASE No. 0032 OF 2016

UGANDA …… PROSECUTOR

VERSUS

AKOPE PHILLIPS LOKWANG …… ACCUSED

Before Hon. Justice Stephen Mubiru.

SENTENCE AND REASONS FOR SENTENCE

When this case came up for plea taking, the accused was indicted with the offence of Aggravated Defilement c/s 129 (3) and 4 (a) of The *Penal Code Act*. It was alleged that on 1st December 2015 at Lorengachora, Kapedo Parish, Kapedo sub-county, Kaabong District the accused performed a sexual act with one Nangiro Omo, a female juvenile aged 6 years. The accused entered a plea of guilty to the indictment.

The court then invited the learned Resident State Attorney to present the facts of the case, whereupon he narrated the following facts; On 1st December 2015 at Lorengachora, Kapedo sub-county, Kaabong District, the accused met the victim on the way and took her to a deserted place at around 4.00 pm and performed a sexual act on her. He left the victim crying and bleeding the victim reported to a one Alice who found her bleeding the matter was reported to the police and the accused was arrested on the 18th December 2015. Upon his arrest an identification parade was done and he was picked as the assailant. He was taken for medical examination on 8th December and the victim was examined on the 1st December. The doctor noted that her clothes were soiled with blood. She was sad and on the genitalia there was a severe tear almost connecting to the anal area. The Dr. was Emmanuel Ocaya, A senior Clinical Officer of Kapedo Health Centre III in Kaabong District. the accused was examined on 8th December by Mr. Awany William a holder of a diploma in medicine and found the accused to be 24 years and mentally oriented. The identification parade report is dated 18th December 2015 and was done by ASP Ogwang Nixon. The victim identified the suspect who is now the accused. The three Police Forms 24A, 3A and 69 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 (a) of the *Penal Code Act*.

Submitting in aggravation of sentence, the learned Resident State attorney stated that; the victim was a very young girl. The act was so violent and the conduct of the accused of running away and the vulnerable position where it took place. She deserved protection yet the accused abused the good will. He prayed that the proposed sentence of nine years' imprisonment be allowed.

On his part, Counsel for the accused on State brief prayed for a lenient custodial sentence on grounds that; the convict is a first offender with no previous conviction. He is remorseful and readily pleaded guilty. In his *allocutus*, the convict prayed for a lenient sentence because his father died and he does not have siblings. His mother is lame. He has a wife with two school going children. His wife is epileptic. His two children were of school going age. He is afflicted by some illness and he was told there is no treatment here in prison. He has a sickness which requires him to be taken to a river, and sand put sand placed on his body and he needs traditional herbs which cannot be accessed in prison. The nurses told him to pray for lenience to enable him to get out of prison and get treated.

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. In the case before me, although the accused was HIV positive at the time he committed the offence, there is no evidence to suggest that he knew at the time or had reasonable cause to believe that he had acquired HIV/AIDS. 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 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 that the victim was only six years old yet the accused was 24 years old at the time, making a difference of eighteen years between the victim and the accused. He inflicted severe physical injury on the victim's genital and anal area. 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 twenty four 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*). 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 four years to a period of sixteen 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 four years, he deserves more of a rehabilitative than a deterrent sentence. The severity of the sentence he deserves for those reasons has been tempered and is reduced further from the period of sixteen years, proposed after taking into account his plea of guilty, now to a term of imprisonment of eleven (11) 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 a 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 eleven (11) years' imprisonment arrived at after consideration of the mitigating factors in favour of the convict, he having been on remand since December 2015, I hereby take into account and set off two years as the period the accused has already spent on remand. I therefore sentence the accused to nine (9) 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 Moroto this 29th day of September, 2017.

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Stephen Mubiru,
Judge.
29th September, 2017