

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT MOROTO
CRIMINAL SESSIONS CASE No. 0096 OF 2017

UGANDA **PROSECUTOR**
ODONG IBRAHIM **ACCUSED**

VERSUS

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 8th July 2016 at Matany Town Board in Matany sub-county in the Napak District, the accused performed a sexual act with one Adeun Sraha, a female juvenile aged 12 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 8th July 2016 the victim was realised missing at home however the following day she returned at around 9.00 am. She found her mother, two uncles and upon interrogation he revealed that he was with the accused who took her to her place and performed a sexual act. He was traced and arrested. He was charged accordingly. The victim was examined medically on 11th July 2016 at St. Kizito Matany by a medical doctor and she was found to be about twelve years. Her hymen was ruptured. There were multiple lacerations at the vaginal walls with some bleeding and the hymen was ruptured. The accused was examine on 7th November 2016 at Lotome Health Centre II in Napak District and it was found that by then he was about twenty two years of age and there was no other finding. Both Police Forms 24A 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 (b) of the *Penal Code Act*.

Submitting in aggravation of sentence, the learned Resident State attorney stated that; the victim was a only twelve years old. She was also a school going girl and the offence affected her. The psychological effect is long and they are exposed STIs. She sustained serious lacerations. She was still bleeding at the time she was medically examined. He proposed eight years' imprisonment.

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. He is still very youthful and has an opportunity to reform. The court can grant him a much more lenient sentence. He has four biological children now headed by a child of twelve years. incarceration will leave the children all alone without any parental guidance. I pray for a lenient sentence as proposed. In his *allocutus*, the convict prayed for a lenient sentence because he is only 22 years old. His mother passed on and he was the one taking care of his sisters and brothers. He was the one taking them to school. People have grabbed land from them and there is no one following up. He was the one supporting them. He would ride a motorcycle and also fetch sand to earn a living. He has readily accept to have committed the offence.

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 *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 twelve years old yet the accused was 22 years old at the time, making a difference of ten years between the victim and the accused. He also waylaid her along a path and dragged her into the bush before defiling her. An offender who commits an offence in such circumstances and causing such physical injury as was found by the doctor deserves a deterrent punishment. Accordingly, in light of those aggravating factors, I have adopted a starting point of eighteen 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 eighteen years to a period of thirteen 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 a relatively young person at the age of twenty two 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 thirteen years, proposed after taking into account his plea of guilty, now to a term of imprisonment of six (6) years and eight (8) months.

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 six (6) years and eight (8) months' imprisonment arrived at after consideration of the mitigating factors in favour of the convict, he having been on remand since 8th November 2016, I hereby take into account and set off the eight months as the period the accused has already spent on remand. I therefore sentence the accused to six (6) 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