

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
CRIMINAL SESSIONS CASE No. 0229 OF 2018

UGANDA**PROSECUTOR**

VERSUS

SSALI GODFREY **ACCUSED**

Before Hon. Justice Stephen Mubiru

SENTENCE AND REASONS FOR SENTENCE

When this case came up this morning, for plea, the accused was indicted with the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*. He pleaded not guilty and the case was fixed for commencement of hearing later this afternoon. This afternoon, there are two prosecution witnesses in attendance ready to testify but the accused has chosen to change his plea and the indictment has been read to him afresh. It is alleged that on 14th November, 2014 at Kazo Central Zone, Nabweru sub-county in Wakiso District, the accused performed an unlawful sexual act with Karungi Daisy, a girl aged 12 years. The accused has pleaded guilty to the indictment.

The learned State Attorney, Ms. Kataike Florence has narrated the following facts of the case; the victim was aged 12 years and a pupil in primary four at Kazo Nursery and Primary School. She used to reside with her aunt. The accused at the time was 33 years old and a builder in the same area. On 14th November 2014, Musiime Enid the Auntie to the victim sent her to the nearby shops to buy airtime and it was drizzling at around 6.00 pm. She is epileptic. On her way back she met the accuse who held her hand and took her to a nearby unoccupied house in a bathroom where he asked her for sexual intercourse ad had two rounds without protection. As she left the house, the victim met her uncle who was searching for her, worried because of her condition. The uncle grabbed her and asked her where she had been and she said that she was having sexual intercourse with the accused and that this was not the first time and that whenever it occurred he would give her money. The uncle took her to the auntie and she narrated the same story. She said that the accused removed her knickers, put her on the wall and defiled her. On the 17th

November, 2014 the accused was arrested by Nabweru Police and taken for interrogation. He admitted having met her but denied having had sexual intercourse with her. She was examined on P.F 3 and was found to be 12 years old, HIV negative but with ruptured hymen and scars in her private parts associated with penile penetration. The accused was examined on P.F 24 on 20th November, 2014 and found to be 33 years old and was of a normal mental status. He had no bruises. He was indicted with aggravated Defilement and was committed to the High Court for trial. Both police forms; P.F. 3A and P.F 24A as well as the respective antibody examination slips were tendered as part of the facts.

Upon ascertaining from the accused that the facts as stated were correct, he has been 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 State Attorney has stated that although she has no previous record of the accused, and he has been on remand for about three years and eight months, the offence is serious and carries a maximum sentence of death. On basis of his plea, she does not seek the maximum punishment. In light of the fact that the victim is epileptic, she thus proposed a deterrent sentence.

In response, the learned defence counsel Mr. Kumbuga Richard prayed for a lenient custodial sentence on grounds that; the accused is a first time offender and has not wasted court's time and had been on remand for three years and eight months. He is reposedful and admitted the offence in his plain statement. He lacked the opportunity to plead guilty for all these years. He just tricked the victim into the act. There was no violence applied. He deserves lenience. He talked to the victim and the complainant stated that the accused did not seek forgiveness and that is the reason the case has come this far. Under article 126, he invited the court to promote the spirit of reconciliation. The complainant values forgiveness. The convict will reform and go back to his family. He suggested five years and the period on remand be deducted. In his *allocutus*, the convict apologised to the complainant and the victim. In her victim impact statement, Ms. Musiime Enid, the victim's cousin, stated that she had lived with the accused for some time and he had no problem. She believed he had repented.

According to section 129 (3), the maximum penalty for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*, is death. However, this punishment is by sentencing convention reserved for the most egregious forms of perpetration of the offence such as where it has lethal or other extremely grave consequences. Since in this case death was not a very likely or probable consequence of the act, I have 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. Only one aggravating factor prescribed by Regulation 22 of the Sentencing Guidelines, which would justify the imposition of a sentence of life imprisonment, is applicable to this case, i.e. the victim was defiled repeatedly by an offender who is supposed to have taken primary responsibility of her. A sentence of life imprisonment may as well be justified by extreme gravity or brutality of the crime committed, or where the prospects of the offender reforming are negligible, or where the court assesses the risk posed by the offender and decides that he or she will probably re-offend and be a danger to the public for some unforeseeable time, hence the offender poses a continued threat to society such that incapacitation is necessary (see *R v. Secretary of State for the Home Department, ex parte Hindley [2001] 1 AC 410*). I do not consider the sentence of life imprisonment to be appropriate in this case.

When imposing a custodial sentence on a person convicted of the offence of Aggravated Defilement c/s 129 (3) and (4) (c) of the *Penal Code Act*, the *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* stipulate under Item 3 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule, that the starting point should be 35 years' imprisonment, which can then be increased on basis of the aggravating factors or reduced on account of the relevant mitigating factors.

Although the manner in which this offence was committed did not create a life threatening situation, in the sense that death was not a very likely immediate consequence of the act such as would have justified the death penalty, they are sufficiently grave to warrant a deterrent custodial sentence. At the time of the offence, the accused was 33 years old and the victim 12 years old. The age difference between the victim and the convict was 21 years. The victim was also epileptic. However I am mindful of the decision of the Court of Appeal in *Ninsiima v. Uganda*

Crim. Appeal No. 180 of 2010, where the Court of appeal opined that the sentencing guidelines have to be applied taking into account past precedents of Court, decisions where the facts have a resemblance to the case under trial. In that case, it set aside a sentence of 30 years' imprisonment and substituted it with a sentence of 15 years' imprisonment for a 29 year old appellant convicted of defiling an 8 year old girl.

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 8th 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 1st 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 6th 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 6th 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. Accordingly, in light of those aggravating factors, I have adopted a starting point of eighteen (18) years' imprisonment.

Against this, I have considered the fact that the convict has 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 has pleaded guilty, as one of the factors mitigating his sentence, hence reducing it to twelve years.

I have considered further the submissions made in mitigation of sentence and in his *allocutus* and thereby reduce the period to eight years' imprisonment. In accordance with Article 23 (8) of the Constitution and 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. I note that the convict has been in custody since 3rd December 2014. I hereby take into account and set off a period of three years and six months as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of four (4) years and six (6) months, 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 Kampala this 11th day of June, 2018

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Stephen Mubiru
Judge,
11th June, 2018.