

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CRIMINAL SESSIONS CASE No. 181 OF 2017

UGANDA **PROSECUTOR**

5 **VERSUS**

O. A. (a juvenile) **JUVENILE OFFENDER**

Before: Hon Justice Stephen Mubiru

10 **DISPOSITION ORDER**

When this case came up this morning for plea, the juvenile offender 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 22nd January, 2017 at Tuma-Too village in Lamwo District, the juvenile offender performed an unlawful sexual act with Aciro-Kop Ketty, a girl aged 13 years. The juvenile offender pleaded guilty to the indictment.

The learned Resident Senior State Attorney, Mr. Patrick Omia then narrated the following facts of the case; on 22nd January, 2017 at Tuma-Too village Lamwo District, the offender returned from a disco dance at around midnight and opened the house where the victim was sleeping. He undressed her and performed a sexual act on her. The victim reported to one Charles Oroma and the following day the juvenile offender was arrested by the L.C. 1 Chairman and taken to Paloga Police Post where he was accordingly charged. The victim was examined on 23rd January, 2017 and found to be of the apparent age of 13 years. There were bruises on the *labia majora* and *minora*. She complained of pain around the private parts, Her parents produced an immunisation card indicating she was born on 4th October, 2003. The offender was examined on 27th January, 2017 and his age was estimated at 17 years. However police went ahead and got his national ID card in the name of Opwonya Absi and it indicated he was born on 14th March, 1998. By the time he committed the offence he was an adult. On being charged he was charged as 19 and later amended to 17 years. Both police forms; P.F. 3A and P.F 24A as well as a photocopy of the juvenile offender's National Identity Card were tendered as part of the facts.

Upon ascertaining from the juvenile offender that the facts as stated were correct, he was on basis of his own plea of guilty found responsible for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of *The Penal Code Act*.

5 Submitting in aggravation of sentence, the learned State Attorney stated that; the offender entered into a house of the victim, he had come from a disco hall meaning he was a reckless. The act of running away means pre-meditation. He has been on remand since the 1st of February, 2017 and has been on remand for one year and six months. He proposed an order of an order of detention for two years from, which the one year six months should be deducted.

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In response, the learned defence counsel Mr. Tony Kitara prayed for lenient disposition orders on grounds that; the juvenile offender has admitted responsibility. He is remorseful and has not wasted time. At the time of the offence he was a P.7 pupil at Paloga primary School in Lamwo District. He is a complete orphan both of whose parents are deceased and that explains behaviour
15 of lack of parenting. The auntie has intimated to me that he will change the environment and he will stay in Gulu. He has spent on remand one year and six months. He proposed that in accordance with s. 94 (1) (a) of *The Children Act* the court finds the period he has spent on remand is enough and he is discharged to go and live with the auntie.

20 In his *allocutus*, the juvenile offender prayed that he is set free so that he can go back to school. He prayed for forgiveness for the wrong he committed and promised never to repeat it. In further mitigation, his paternal Aunt Ms. Atoo Agnes, stated that she apologises because of the wrong. The juvenile offender is a complete orphan who was living with his grandmother at the time of the offence who could not take care of him and that is why he messed. She will now take care of
25 him and make sure he does not go wrong. Contributing to the disposition hearing, Ms. Lamwaka Susan Christine, the Assistant Welfare and probation Officer, Gulu attached to the remand home where the juvenile offender has been in custody while on remand stated that he is a total orphan. By the time he was received at the remand home he was traumatised. He was living a reserved and quiet life. Upon counselling and guidance he began living a happy life and is among the
30 leaders in the remand home. It has brought a change in his life. She proposed that he is released

and cautioned so that he can join his younger siblings, in accordance with section 94 (1) (b) of *The Children Act*.

5 Before determination of the appropriate orders, it is necessary to make an age determination of the juvenile offender. This is because of the disparity between the age declared in the charge sheet and that reflected in exhibit P. Ex. 4. According to section 107 (2) of *The Children Act*, in making the inquiry for purposes of age determination, the court may take any evidence, including medical evidence, which it may require. In the instant case, the national identity card, exhibit P. Ex.4 indicates that the juvenile offender was born on 14th March, 1998. I have closely
10 examined the image of the juvenile offender before court as reflected in the exhibit and he is conspicuously not an adult. It is consistent with his explanation. I therefore find that the offender before court, was a juvenile at the time he committed the offence, he is still a juvenile and he will therefore be sentenced as such.

15 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, according to section 104 (A) (1) of *The Children Act*, a death sentence is not to be pronounced on or recorded against a person convicted of an offence punishable by death, if it appears to the court that at the time when the offence was committed the convicted person was below the age of eighteen years. The
20 alternative is provided for by section 94 (1) (g) of *The Children Act*, which states that in such instances the maximum period of detention is to be three years.

On account of children's diminished culpability and heightened capacity for reform, by statute children are different from adults for sentencing purposes. Sentencing a juvenile offender to
25 three years in a children detention facility is the most severe criminal penalty available. Whereas the maximum punishment for a juvenile offender found responsible for an offence punishable by death is three years' detention, section 94 (1) (g) of *The Children Act* provides that detention shall be a matter of last resort and shall only be made after careful consideration and after all other reasonable alternatives have been tried and where the gravity of the offence warrants the
30 order.

In arriving at an appropriate disposition order, the court will take into account the aggravating and mitigating factors relevant to the offence charged, the character of the offender, including but not limited to the facts and circumstances of the crime, the criminal history of the offender, the offender's level of family support, social history, the offender's record while on remand, the offender's ability to appreciate the risks and consequences of the conduct, the degree of criminal sophistication exhibited by the offender, the degree of responsibility the offender was capable of exercising, the offender's chances of being rehabilitated, the physical, psychological and economic impact of the offense on the victim and the community, and such other factors as the court may deem relevant. Orders imposing the maximum period of detention should normally be reserved for the worst offenders and the worst cases.

Orders of that kind may be justified where the offence was committed with brutality, or where the prospects of the juvenile offender reforming through non-custodial interventions are negligible, or where the court assesses the risk posed by the juvenile offender and decides that he or she will probably re-offend and be a danger to the public for a considerable time to come. In such cases, maximum incapacitation is desirable. In cases of a grave nature but where the court forms the opinion that they were only the consequence of unfortunate yet transient immaturity of youth, from that maximum point the sentence should be graduated and proportional to the offender and the gravity of the offence, with a view to strike a balance between the need for public safety and that of rehabilitating the juvenile offender. A distinction must be made between the juvenile offender whose crime reflects unfortunate yet transient immaturity of youth from the rare juvenile offender whose crime reflects a deep-seated depravity. In the instant case, the juvenile offender defiled a girl aged thirteen years for which reason the gravity of the offence warrants an order of detention and I thus consider one (1) year and five (5) months period of detention to be appropriate for this offender.

Against this, I have considered the fact that the juvenile offender 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* 5 [1996] 2 Cr. App. R (S) 25 CA). In this case therefore I have taken into account the fact that the juvenile offender has pleaded guilty, as one of the factors mitigating his sentence, hence reducing it by one third to one year (1).

I have considered further the submissions made in mitigation of sentence and in his *allocutus*, 10 especially the fact that he is a first offender, and thereby reduce the period to eight months' detention. In accordance with section 94 (3) of *The Children Act*, to the effect that where a child has been remanded in custody prior to an order of detention being made in respect of the child, the period spent on remand shall be taken into consideration when making the order, I note that the convict has been in custody since 1st February, 2017. I hereby take into account and set off 15 one year and six months as the period the juvenile offender has already spent on remand. Having taken into account that period, I therefore find that the "time served" is an appropriate punishment for the juvenile offender and he should accordingly be set free unless he is being held for other lawful reason. He however is to remain under the care of his auntie Ms. Atoo Agnes present in court for a minimum of three months under the supervision of a probation 20 officer who is to furnish a report to this court within two weeks of the lapse of that period. In the event of violation of nay of these conditions, the juvenile offender is to be taken back into custody to serve a period of six (6) months' detention.

Having been found responsible and the disposition order made on basis of his own plea of guilty, 25 the juvenile offender is advised that he has a right of appeal against the legality and severity of that order, within a period of fourteen days.

Dated at Gulu this 6th day of August, 2018.

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Stephen Mubiru
Judge,
6th August, 2018.