

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CRIMINAL SESSIONS CASE No. 026 OF 2018

UGANDA **PROSECUTOR**

5 **VERSUS**

O. R. (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 23rd September, 2017 at Latwong village, Awach sub-county in Gulu District, the juvenile offender performed an unlawful sexual act with Lamwaka Oliver, a girl aged 2 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 23rd September, 2017 at Latwong village Awach sub-county in Gulu District the juvenile offender who was staying at the home of the victim's parents and also is a son to the Aunt of the victim's father (cousin) was left at home by the mother of the victim Prossy Apio as she went to collect water. On return at 2.00 pm she found the victim was lying naked in the kitchen. The offender was also in the kitchen. The mother asked the victim who reported to her that the offender had beaten her in her private parts and was feeling pain. The victim was two years old at the time. On examination by a medical practitioner on 24th September, 2017, she was found to be of the apparent age of 2 years. She had injuries around her private parts and there was some creamy discharge from her private parts. The injuries were attributed to a blunt object. The offender was examined on 26th December, 2017 and the medical report indicated he was of the apparent age of 18 years with a total dentition of 30 teeth and was HIV negative. He had no disabilities. Both police forms; P.F. 3A and P.F 24A 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 juvenile offender was not a child anymore at the time but decided to defile a close relative. He betrayed the mother's trust having been left to take care of her. The victim was just two years old. He also betrayed the hospitality accorded to him by the parents of the victim. He has told lies that he was staying at the victim's parents' home. The victim sustained injuries as indicated on the police
10 form. The maximum sentence is death. He has been on remand since 2nd October, 2017, hence ten months. He prayed for a severe custodial sentence so that he can be kept away from children. If he can defile a relative as this victim, no other child is safe. He proposed ten years' imprisonment.

15 In response, the learned defence counsel Mr. Tony Kitara prayed for lenient disposition orders on grounds that; a plea of guilt should mitigate the sentence. His upbringing has been very poor. He is an orphan who lost a mother and has a very irresponsible parent. The foundation of his life has been a problem and that explains this act. He prayed that he is given an appropriate sentence. In his *allocutus*, the juvenile offender prayed for forgiveness and stated that he was born in 1999.
20 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 when we was received at the remand home he told them that he was seventeen years old. He comes from a broken family. He dropped out of school in primary three and he has been subjected to hard conditions. The father failed to pay school fees
25 for him and he engaged him in hard work, farming and looking after cattle. He appeared to be unhappy. He has lost hope and exhibits a character of being unremorseful. She proposed that he is treated as a juvenile. He never thought of fighting or running away while on remand. She further proposed that he is placed on detention for s period of eight months in accordance with section 91 (4) (b) of *The Children Act*.

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 both the charge sheet and in exhibit P. Ex. 2 from the fact that he has all this time been remanded in a juvenile facility. 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, exhibit P. Ex. 2 (Police Form 24A) indicates that the juvenile offender was medically examined on 26th September, 2017 at Awacha Health Centre III by a medical officer. On basis of the dentition of the offender (30 teeth) and the presence of mature secondary sexual features, the medical officer formed the opinion that the offender was of the apparent age of 18 years. It is that age which is reflected on the charge sheet dated 29th September, 2017.

In his allocutus, the offender stated that he was born in 1999 although he did not know the month, implying that it is possible he was 18 years old last year. I however have closely observed the physical appearance of the offender while he appeared before court and his mannerisms. It is apparent why he was treated as a juvenile when he appeared before the court below for charging and later committal to this court. He looks younger than the age declared in exhibit P. Ex. 2 and the charge sheet. Being a borderline age and considering that it was a mere estimate, I have chosen to give the offender the benefit of the doubt.

In any event, I have observed the offender while in court and formed the opinion that he is a person in need of urgent restoration of his psychological state to normalcy through counselling, training and therapy as opposed to vengeance for the wrong he committed. To say that some offenders need help to be rehabilitated is to accept the idea that circumstances can constrain, if not compel, and lead to criminality. The background of this offender involved neglect and abuse as a result of which he has a glaringly angry countenance and is despondent. If incarcerated in an adult prison, he runs the risk of turning into a violent criminal. Since the idea of punishment is that it must not only fit the offence but also the offender, I find that the offender before court, deserves the benefit of the doubt. He was a juvenile at the time he committed the offence, he is still a juvenile and he will therefore be sentenced as such.

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
5 offence was committed the convicted person was below the age of eighteen years. The 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
10 children are different from adults for sentencing purposes. Sentencing a juvenile offender to 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
15 other reasonable alternatives have been tried and where the gravity of the offence warrants the 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
20 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
25 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
30 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 child aged only two years for which reason the gravity of the offence warrants an order of detention and I thus consider two (2) years and eight (8) 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 [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 two (2) years.

I have considered further the submissions made in mitigation of sentence and in his *allocutus*, especially the fact that he is a first offender, and thereby reduce the period to one year and seven 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 juvenile offender has been in custody since 4th October, 2017. I hereby take into account

and set off nine months as the period the juvenile offender has already spent on remand. Having taken into account that period, I therefore sentence the convict to a term of nine (9) months' detention at a juvenile detention facility of to be served starting today.

- 5 Having been found responsible and the disposition order made on basis of his own plea of guilty, 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 7th day of August, 2018

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Stephen Mubiru
Judge,
7th August, 2018.