

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT GULU**  
**CRIMINAL SESSIONS CASE No. 120 OF 2018**

**UGANDA** ..... **PROSECUTOR**

5 **VERSUS**

**O. S. alias O. G. (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) (b) of the *Penal Code Act*. It was alleged that on 9<sup>th</sup> December, 2017 at Lamogi Wilyec village in Pader District, being a person who is HIV Positive, the juvenile offender performed an unlawful sexual act with Ajok Agnes, a girl under the age of 18 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 9<sup>th</sup> December, 2017 at Lamogi Wilyec village in Pader sub-county, Pader District, the juvenile offender found the victim at a wedding reception party. He took her and performed a sexual act with her. The next morning she reported to her mother that the offender had forced her into a sexual cat. The mother, Aneno Doreen reported the case to Pajule police station. The offender was apprehended and charged. The victim was examined and she was found to have been about fifteen years old. She had a ruptured hymen. The juvenile offender too was examined on 16<sup>th</sup> December, 2017 and his age was estimated to be 18 years old and over, and also HIV positive. 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) (b) of *The Penal Code Act*.

Submitting in aggravation of sentence, the learned State Attorney stated that; he forcefully subjected the child to asexual act and he has been on remand for seven months, since 4<sup>th</sup> January this year. He proposed an order of detention for two years.

5 In response, the learned defence counsel Ms. Alice Latigo prayed for lenient disposition orders on grounds that; the juvenile offender is remorseful and plead without wasting time. He has been on remand for seven months. He was a pupil at Paiwula P.7 School in Pader District. He is a total orphan as both parents died. He lives with his brother. He was 15 years old at the time of the offence and by appearance he looks a child to-date. As to the issue of HIV, he was not aware that  
10 he had it but he lost both his parents to HIV. She proposed that the seven months he has been on remand be taken as sufficient punishment. The victim was 15 at the time. In the alternative he should be bound for six months under supervision of a probation officer of Pader since he lives about 2 - 4 kms from the Town Council.

15 In his *allocutus*, the juvenile offender prayed for forgiveness for the wrong he did so that he is enabled to go back to school. Mr. Okech David, a son to his paternal uncle has been visiting him on remand. He is 25 years old. He is carpenter at Paiwula village. The offender was living with his brother Ogwok Peter at the time of arrest but it is because of the distance that the brother has not travelled to visit him on remand. He was in P.6 at the time of his arrest. He attributed the  
20 offence to being misadvised by his friends. 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 the juvenile was 15 at the time he was received at the remand home and a pupil of Paiwula Primary School in primary six. He was initially remanded at Kinene adult prison for two months before  
25 he was transferred to the remand home. He is a total orphan. He looked sad and miserable to an extent that his health began deteriorating at the remand home. He was taken for treatment and found to be HIV positive which he never knew before. He has been on medication since then. It is a challenge to keep children suffering from this sickness in the remand home in terms of diet and monitoring, He lacked the love, guidance and care of the parents. A custodial sentence will  
30 cast difficulty on a detention centre in taking care of him. She proposed instead that he should be

placed on probation for six months in accordance with s. 94 (1) (f) of *The Children Act* as amended as they plan to resettle him with his relatives.

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 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  
10 offender was medically examined on 16<sup>th</sup> December, 2017 at Pajule Health Centre IV by a Medical Clinical Officer. On basis of "Turner's Scale" of age determination, he 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 29<sup>th</sup> December, 2017.

15 However, the probation officer stated that at the time he was received at the remand home, the offender was 15 years old. I too closely observed the physical appearance of the offender while he appeared before court and his mannerisms. It is apparent why although he had initially been remanded in an adult prison, he was subsequently transferred to the remand home. He looks much younger than the age declared in exhibit P. Ex. 2 and the charge sheet. Being a borderline  
20 age and considering that it was a mere estimate, I have chosen to give the offender the benefit of the doubt. I 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.

According to section 129 (3), the maximum penalty for the offence of Aggravated Defilement c/s  
25 129 (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 alternative is provided for by section 94 (1) (g) of *The Children Act*, which states that in such  
30 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 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 order.

10 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  
15 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.

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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  
25 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  
30 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 fifteen year old girl while he was HIV positive, although he was unaware at the time of his sero-status, for which reason the gravity of the offence warrants an order of detention and I thus consider two (2) years and four (4) months period of detention to be appropriate for this offender.

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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* 15 [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 (1) year and six (6) months.

I have considered further the submissions made in mitigation of sentence and in his *allocutus*, 20 especially the fact that he is a first offender, and thereby reduce the period to eleven 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 4<sup>th</sup> January, 2018. I hereby take into account and 25 set off seven months as the period the juvenile offender has already spent on remand.

Having taken into account that period, I consider that a detention order of four months of what would otherwise be left of the period of detention will not serve any additional useful purpose. Instead in accordance with section 94 (1) (f) of *The Children Act*, I impose an order of probation 30 of six (6) months starting today. He is placed under the supervision of the District probation officer and the magistrate's court having jurisdiction in the district or area for the time being in

which the juvenile offender resides or will reside. In addition, in accordance with section 94 (1) (d) of *The Children Act*, I impose an order binding the juvenile offender over to be of good behaviour for a period of six (6) months starting today. In the event of violation of any 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, the juvenile offender is advised that he has a right of appeal against the legality and severity of that orders, within a period of fourteen days.

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Dated at Gulu this 7<sup>th</sup> day of August, 2018

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Stephen Mubiru  
Judge,  
7<sup>th</sup> August, 2018.

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