

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CRIMINAL SESSIONS CASE No. 130 OF 2018

UGANDA **PROSECUTOR**

5 **VERSUS**

O. F. (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 one count of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*. It was alleged that on 26th September, 2017 at Lacor village in Gulu District, the juvenile offender performed an unlawful sexual act with Aloyo Prisca, a girl aged six (6) 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 1st February, 2018, Aneno Christine the mother of the victim left the victim who was three years old at home with a baby sitter and went for work. On her return she found the baby sitter had gone to collect water. The victim came to her crying while pointing at her private parts. When the mother asked what the problem was she told her mother that Otim Francis alias Odel had put his susu in hers. Her mother examined her and found that her private parts had bruises. The juvenile offender who was a baby sitter at the neighbour's home was called and admitted the allegation. The case was reported to the police and he was charged. the victim was examined on 2nd February, 2018 by Dr. Maureen Tumwesigye at Kalongo Hospital and she found that the victim was three years old. She had lacerations of both *labia majora* measuring about 2 cms. There was another laceration on the inferior aspect of the vaginal opening at the location of 6 o'clock measuring about 1 cm. A tear on the inferior aspect of the hymen and she was bleeding on contact. She also noted that the child was traumatised by the incident. The offender was examined on 5th February, 2018 from Patongo health Centre III by Acio Susan Rita

a Medical Clinical Officer and was found to be below 18 years approximately 12 years based on incomplete dentition of 28 teeth. He was found to be HIV negative. There is a Child Health Card (immunisation Card) issued from St. Joseph's Hospital Kitgum showing that the victim was born on 28th March, 2014. The two police forms; P.F. 3A and P.F 24A and the Child Health Card
5 (immunisation 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 adjudged responsible for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of *The Penal Code Act*.

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Submitting in aggravation of sentence, the learned State Attorney stated that; the offender performed a sexual act with a baby of three years. He inflicted injuries on her which are documented on the police form. The child was traumatised as a result of the act. His act as well threatens the relationship of the neighbours. He lived with a neighbour as a baby sitter. He was
15 living with his uncle Ojok Joseph who is in court. He has been on remand for five months and 22 days from 21st February, 2018. At his age, the maximum detention order is 3 years. He proposed that the juvenile offender is detained for two and a half years from which the period he has spent on remand should be deducted.

20 In response, defence counsel Ms. Alice Latigo submitted in mitigation that; the juvenile offender is remorseful and has admitted without wasting court's time. He is a first offender. He comes from a home which is polygamous. The father has partially neglected the mother. He was in P.4 at Dr. Ambrossoli Primary School in Kalongo, Agago District and was resident with the uncle's wife. The uncle works at a different place. It is unfortunate that the victim is young and that this
25 has harmed the relationship between the offender's and the victim's family. The offender is capable of reform. If released under section 94 (1) (b) of *The Children Act*, the mother is willing to take him to Abongole in Kwania District where he will be taken to school. The uncle also offers to take him to Lira Paluo L.C.III where he works and has a home. He has been on remand from 21st February, 2018 hence 5 months. He should be sentenced under section 94 (1) (b) of *The*
30 *Children Act* and he should be under probation for at least 6 months.

In his *allocutus*, the juvenile offender prayed for forgiveness from the parents of the victim and his uncle. Ms. Joyce Atim, mother of the offender too prayed for forgiveness. She pleaded with the parents of the victim to forgive her as the mother of the victim. On his part, Mr. Ojok Joseph apologised to the family of the victim. He stated further that on 1st February, 2017 when the offender was arrested he was called at 8.00 pm while at work. He arrived home past midnight. It was difficult to talk to the parents of the victim at that late hour. Early morning they went to the police and he followed them. The o/c called the father but he was not willing to talk to him. The young boy could not stay in the cells with the thieves. He took the boy home and returned him to the police in the morning. He tried to mediate with the parents but they refused to mediate.

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In his victim impact statement, Mr. Ochieng Francis, the father of the victim. The offender has been on remand for one month only not five months. On 1st February, 2018 he was taken to Kalongo but there was no juvenile home. On 1st June, 2018 is when he was remanded. The court may decide on the requests made. They are not convinced as parents. They as parents are traumatised. The boy should be detained for three years as suggested by the State Attorney. On her part, Ms. Aneno Christine, the mother of the victim stated that when the incident happened she called the offender but he denied the offence. Today he has admitted and she does not know what has made him change his mind. The juvenile offender has not yet changed. He should be punished for him to learn a lesson. He has caused confusion at home and if they try to speak to their neighbours they do not respond. They have not reconciled with them. The uncle did not go to them but instead went to the police and brought the juvenile offender back home with him from the police. She leaves the decision to court.

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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 remanded on 17th May, 2018 hence about two months. He has both parents alive. It is a broken family since they separated. The father left while the juvenile was still a child. The mother lives in Atonga Estate in Kwanja District from where he was brought by an uncle Mr. Ojok Joseph for purposes of study. It is his first time at the remand home. He prays for forgiveness from the court, the parents of the victim and his uncle. He was to start schooling at Dr. Ambrossoli Primary School in Kalongo in P.4 but he

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committed the offence and was arrested. This is an active stage of adolescence. He needs a lot of parental guidance. He is below the age of criminal responsibility since he is eleven years old. The mother says he was born on 5th July 2007. He should be bound over for twelve months to be of good behaviour according to section 94 (1) (b) of *The Children Act*.

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Before making an appropriate order in respect of this the juvenile offender, I need to determine whether or not he had attained the age of criminal responsibility at the time he committed the offence as this has a bearing on the orders. According to section 107 (1) of *The Children Act*, the Court is empowered, on its own motion, to make an inquiry as to the age of a person appearing
10 before it as an accused or one who is brought before it otherwise than for the purpose of giving evidence, when it appears to the court that he or she is under eighteen years of age. This determination has not been necessitated by the physical appearance of the juvenile offender before court, but rather the submission of the Probation and Social Welfare Officer to the effect that he was born on 5th July, 2007, implying that by the date of the offence, 1st February, 2018, he
15 was only eleven (11) years old. She displayed a birth certificate issued at the sub-county, dated 5th February, 2018. The learned State Attorney disputed the authenticity of the evidence.

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
20 require. I observed the birth certificate. The probability that it was prepared specifically for this case is palpable. This evidence is rejected as misleading and unreliable. On the other hand, the medical examination done at Patongo Health Centre III on 5th February, 2018 (exhibit P. Ex. 2) indicates that based on his dental development, the juvenile offender was 12 years old at the time. I am inclined to rely on the medical examination and therefore find that the a juvenile
25 offender had attained the age of criminal responsibility at the time he committed the offence and the appropriate orders will be made on that basis.

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
30 *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 instances the maximum period of detention is to be three years.

5 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
10 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.

In arriving at an appropriate disposition order, the court will take into account the aggravating
15 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
20 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.

25 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
30 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 toddler causing her considerable pain and suffering, 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 one (1) year and eight (8) months.

I have considered further the submissions made in mitigation of sentence and in his *allocutus*, and thereby reduce the period to one (1) year and five (5) 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 was remanded on 17th May, 2018. He has been in custody since then. I hereby take into account and set off two months as the period the juvenile offender has already spent on remand.

Having taken into account that period, I consider that an order of further 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 of twelve (12) months starting today. He is placed under the supervision of the District probation officer and the Family and Children's Court having jurisdiction in the district or area for the time being in which the juvenile offender resides or will reside. In addition, since this is the second offence for which he has been adjudged responsible during this session, 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 (12) months starting today. During the period of probation, the juvenile offender is to live with his uncle Mr. Ojok Joseph who is not to hand over custody of the juvenile offender to any other person during that period. For his own personal safety and for the emotional well-being of the victim, the juvenile offender is further restrained from visiting the home where the offence was committed or being in the immediate physical presence of the victim until she attains the age of eighteen years. 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 one (1) year and three (3) months' detention.

Having been found responsible and the disposition orders 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 the orders, within a period of fourteen days.

Dated at Gulu this 13th day of August, 2018

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Stephen Mubiru
Judge,
13th August, 2018.



**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN
AT GULU**

TO:

- 1. The probation Officer, Agago District**
- 2. The Family and Children Court, Agago District**

ORDER OF RELEASE ON PROBATION

WHEREAS on the **13TH** day of **AUGUST** 2018, **O. F.** the **Juvenile Offender** in Criminal Session Case No.**0130** of the Calendar Year for **2018** was found responsible and adjudged a Juvenile Offender before me: Honourable Justice **MUBIRU STEPHEN**, a **Judge of the High Court of Uganda**, for the offence of **AGG. DEFILEMENT CONTRARY TO SECTION 129 (3) & (4) (a)** of the Penal Code Act and is placed on probation as of this date for a period of **TWELVE (12) MONTHS**.

THIS IS TO AUTHORISE, REQUIRE YOU, and to place the said **O. F.** under your supervision for the duration of that period as the District probation officer and the Family and Children's Court having jurisdiction in the district or area for the time being in which the juvenile offender resides or will reside, together with this **Warrant** and there carry the afore said order into execution according to Law.

During the period of probation, the juvenile offender is ordered to comply with the following conditions of probation;-

1. in accordance with section 94 (1) (d) of *The Children Act*, he is bound over to be of good behaviour for a period of **SIX (6) MONTHS** starting today.
2. He is to remain in the custody of his uncle Mr. Ojok Joseph for the duration of that period.
3. He is not to be within the physical presence of the victim until she is 18 years old.

I hereby accept probation in lieu of detention and agree to comply with the conditions imposed. These conditions of probation have been read and explained to me, and I understand the purpose and scope of these conditions and what is expected of me during the probation period. I also understand that if I violate any of the conditions of probation the Court may revoke probation and I will be required to serve the period of **ONE (1) YEAR AND THREE (3) MONTHS'** detention originally imposed.

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JUVENILE OFFENDER

In the presence of;

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PROBATION AND SOCIAL WELFARE OFFICER

GIVEN under my Hand and the Seal of the court this **13TH day** of **AUGUST, 2018.**

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JUDGE