

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CRIMINAL SESSIONS CASE No. 090 OF 2017

UGANDA **PROSECUTOR**

5 **VERSUS**

O. S. alias T. (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) (4) (a) and (b) of the *Penal Code Act*. It was alleged that on 14th and 17th of December, 2016 at Cwero Trading Centre in Gulu District, being
15 a person infected with HIV / AIDS performed an unlawful sexual act with Alimo-Gum Gloria, a girl aged 13 years. The juvenile offender pleaded guilty to the indictment and the trial commenced. However, it was subsequently amended to the offence of Child to Child sex c/s 129A (2) of the *Penal Code Act*. The juvenile then changed his plea and pleaded guilty to the amended indictment.

20 The learned Resident Senior State Attorney, Mr. Patrick Omia has narrated the following facts of the case; on 14th December, 2016 at Cwero trading Centre, Paicho sub-county in Gulu District, the juvenile offender lived with the victim and her parents on the same village. He called the victim at around 4.00 pm and asked her to go his house with the help of some of his friends. In
25 the house, the offender subjected the victim to repeated acts of sexual intercourse. He kept the victim in his house up to 17th December, 2016. He could not allow her to escape until when one Opio a friend to the offender told the victim that the offender ids HIV positive and on ARVs and helped her to escape at around 1.00 pm. The victim reported to one of her uncles, Francis until
30 when her parents found her there and took her home. Subsequently the offender was arrested and forwarded to Paicho Police post. Upon medical examination, the victim was found to be a child of 13 years. The offender was 15 at the time. 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 Child to Child sex c/s 129A (2) of the *Penal Code Act*.

5 Submitting in aggravation of sentence, the learned State Attorney stated that the juvenile offender kept the other child in his house for four days before she was found by her mother. It placed the other juvenile at the risk of contracting HIV. His pre-trial remand is one year and seven months. He opined though that the juvenile offender does not deserve further detention.

10 In response, the learned defence counsel Ms. Harriet Otto prayed for lenient disposition orders on grounds that; the juvenile offender is remorseful. He has pleaded guilty. He has been on remand for one year and seven months. He has no criminal record. He is also HIV positive and at the time he was not aware since he was born with it. She prayed for lenience under section 94 of *The Children Act* and have the offender cautioned and released.

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In his *allocutus*, the juvenile offender prayed for forgiveness and stated that he needs to go back to school. He promised not to do the act again. 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
20 juvenile offender did not waste court's time. He has spent time on remand, he was counselled and guided and prayed to be forgiven. He is on ARV treatment, he promises not to repeat the offence. She recommended that he is cautioned and allowed to go back to school under s. 94 (1) (b) of *The Children Act* and handed over to the adult relatives present in court. The juvenile offender's mother, Ms. Lala Esther, prayed that he is handed to her so that she can teach him and take him
25 back to school since he does not deny that he committed the offence. His father is dead

According to section 129 (3), the maximum penalty for the offence of Child to Child Sex c/s 129A (2) 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
30 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.

On account of children's diminished culpability and heightened capacity for reform, by statute
5 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
10 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
15 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
20 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
25 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
30 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 six years for which reason the gravity of the offence warrants an order of detention and I thus consider a two (2) year 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 year (1) and four (4) months.

I have considered further the submissions made in mitigation of sentence and in his *allocutus* and thereby reduce the period to one years' 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 6th January, 2016. I hereby take into account and set off one year and seven 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 instead pronounce sentence of caution and discharge. This is the lightest possible sentence permitted by the law and he should accordingly be set free unless he is being held for other lawful reason.

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.

5 Dated at Gulu this 20th day of August, 2018

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Stephen Mubiru
Judge,
20th August, 2018.

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