

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CRIMINAL SESSIONS CASE No. 284 OF 2018

UGANDA PROSECUTOR

VERSUS

1.	ACIRE JOHN	}	ACCUSED
2.	OKOT COSMAS	}	ACCUSED
3.	O. B.	}	JUVENILE OFFENDER
4.	K. M.	}	JUVENILE OFFENDER

Before: Hon Justice Stephen Mubiru

SENTENCE AND REASONS FOR SENTENCE

The two accused and two juvenile offenders were jointly indicted with the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*. It was alleged that between the month of August and October, 2017 at Akobi village, Akobi Parish, Omiya Anyima sub-county in Kitgum District. the two accused and the two juvenile offenders performed unlawful sexual acts with Agenorwot Sharon Peace, a girl aged 10 years. The two accused and two juvenile offenders each pleaded not guilty to the indictment.

The trial commenced on 13th August, 2018 and after leading evidence of four witnesses, the prosecution rested its case. Having found that each of the two accused and the two juvenile offenders had a case to answer, the trial was adjourned to 23rd August, 2018 for the defence case to open. On this day, counsel for the accused and the two juvenile offenders have intimated to court that each of them wishes to change his plea. The indictment had accordingly been read to them and each of them has pleaded guilty.

The learned Resident Senior State Attorney, Mr. Patrick Omia has then narrated the following facts of the case; during the year 2017 between the month of August - October when the victim of the case, Agenorwoth Sharon was living with her paternal grandparents at Akobi Kenya West village, Akobi Parish, Omiya Anyima sub-county, the four accused on various days individually

subjected the victim Peace to an act of a sexual nature. The victim reported each of those occasions to her grandparents who paid no attention to her complaint but instead rubbished it. As a result of the acts, the victim had to escape from the home on 12th November, 2017 to her maternal grand parents' home and reported to her maternal aunt, Lanyero Monica. The matter
5 was then reported to Omia Anyima Police Post leading to the arrest of the four accused. The victim was examined medically. Each of the accused too was examined. They were accordingly charged as per the indictment. All the police forms; P.F. 3A and P.F 24A were tendered as part of the facts.

10 Upon ascertaining from each of the two accused and the two juvenile offender that the facts as stated were correct, each of the two adult accused was convicted and the each of the two juvenile offenders adjudged responsible, on basis of their own respective pleas of guilty, for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of *The Penal Code Act*.

15 Submitting in aggravation of sentence, the learned State Attorney stated that; the first accused person is 24 years old. He subjected a child of ten years to a sexual act. She underwent a lot of pain and mental stress. She narrated the circumstances when A1 took advantage of her when he asked her to pick a bottle of Waragi. He betrayed the confidence the child had in him as a neighbour to their home. He committed the act three times. A2, A3 and A4 are all paternal uncles
20 of the child. At that time the victim was living with them at the home of her paternal grandparents. They resided in the same homestead and they should have protected the child from the very savage behaviour. Instead each performed a sexual act with her a number of times. This act should be condemned in the strongest terms. That home had rejected the child and the only way they could show it was to subject these acts to her with the support of the grandparents. A2
25 is positive for Hepatitis "B" and the child could have contracted it. The father of the child is deceased. The victim had gone to the home on the invitation of her grandparents who turned against her. She has suffered injuries in the private parts as per the medical report. She has also suffered psychological trauma. She was referred for counselling. This will have a long lasting effect on her as well as the relationship between her and all her relatives on the father's side. She
30 now lives with her mother. They were first remanded on 18th December, 2017. They have been on remand for the last eight months. For A1 and A2 the maximum punishment is death. The

starting point is 35 years. In the circumstances we pray for 20 years' imprisonment from which the 8 months should be deducted because they have pleaded guilty belatedly. A3 and A4 should have the maximum of three years, from which the 8 months should be deducted. A.2, A.3 and A.4 were supported by the parents and they cannot be their good guides.

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In response, the learned defence counsel Ms. Alice Latigo prayed for lenient sentences and disposition orders on grounds that; A1 was 23 years old at the time of the offence. He was a student at Kitgum Technical Institute in the second year. He is still young person capable of reform. He has pleaded guilty and this is a sign of remorsefulness. He is a first offender. It is
10 unfortunate he committed the offence. He prays for lenience. God forgives too. He is a young person who should not be in prison for twenty years. It should be a reformatory sentence so that he comes out as an example. A2 Okot Cosmas, is just above 18 years, a pupil at Labworomor P.7 school and he has pleaded guilty. He is a first offender and a young youth. He has promised never to repeat such an act and that it was as a result of bad influence. He regrets it because the
15 girl is his brother's daughter. The court should be lenient. A3 O. B. was a pupil at Lufur P.7 School. He is remorseful and has pleaded guilty. He is a first offender and a juvenile. He prays for lenience. He has promised never to do it again. He regrets what he did against his brother's daughter. The period spent on remand be taken as time enough for the offence or in the alternative under s. 94 (1) of *The Children Act*, he should be bound to be of good conduct. She
20 proposed six months. This offender is to be resident with the parents who are in court. The father of the juvenile is a catechist in the Catholic Church. A4 is K. M., is remorseful and had pleaded guilty. He is a first offender who has been on remand for 8 months. He was a pupil in P.6 at Labworomor. He was under bad peer pressure. The eight months be taken as time enough, in the alternative under s. 94 (1) of *The Children Act* he should be bound to be of good conduct for six
25 months. A1 and A2 face a maximum of death, but they do not deserve it because they pleaded guilty. The sentence of life imprisonment is undeserved because of their age and twenty years is too heavy. She proposed five years such that the period on remand be deducted and the 4 years an 4 months would be time enough.

30 In his *allocutus*, A1 stated that he admits this offence before the almighty God. He pleaded to the court to have mercy upon him. He also pleaded for forgiveness from Sharon and from her

parents. The time he has spent in prison, he has learnt something. He knows that when he comes out he will not commit any offence. He was a student and had completed year 1 and year 2. He am the only one in the family who has attained that level of education. At that time he was looking for school fees. They were eleven in the family and he was the 4th borne and he was the one supporting his siblings at school by paying PTA fees. He was told that two of them are no longer going to school. It will ruin the future of their family. He also prayed for the court to consider his plea and he will study civil engineering and be useful to the country.

In his *allocutus*, A2 stated that he apologises before God and Court, Sharon and the mother of Sharon. He prayed for forgiveness. He is still a young man in school. He prayed that the sentence is light so that he can go back to school and support himself and the country. He apologised to his parents. He will never repeat it when he is out. He will be the one teaching the family about the danger of committing offences. In school he was the one supporting his grandmother who is 80 years old now. He was earning money from odd jobs. He prayed that he goes back to school and also supports his grandmother. In his *allocutus*, A3 stated that he appreciates God for giving us life to this moment. He prayed that the court forgives him. He appealed to the parents of Sharon to forgive him. This will never happen again. He appealed to his parents to forgive him. He prayed for an opportunity to go back to his studies and engage in work. On his part, A4 stated that he too appreciates God for protecting us. He prayed for an opportunity to go back to school. He appealed to the mother of the victim to forgive him because of the offence. He as well appealed to his parents to forgive him.

In her victim impact statement, Ms. Akumu Florence, the mother of the victim stated that she was heavily grieved. It traumatised her to a very high level and she nearly ran mad. It has never been easy to rehabilitate the victim. The child should be helped to return to her normal self as a child. She asked her whether that was her father's home and whether they were truly brothers of her late father. The response of the grandparents was bad. They told the victim that that is what she wanted. It subjected her to a lot of pain and it is now up to court to decide their fate. When the doctor testified, the victim had not been examined the second time. Court should direct another test. She has to find a way of rehabilitating her.

Ms. Cantina Akello, the victim's grandmother and mother of A2, A3 and A4 stated that she regards Sharon as her own child. She did not segregate her from her children. For long she was under her care. She breastfeed both the victim and her own child at the same time. The victim did not give her a proper report of what was going on. She only requested that she wanted to go the trading centre. She would not have allowed this to go on. She prayed that they are given a light sentence. She will continue teaching them never to commit the same offence again. This kind of act brought shame to her. She has never been embarrassed like this before. She is ready to welcome all of them back in her home and teach them.

On his part, Mr. Opira Benjamin, the grandfather of the victim and father of A2, A3 and A4 stated that it is the first time he felt pain today. A2, A3 and A4 have denying the offence whenever he went to see them. He apologised to his daughter in law and his granddaughter and asked for forgiveness. Ever since her husband died, he has never seen anything bad coming from her. He has abandoned his work since A2, A3 and A4 were arrested. He now has to do work they were doing. He admitted he could have been weak at that time. If they are allowed to go back home, he will be close to them so that they do not repeat the mistake. His daughter in law and the grandchild now fear him but at one point they need to come closer to him and they resolve this. He no longer works as a catechist and he is at home. He will, be at home. He was heading the catechists in the mission and he used to stay there. He returned home in 2014.

Contributing to the disposition hearing, Ms. Lamwaka Susan Christine, the Assistant Welfare and probation Officer, Gulu attached to the remand home where the two juvenile offenders have been in custody while on remand stated that A3 was a pupil at Lanboromwor P.6. both parents are sorry for what the children did. The father was away from home and would visit on certain occasions. He was counselled and admitted committing the offence. It was due to bad influence from the adults. He now understands how dangerous the act is. He is 14 years old and at the remand home he lived a reformed life. A4 is 17 years old. He was a pupil in P.7 at Lufur Primary School. He was in term III when he was arrested. He has been counselled. He admits committing the offence and he is sorry for the act. He promises never to commit it again. At the remand home he appeared remorseful. Both of them are uncles to the victim. They have apologised to the parents and the mother. They are school going children. She recommend that they are bound

over for twelve months under s. 94 (1) (b) of *The Children Act* and also be placed on probation for 8 months in accordance with s. 94 (1) (f) of *The Children Act*.

5 The offence for which the two accused A1 and A2 have been convicted is punishable by the maximum penalty of death as provided for under section 129 (3) of the *Penal Code Act*. However, this represents the maximum sentence which is usually reserved for the worst of the worst cases of Aggravated Defilement. I do not consider this to be a case falling in the category of the most extreme cases of Aggravated Defilement. I have not been presented with any of the extremely grave circumstances specified in Regulation 22 of *The Constitution (Sentencing*
10 *Guidelines for Courts of Judicature) (Practice) Directions, 2013* that would justify the imposition of the death penalty. Death was not a very likely immediate consequence of the offence and I have for that reason discounted the death sentence.

Where the death penalty is not imposed, the next option in terms of gravity of sentence is that of
15 life imprisonment. However, none of the relevant aggravating factors prescribed by Regulation 22 of the Sentencing Guidelines, which would justify the imposition of a sentence of life imprisonment, are applicable to this case. They include; where the victim was defiled repeatedly by the offender or by an offender knowing or having reasonable cause to believe that he or she has acquired HIV/AIDS, or resulting in serious injury, or by an offender previously convicted of
20 the same crime, and so on. In the case before me, although the accused was HIV positive at the time he committed the offence, there is no evidence to suggest that he knew at the time or had reasonable cause to believe that he had acquired HIV/AIDS. Similarly, the sentence of life imprisonment too is discounted.

25 Although the circumstances did not create a life threatening situation, in the sense that death was not a very likely immediate consequence of the action such as would have justified the death penalty or a sentence of life imprisonment, they are sufficiently grave to warrant a deterrent custodial sentence. The starting point in the determination of a custodial sentence for offences of Aggravated defilement has been prescribed by Regulation 33 to 36 and Item 3 of Part I (under
30 Sentencing ranges - Sentencing range in capital offences) of the Third Schedule of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* as 35

years' imprisonment. According to *Ninsiima v. Uganda Crim. Appeal No. 180 of 2010*, these guidelines have to be applied taking into account past precedents of Court, decisions where the facts have a resemblance to the case under trial. A Judge can in some circumstances depart from the sentencing guidelines but is under a duty to explain reasons for doing so.

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Since in sentencing the convict, I must take into account and seek guidance from current sentencing practices in relation to cases of this nature, I have considered the case of *Ninsiima v. Uganda Crim. Appeal No. 180 of 2010*, where in its judgment of 18th day of December 2014, the Court of Appeal reduced a sentence of 30 years' imprisonment for aggravated defilement of an 8 year old girl, contrary to Sections 129 (3) (4) (a), to a sentence of 15 years' imprisonment. The reasons given were that the sentence was manifestly harsh and excessive considering that the appellant was aged 29 years, a first offender, had spent 3 years and 4 months on remand, a person with family responsibilities and with dependants to support. In *Babua v. Uganda, C.A Crim. Appeal No. 303 of 2010*, a sentence of life imprisonment was substituted with one of 18 years' imprisonment on appeal by reason of failure by the trial Judge to take into account the period of 13 months the appellant had spent on remand and the fact that the appellant was a first offender. The Court of Appeal however took into account the fact that the appellant was a husband to the victim's aunt and a teacher who ought to have protected the 12 year old victim.

20 I note that the sentences above were meted out after a full trial, and may not be directly applicable to the one before me where the accused pleaded guilty. I however have considered the aggravating factors in this case being; the fact that the victim was only ten years old yet the A1 was 24 years old at the time and A1 18 years old, making a difference of fourteen and eight years respectively between the victim and the accused. They repeatedly inflicted severe physical injury on the victim's genital area and subjected her to psychological trauma. An offender who commits an offence in such circumstances deserves a deterrent punishment. Accordingly, in light of those aggravating factors, I have adopted a starting point of twenty five years' imprisonment.

From this, the two convicts are each entitled to a discount for having 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 convict readily pleaded guilty, as one of the factors mitigating his sentence.

The sentencing guidelines leave discretion to the Judge to determine the degree to which a sentence will be discounted by a plea of guilty. As a general, though not inflexible, rule, a reduction of one third has been held to be an appropriate discount (see: *R v. Buffrey (1993) 14 Cr App R (S) 511*). Similarly in *R v. Buffrey 14 Cr. App. R (S) 511*). The Court of Appeal in England indicated that while there was no absolute rule as to what the discount should be, as general guidance the Court believed that something of the order of one-third would be an appropriate discount. In light of the convict's plea of guilty having come only after they were put to their defence, and persuaded by the English practice, I propose at this point to reduce the sentence by one fifth only from the starting point of twenty four years to a period of twenty one years' imprisonment.

The seriousness of this offence is mitigated by a number of factors. In my view, the fact that the convicts are a first offenders and are relatively young persons, they deserve more of a rehabilitative than a deterrent sentence. The severity of the sentence each of them deserves for those reasons has been tempered and is reduced further from the period of twenty one years' imprisonment, proposed after taking into account their respective pleas of guilty, now to a term of imprisonment of eleven (11) years.

It is mandatory under Article 23 (8) of the *Constitution of the Republic of Uganda, 1995* to take into account the period spent on remand while sentencing a accused. Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, requires the court to "deduct" the period spent on remand from the sentence considered

appropriate, after all factors have been taken into account. This requires a mathematical deduction by way of set-off. From the earlier proposed eleven (11) years' imprisonment arrived at after consideration of the mitigating factors in favour of each of the two convicts, A1 Acire John and A2 Okot Cosmas, they having been on remand since 18th December, 2017 I hereby take
5 into account and set off eleven months as the period each of the two convicts A1 and A2 have already spent on remand. I therefore sentence A1 Acire John and A2 Okot Cosmas respectively, each to ten (10) years and one (1) months' imprisonment to be served starting today. Having been convicted and sentenced on their own respective pleas of guilty, each of the convicts is advised that he has a right of appeal against the legality and severity of this sentence, within a period of
10 fourteen days.

Although 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
15 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.

20 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
25 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
30 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 offenders defiled a child aged only ten years and repeatedly for which reason the gravity of the offence warrants an order of detention and I thus consider two (2) years and six (6) months period of detention to be appropriate for each of these two juvenile offenders.

Against this, I have considered the fact that each of the two the juvenile offenders have pleaded guilty. I have taken this into account as one of the factors mitigating their sentence. Although it is a belated plea, being juveniles I have decided to give them the full benefit of the common law discount, hence reducing it by one third to one year (1) and eight (8) months.

I have considered further the submissions made in mitigation of sentence and their respective *allocutus*, especially the fact that they are first offenders, and thereby reduce the period to one year and three months' detention. Although it was proposed that the two juveniles should not be

subjected to a custodial order, I find that it is unavoidable in the circumstances of this case. The offences were committed repeatedly, the victim sought help of the grandparents who only castigated and blamed her. Instead of taking disciplinary and corrective action, they chose to shield their sons, thus encouraging and painting a picture of impunity. This picture of impunity must be erased from the minds of these juveniles by subjecting them to a custodial order. The parents having failed in their parental responsibilities to an extent of expressing indifference to such grave, criminal conduct, cannot be trusted with the immediate supervision of these juveniles. The state has to take over when parents fail in their parental responsibilities.

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 each of the two juvenile offenders has been in custody since 18th December, 2017. I hereby take into account and set off eight months as the period each of the two the juveniles offenders has already spent on remand. Having taken into account that period, I therefore impose an order of twelve (12) months' detention, to be served starting today.

Having been found responsible and the disposition order made on basis of their own respective pleas of guilty, the juvenile offenders are advised that they have a right of appeal against the legality and severity of that order, within a period of fourteen days.

Dated at Gulu this 24th day of August, 2018

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Stephen Mubiru
Judge,
24th August, 2018.