

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT LUWERO

CRIMINAL SESSIONS CASE No. 0404 OF 2015

UGANDA

PROSECUTOR

VERSUS

NKURUNZIZA ANTHONY

ACCUSED

Before Hon. Justice Stephen Mubiru

SENTENCE AND REASONS FOR SENTENCE

When this case came up on 3rd January, 2018, for plea, the accused was indicted with the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of the *Penal Code Act*. He pleaded not guilty and the case was fixed for commencement of hearing on 18th January, 2018. Today, there are two prosecution witnesses in attendance ready to testify. One of them had been examined in chief but the accused has chosen instead to enter into a plea bargain with the prosecution. It is alleged that on 21st December, 2014 at Corner Kilak village in Nakaseke District, the accused performed an unlawful sexual act with Akankunda Gloria, a girl aged 6 years.

When the case was called, the learned Resident State Attorney, Ms. Beatrice Odongo reported that she had successfully negotiated a plea bargain with the accused and his counsel. The court then allowed the State Attorney to introduce the plea agreement and obtained confirmation of this fact from defence counsel on state brief, Mr. Kamugisha Gastone. The court then went ahead to ascertain that the accused had full understanding of what a guilty plea means and its consequences, the voluntariness of the accused's consent to the bargain and appreciation of its implication in terms of waiver of the constitutional rights specified in the first section of the plea agreement. The Court being satisfied that there was a factual basis for the plea, and having made the finding that the accused made a knowing, voluntary, and intelligent plea bargain, and after he

had executed a confirmation of the agreement, went ahead to receive the agreement to form part of the record. The accused was then allowed to take plea whereupon a plea of guilty was entered.

The court then invited the learned State Attorney to narrate the factual basis for the guilty plea, whereupon she narrated the following facts; on 21st December, 2014 at about 1.00 pm the victim was with the mother when the accused arrived with charcoal in a black polythene bag. He asked the victim to carry him the charcoal to his house which was nearby. The mother allowed the daughter to move with the accused as she knew him as a close neighbour. The victim delayed to return back home prompting the mother to follow up where he found the accused performing a sexual act with the victim on his bed. Immediately the mother of the accused grabbed him and began beating him while raising an alarm. He was joined by others and together they arrested the accused half naked and took him to the police. the victim was taken to Kapeeka Hospital for examination on P.F 3A on 22nd December, 2014. She was examined by Lubira Benedict a medical Clinical Officer. She was found with a ruptured hymen and her age was established to be six years at the time. He signed and stamped the form. The accused was also examined on P.F 24 by the sane doctor on 22nd December, 2014 and was found to be 23 years old and his mental status was found to be normal. The doctor signed and stamped it as well. Both police forms; P.F. 3A and P.F 24A were tendered as part of the facts.

Upon ascertaining from the accused that the facts as stated were correct, he was convicted on his own plea of guilty for the offence of Aggravated Defilement c/s 129 (3) and (4) (a) of *The Penal Code Act*. In justification of the sentence of eight to ten (8 - 10) years' imprisonment proposed in the plea agreement, the learned State Attorney adopted the aggravating factors outlined in the plea agreement which are that; the offence is rampant within the district, the victim was only six years old and the offence caused injury and trauma to the victim.

In response, the learned defence counsel prayed for a lenient custodial sentence on grounds that; the convict is a first offender, has not wasted court's time and is remorseful. He has been on remand for three years. He was also looking after his mother and had three children. In his *allocutus*, the convict stated that he has a family with children with no one to look after them and the children have dropped out of school. He is now a changed man after the prison experience

and will never repeat what I did. He has been training the inmates on basic law. He qualified with a certificate. He was assaulted in prison and he now cannot carry heavy loads. He bleeds when he engages in strenuous work. He prayed that the prison authorities are directed not to give him heavy work. In her victim impact statement, the mother of the victim stated that the victim had to undergo treatment and she kept her on medication for some time after the incident. She complains about back pains as a result of the offence. She is in school and is now in P.2. When she asks her about the incident, she keeps quiet. She prayed for a sentence of about 10 - 15 years' imprisonment.

According to section 129 (3), the maximum penalty for the offence of Aggravated Defilement c/s 129 (3) and (4) (c) of the *Penal Code Act*, is death. However, this punishment is by sentencing convention reserved for the most egregious forms of perpetration of the offence such as where it has lethal or other extremely grave consequences. Since in this case death was not a very likely or probable consequence of the act, I have discounted the death sentence.

Where the death penalty is not imposed, the next option in terms of gravity of sentence is that of life imprisonment. Only one aggravating factor prescribed by Regulation 22 of the Sentencing Guidelines, which would justify the imposition of a sentence of life imprisonment, is applicable to this case, i.e. the victim was defiled repeatedly by an offender who is supposed to have taken primary responsibility of her. However, for reasons stated later in this sentencing order, I do not consider the sentence of life imprisonment to be appropriate in this case.

When imposing a custodial sentence on a person convicted of the offence of Aggravated Defilement c/s 129 (3) and (4) (c) of the *Penal Code Act*, the *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* stipulate under Item 3 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule, that the starting point should be 35 years' imprisonment, which can then be increased on basis of the aggravating factors or reduced on account of the relevant mitigating factors.

Although the manner in which this offence was committed did not create a life threatening situation, in the sense that death was not a very likely immediate consequence of the act such as

would have justified the death penalty, they are sufficiently grave to warrant a deterrent custodial sentence. At the time of the offence, the accused was 23 years old and the victim 6 years old. The age difference between the victim and the convict was 17 years. He was nearly old enough to be the father of the victim. However I am mindful of the decision of the Court of Appeal in *Ninsiima v Uganda Crim. Appeal No. 180 of 2010*, where the Court of appeal opined that the sentencing guidelines have to be applied taking into account past precedents of Court, decisions where the facts have a resemblance to the case under trial. In that case, it set aside a sentence of 30 years' imprisonment and substituted it with a sentence of 15 years' imprisonment for a 29 year old appellant convicted of defiling an 8 year old girl.

I have considered the decision in *Kato Sula v. Uganda, C.A. Crim. Appeal No 30 of 1999*, where the Court of Appeal upheld a sentence of 8 years' imprisonment for a teacher who defiled a primary two school girl. In *Bashir Ssali v. Uganda, S.C. Crim. Appeal No 40 of 2003*, the Supreme Court, on account of the trial Court not having taken into account the time the convict had spent on remand, reduced a sentence of 16 years' imprisonment to 14 years' imprisonment for a teacher who defiled an 8 year old primary three school girl. The girl had sustained quite a big tear between the vagina and the anus. In *Tujunirwe v. Uganda, C.A. Crim. Appeal No 26 of 2006*, where the Court of Appeal in its decision of 30th April 2014, upheld a sentence of 16 years' imprisonment for a teacher who defiled a primary three school girl.

In light of the sentencing range apparent in those decisions, the aggravating and mitigating factors mentioned before and the mandatory requirement of Article 23 (8) of the *Constitution of the Republic of Uganda, 1995* as applied in Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, I have considered the sentence proposed in the plea agreement to be appropriate in the circumstances. I accordingly sentence the convict to a term of imprisonment of ten (10) years, to be served starting today.

Having been convicted on his own plea of guilty, the convict is advised that he has a right of appeal against the severity and legality of the sentence, within a period of fourteen days.

Dated at Luwero this 18th day of January, 2018.

Stephen Mubiru

Judge.

18th January, 2018.