

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT LUWERO

CRIMINAL SESSIONS CASE No. 0147 OF 2015

UGANDA **PROSECUTOR**

VERSUS

AHIMBISIBWE JULIUS **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 29th January, 2018. Today, there are three prosecution witnesses in attendance ready to testify but the accused has chosen to change his plea and the indictment has been read to him afresh. It is alleged that on 29th November, 2014 at Bulyamusenyi L.C.1 in Nakaseke District, the accused performed an unlawful sexual act on Nahabwe peace, a girl aged 12 years. The accused has pleaded guilty to the indictment.

The learned Resident State Attorney, Ms. Beatrice Odongo has narrated the following facts of the case; the victim was twelve years old and in primary four at the time. The accused was well known to the victim as a neighbour. On 27th November 2014, the victim was left alone at home alone at about 7.00 am when the parents had gone to the kraal to milk cows. At 9.00 o'clock the victim went to collect utensils used for milking for washing,. The accused grabbed her and threw her onto his bed and defiled her. The victim went to her parents in the kraal while crying and narrated her ordeal. The father called some two people to help him find the accused who by then had escaped. He was found, arrested and taken to Ngoma Police Station where he was charged with aggravated defilement. The victim too was taken for medical examination where she was examined and found to be 10-12 years old. She was examined by Dr. Muhereeza of Nakaseke

Hospital on 17th November, 2014. She was found to have a ruptured hymen. The accused too was examined on 28th November, 2014 at Nakeseke Hospital by Dr. Muhereza and was found to be above 25 years and he was found to be normal mentally. 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 has been 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*. Submitting in aggravation of sentence, the learned State Attorney has stated that although she has no previous record of the accused, given the manner in which the offence was committed by the accused on a victim of tender age, she prayed that he be given a deterrent sentence. The convict was a domestic servant whereby he was supposed to be like a brother to the victim. The convict breached the trust the parents had in him. He did this twice and it was thus a repeated act but on different dates. In the circumstances he deserves a deterrent sentence.

In response, the learned defence counsel Mr. Asaph Tumubwine prayed for a lenient custodial sentence on grounds that; the convict has pleaded guilty and saved court's time and resources. He is a first offender. He has been on remand for three years. He had a family and was a bread winner at the time of his arrest. He is 28 years old. He was a casual labourer. He is a remorseful person capable of reforming. He proposed that the sentence should not exceed five years. In his *allocutus*, the convict prayed for lenience on grounds that he has a family to look after. His father died and he was looking after his younger brothers who are twins. He prayed for a lenient sentence so that he can go back and look after the children. In his victim impact statement, Mr. David Rwentaro, the father of the victim, prayed for a long term of imprisonment because the victim became ill after the act and he took her for treatment. It took two months for the pain to be cured. She was in school at the time and was on and off because of the sickness. She is still in school. He proposed six years' imprisonment. In her victim impact statement, Nahabwe Peace, too prayed that the convict be sentenced to six years' imprisonment because she felt pain in her lower abdomen following the act and the accused had scared and threatened her on the first occasion that if she reported he would beat her.

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, 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. A sentence of life imprisonment may as well be justified by extreme gravity or brutality of the crime committed, or where the prospects of the offender reforming are negligible, or where the court assesses the risk posed by the offender and decides that he or she will probably re-offend and be a danger to the public for some unforeseeable time, hence the offender poses a continued threat to society such that incapacitation is necessary (see *R v. Secretary of State for the Home Department, ex parte Hindley [2001] 1 AC 410*). There are cases where the crimes are so wicked that even if the offender is detained until he or she dies it will not exhaust the requirements of retribution and deterrence. It is sometimes impossible to say when that danger will subside, and therefore an indeterminate sentence is required (see *R v. Edward John Wilkinson and Others (1983) 5 Cr App R (S) 105 at 109*). However, since proportionality is the cardinal principle underlying sentencing practice, 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 over 25 years old and the victim 12 years old. The age difference between the victim and the convict was 13 years. He abused a fiduciary relationship of the trust with 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 also reviewed current sentencing practices for offences of this nature. In this regard, I have considered the case of *Agaba Job v. Uganda C.A. Cr. Appeal No. 230 of 2003* where the court of appeal in its judgment of 8th February 2006 upheld a sentence of 10 years' imprisonment in respect of an appellant who was convicted on his own plea of guilty upon an indictment of defilement of a six year old girl. In the case of *Lubanga v. Uganda C.A. Cr. Appeal No. 124 of 2009*, in its judgment of 1st April 2014, the court of appeal upheld a 15 year term of imprisonment for a convict who had pleaded guilty to an indictment of aggravated defilement of a one year old girl. In another case, *Abot Richard v. Uganda C.A. Crim. Appeal No. 190 of 2004*, in its judgment of 6th February 2006, the Court of Appeal upheld a sentence of 8 years' imprisonment for an appellant who was convicted of the offence defilement of a 13 year old girl but had spent three years on remand before sentence. In *Lukwago v. Uganda C.A. Crim. Appeal No. 36 of 2010* the Court of appeal in its judgment of 6th July 2014 upheld a sentence of 13 years' imprisonment for an appellant convicted on his own plea of guilty for the offence of aggravated defilement of a thirteen year old girl. Lastly, *Ongodia Elungat John Michael v. Uganda C.A. Cr. Appeal No. 06 of 2002* where a sentence 5 years' imprisonment was meted out to 29 year old accused, who had spent two years on remand, for defiling and impregnating a fifteen year old school girl. Accordingly, in light of those aggravating factors, I have adopted a starting point of fourteen years' imprisonment.

Against this, I have considered the fact that the convict has 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 has pleaded guilty, as one of the factors mitigating his sentence but because it has come on a day fixed for hearing and not at the earliest opportunity, I will not grant the convict the traditional discount of one third (five years) but only a quarter (three years six months), hence reduce it to eleven years and six months.

I have considered further the submissions made in mitigation of sentence and in his *allocutus* and thereby reduce the period to nine years and six months' imprisonment. In accordance with Article 23 (8) of the Constitution and Regulation 15 (2) of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, to the effect that the court should deduct the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. I note that the convict has been in custody since 2nd December 2014. I hereby take into account and set off a period of three years and one month as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of six (6) years and five (5) months, to be served starting today.

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

Dated at Luwero this 29th day of January, 2018

Stephen Mubiru
Judge,
29th January, 2018.

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