

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT LUWERO
CRIMINAL SESSIONS CASE No. 0173 OF 2015**

**UGANDA PROSECUTOR
VERSUS
MULWANA JAMES 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), (4) (a) and (b) of the *Penal Code Act*. He pleaded not guilty and the case was fixed for commencement of hearing on 30th 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 16th October 2014 at Segalye village in Nakaseke District, being a person with HIV, the accused performed a sexual act with Nalwoga Oliver, a girl aged under 14 years. When the indictment was read to him, the accused pleaded guilty.

The learned Resident State Attorney, Mr. Ntaro Nasur has narrated the following facts of the case; on 16th October, 2014 the victim and her siblings were asleep while the parents were away. The accused who was a neighbour used that opportunity and gained entry and forcefully had sexual intercourse with the victim. After the act he warned her not to reveal it to any person, until the following day when the mother of the victim returned and the victim revealed to her. She narrated how she identified him by virtue of light from a torch. Upon examination of the victim after reporting to the police she was found to be twelve years old. Her hymen had been freshly removed but there were no bruises. The accused was arrested the following day and upon examination he was found to be an adult with a normal mental status and HIV +ve. Both Police Forms 24A and 3A have been tendered as part of the facts. The accused having confirmed those

facts to be true, he has been convicted on his own plea of guilty for the offence of Aggravated Defilement c/s 129 (3), (4) (a) and (b) of the *Penal Code Act*.

Submitting in aggravation of sentence, the learned State attorney stated that; although he has no previous record of the accused, the victim was thirteen years as of then and the accused had HIV +ve at the time. The future of the young girl will remain traumatized although she was found to be HIV negative. He proposed ten years' imprisonment.

On his part, Counsel for the accused on state brief, Mr. Asaph Tumubwine, prayed for a lenient custodial sentence on grounds that; the convict has not wasted court's time, he is remorseful and is sorry for what happened and is capable of reforming. He is 30 years old and since October 2014 he is now making his fourth year in prison. The victim was not infected with HIV which is a factor to be considered. The convict is sick. He is on drugs. He deserves lenience. He is a bread winner and had a wife and four children He had come to the village as a casual labourer. He proposed a sentence of not more than ten years' imprisonment because it is not a long sentence that can make one change his attitude; even shorter sentences do. In the circumstances of a sick person not more than ten years will suffice. In his *allocutus*, the convict prayed for a lenient sentence because he has apologized to the court and the victims because of the offence. He has four children and his wife returned them to their grandfather. He is remorseful as a result of incarceration. He prayed that the period of remand be taken into account.

The offence for which the accused was 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 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 life imprisonment. Some 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 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 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.

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 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.

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 *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.

I have considered the aggravating factors in this case being; the fact that the convict was found to be HIV +ve, he sexually assaulted the victim during the night by taking advantage of the absence of the parents of the victim and admonished her not to tell anyone about it. He exposed the victim to the danger of contracting HIV at such a tender age. 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

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 (eight years) but only a quarter (six years), hence reduce it to nineteen years.

The seriousness of this offence is mitigated by a number of factors. In my view, the fact that the convict is a first offender and a relatively young person at the age of thirty eight years, and on treatment for HIV, he deserves more of a rehabilitative than a deterrent sentence. The severity of the sentence he deserves for those reasons has been tempered and is reduced further from the period of nineteen years, proposed after taking into account his plea of guilty, now to a term of imprisonment of fifteen 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 term of fourteen years' imprisonment arrived at after consideration of the mitigating factors in favour of the convict, he having been charged on 28th October 2014 and has been in custody since then, I hereby take into account and set off the three years and three months as the period the accused has already spent on remand. I therefore sentence the accused to eleven (11) years and nine (9) months' imprisonment, 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

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Stephen Mubiru

Judge,

29th January, 2018.