THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT LUWERO

CRIMINAL SESSIONS CASE No. 0155 OF 2015

UGANDA …… PROSECUTOR

VERSUS

ATWINE FRANK KATIMUNTU …… 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 (c) of the *Penal Code Act*. He pleaded not guilty and the case was fixed for commencement of hearing on 30th January, 2018. There were no witnesses in court on that day and it was adjourned to 1st February, 2018 on which day still the prosecution witnesses did not turn up, prompting a further adjournment to 5th February, 2018 Eventually on that day, there were two prosecution witnesses in attendance ready to testify but the accused chose instead to change his plea. It was alleged that on 19th January, 2014 at Kakonge village in Nakaseke District, the accused being a person in authority over the victim, performed an unlawful sexual act with Kabaho Lydia, a girl aged 9 years. When the amended indictment was read to him once more, he pleaded guilty.

The learned Resident State Attorney, Mr. Ntaro Nasur then narrated the following facts of the case; the accused is a paternal uncle of the victim and they were living together. On 19th January 2014 the accused requested the victim to escort him to go and graze animals. While near his house he pulled the victim into his grass-thatched house, grabbed her by the neck and lay her on his bed. He undressed the victim and removed his trousers as well. Lay on top of her and had sexual intercourse with her. She tried to make an alarm but he had covered her mouth with his hand. After the act he left the victim go and play with her friends. She did not reveal the ordeal

immediately Two days later, because of the pain, she revealed to the mother who reported to the husband. The matters were reported to Ngoma Police. She was medically examined and found to be nine years old. The accused was 31 years old. 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), (4) (a) and (c) of *The Penal Code Act*. In justification of the sentence of thirty five (35) years' imprisonment proposed, the learned State Attorney submitted that; although he had no previous record of the accused who has been on remand for close to four years and has saved time by pleading guilty, but the victim was only nine years and she will be traumatised throughout her life. Being a person in the position of a parent, the act of forceful sex with a juvenile cannot be treated lightly. It carries a starting point of 35 years' imprisonment. This is a peculiar case where a brother had come to testify against the accused, his brother. He should be extricated from the public for a long time.

In response, the learned defence counsel Mr. Katamba Sowali prayed for a lenient custodial sentence on grounds that; the convict has not wasted court's time, he is a first offender. He has been on remand since 29th January, 2014. He says he is sorry for what he did. In his *allocutus*, the convict prayed for lenience on grounds that he was born as an only child. His father died when he was 8 years old and he grew up with his lame grandmother. He was looking after her. He had a wife and three children but he has been in prison since 2013 and he was told his wife died while he was in prison. He do not know where his children are. He prayed for a lenient sentence so that he is re-united with his children. He prayed that his remand period is taken into account.

According to section 129 (3), the maximum penalty for the offence of Aggravated Defilement c/s 129 (3), (4) (a) and (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 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.

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.

Although the manner in which this offence in the instant case 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 31 years old and the victim 9 years old. The age difference between the victim and the convict was 22 years. He abused a fiduciary relationship of trust with the victim. He committed the act while violently holding her mouth and a day or so after she felt excruciating pain. In light of the sentencing range apparent in the above mentioned decisions and the aggravating factors mentioned before this case therefore is of particular gravity, reflected by the multiple features of culpability of the convict and harm to which the victim was exposed, I have for that reason considered a starting point of twenty five years' imprisonment.

The seriousness of this offence is mitigated by the fact that the convict pleaded guilty. A plea of guilty offered readily before commencement of trial usually results in a discount of anywhere up to a third of the sentence that would otherwise be imposed after a full trial. 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, after multiple adjournments for lack of witnesses, and not at the earliest opportunity, I will not grant the convict the traditional discount of one third (eight years) but only a fifth (five years), hence reduce it to twenty years.

The gravity of the offence is further mitigated by the factors stated in mitigation by his counsel and his own *allocutus*, and the fact that in his victim impact statement, the father of the victim,

Mr. Brali Jonathan prayed that the convict is forgiven for he has already suffered enough, while the victim herself did not wish to say anything. I thereby reduce the period to eleven years imprisonment. The rather hefty discount in this regard is largely on account of the fact that the direct victims of the offence have since forgiven the convict. This is considered to be one way of promoting reconciliation as mandated by article 126 (2) (d) of *The Constitution of the Republic of Uganda, 1995*. Lastly, in accordance with 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*, 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 29th January, 2014. I therefore hereby take into account and set off three years as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of eight (8) 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 6th day of February, 2018 ……..

Stephen Mubiru

Judge,

6th February, 2018

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