

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI
CRIMINAL SESSIONS CASE No. 0113 OF 2016

UGANDA **PROSECUTOR**

5 **VERSUS**

MAWA CHARLES alias MAMBO **ACCUSED**

Before Hon. Justice Stephen Mubiru.

SENTENCE AND REASONS FOR SENTENCE

10 This case first came up for plea taking on 12th February, 2018, when the accused pleaded not guilty to the indictment and the case was set down for the commencement of hearing on 19th February, 2018. On that day, defence, after the preliminary hearing had been concluded with the admission of police forms 3A, 24A and the victim's health care card, counsel on state brief, Mr. Jurugo Isaac indicated to court that the accused intended to change his plea from not guilty to guilty. The accused was then allowed to take plea afresh whereupon a plea of guilty was entered.

15 The court then invited the learned Resident State Attorney prosecuting the case, Ms. Bako Jacqueline, to present the facts of the case, whereupon she narrated the following facts; on 20th September 2015, at Marinyo village in Adjumani District, as the victim was coming from a disco, the accused came to her and asked her to give him some drinking water. When she brought the water, the accused grabbed her and took her inside his house where he had sexual intercourse with her. He warned her not to tell anyone and she maintained that secrecy until November, 2015 when the victim's uncle, a one Kenyi Thomas, realised that the victim was pregnant and when he tried to interrogate her she admitted that it was true she was pregnant and that it is the accused who had sexual intercourse with her in the month of September. Kenyi reported the case to Adjumani Police where upon the accused was arrested and charged with Aggravated Defilement c/s 129 (3) and (4) (a) of *The Penal Code Act*. The victim was examined on police Form 3A and she was found to have been pregnant as per the evidence on P. Ex. 1 already on court record and as per exhibit P. Ex.3 by the time of the commission of the offence she was 13 years old and she gave birth to a baby girl who is now one year and nine months old..

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 defilement c/s 129 (3) and (4) (a) of *The Penal Code Act*. Submitting in aggravation of sentence, the learned Resident State Attorney stated that; the offence is of a serious nature; the victim was 13 years old and a pupil in primary four. She has since dropped out of school. The convict should be given a deterrent custodial sentence of 20 years' imprisonment to deter him from committing such offences again and also to deter the would be criminals from committing such offence so that girl child education is protected. The victim is 16 years old now ready to go back to school after weaning her baby off and her brother Kenyi Thomas is ready to take her back to school. If the accused is given a lenient sentence he will turn around and distract the education of the victim thereby further destroying her future.

In his submissions in mitigation of sentence, the learned defence counsel argued that; the convict is a first offender. There is no record of previous conviction. He is a useful person as he is still a young person. He has admitted his mistake, he is remorseful. He was 18 at the time of arrest, he is now 20 years and is capable of reforming and returning to society as a useful person. He has a big responsibility of being a father. The 20 years proposed is excessive, he needs to return to the community and take care of his family. He should be given a lenient sentence.

In his *allocutus*, the convict pleaded for lenience on grounds that; he is an orphan. He was in school and dropped out for lack of school fees. If given a long sentence his future will be destroyed. He prayed for a punishment which will enable him return and be useful to society. He has been in custody for three years and requested for not more than three years extra. In her victim impact statement, the victim stated that; the convict should not be given twenty years' imprisonment because their daughter will grow big and she will not know him. She proposed three to four years' imprisonment instead on grounds that the convict has realised his mistake and he will now focus on his future. He needs to give assistance to the girl and buy soap to bring to the child. If she goes back to the school, the convict will look after the child. When she completes her education, she will not be able to pay school fees for the girl single headedly. If the convict serves twenty years, next year the girl will join nursery and now that is a vital stage of education and she does not have the money to pay for her school fees.

On his part, Mr. Kenyi Thomas stated that Abiria Jane her niece, the daughter of his sister. Since he has admitted the offence, the court should forgive him so that he takes care of the child. He has been in hospital for five months and he is sickly and may not be able to take care of the victim and her daughter. The convict will not follow his niece if released. The father of the
5 victim died, the sister is married in Kampala. He brought up the victim and she lives with him. The court should sentence the convict for the period he has been on remand.

The determination of appropriate punishment after the conviction of an offender is often a question of great difficulty and always requires careful consideration. The law prescribes the
10 nature and the limit of the punishment permissible for an offence, but the Court has to determine in each case a sentence suited to the offence and the offender. The maximum punishment prescribed by the law for any offence is intended for the gravest of its kind and it is rarely necessary in practice to go up to the maximum. I do not consider this to be a case that involves exceptional depravity and I for that reason would discount the death penalty.

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I have to consider an appropriate sentence in light of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*. I have also to consider the current sentencing practices for offences of this nature. In this regard, I have considered the case of *Ongodia Elungat John Michael v. Uganda C.A. Cr. Appeal No. 06 of 2002* where in its judgment of 6th
20 February 2006, the court of Appeal upheld a sentence 5 years' imprisonment for the offence of defilement of a fifteen year old school girl by the 29 year old appellant. In that case, the appellant was a special hire taxi driver. On 24th September 2001 he was hired by the victim's mother to take them to Rubaga Girls' School. While the victim's mother and her brother were in the headmaster's officer the appellant and the victim struck a friendship. The victim got the
25 appellant's telephone number. On 26th September 2001, by prior arrangement the appellant took the victim to a lodge at Nakulabye where he defiled her. She became pregnant and the victim's mother learnt that it was the appellant who was responsible for the pregnancy. On his arrest the appellant readily admitted the offence. He was indicted for defilement and pleaded guilty. He was sentenced to 5 years' imprisonment. He had spent two years on remand.

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The measure of punishment in any particular instance depends upon a variety of considerations such as the motive for the crime, its gravity, the character of the offender, his age, antecedents and other extenuating or aggravating circumstances, such as sudden temptation, previous convictions, and so forth, which have all to be carefully weighed by the Court in passing the sentence. In matters of punishment for offences committed by a person, there are many approaches to the problem. On one hand is the traditional reaction of universal nature, which is the punitive approach. It regards the criminal as a notoriously dangerous person who must be subjected to severe punishment to protect the society. The other approach is the therapeutic approach. It regards the criminal as a sick person requiring treatment and reform. While the third is the preventive approach which seeks to eliminate those conditions from society which were responsible for causation of the crime. These are generally reflected in item 6 of Part III of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*.

Under the punitive approach, the rationalization of punishment is based upon retributive and utilitarian theories. Deterrent theory which is also part of the punitive approach proceeds on the basis that the punishment should act as a deterrent not only to the offender but also to others in the community. It is true that sentences which are disproportionately severe should not be passed but that does not mean that the courts should mete out sentences manifestly inadequate since inadequate sentences would fail to produce a deterrent effect on the society at large. Though undue harshness is not required but inadequate punishment may lead to suffering of the community at large.

In this case, I have decided to take the humanist principle of individualizing punishment to suit the person and his circumstances. According to this theory, the object of punishment should be the reform of the criminal, through the method of individualization. It is based on the humanistic principle that even if an offender commits a crime, he does not cease to be a human being. He may have committed a crime under circumstances which might never occur again. Therefore an effort should be made to reform him during the period of his incarceration so that he may be able to start his life again and take up his parental responsibilities after his release from jail, and after the mother of the victim has attained majority age.

I have considered the aggravating and mitigating factors outlined above. I take exception to the fact that the convict selfishly exposed an innocent underage school-going girl to a very serious risk of exposure to sexually transmitted diseases. She became a mother while still a child herself. Although the victim and her family have forgiven the accused, he appears remorseful and there is a significant risk of double victimization of the victim in this case, by virtue of incarcerating the father of her child, thereby denying the victim and he child paternal support, yet these are not proper justifications for a sentence that is manifestly inadequate. I therefore decline to release the accused as prayed by the victim's uncle by considering the period of remand as adequate punishment. Such a sentence would fail to produce a deterrent effect.

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Having considered the sentencing guidelines, the current sentencing practice in relation to offences of this nature, the circumstanced of the case, I consider a sentence of seven years' imprisonment to be appropriate. 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 convict. 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 seven years' imprisonment, the convict having been charged on 12th November, 2015 and has been in custody since then, I hereby take into account and set off two years and two months as the period the convict has already spent on remand and hereby, sentence the accused to a term of imprisonment of four (4) years and ten (10) months, to be served starting from today.

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The convict is advised that he has a right of appeal against both conviction and sentence, within a period of fourteen days.

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Dated at Adjumani this 20th day of February, 2018.

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Stephen Mubiru
Judge.
20th February, 2018.

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