

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI
CRIMINAL SESSIONS CASE No. 0018 OF 2016

UGANDA **PROSECUTOR**

5

VERSUS

MOKOSA MOSES ODDE **ACCUSED**

Before Hon. Justice Stephen Mubiru.

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SENTENCE AND REASONS FOR SENTENCE

When this case came up on 12th February, 2018, for plea, the accused was indicted with the offence of Aggravated Defilement c/s 129 (3) and (4) (b) of the *Penal Code Act*. He pleaded not guilty and the case was fixed for commencement of hearing on 14th February, 2018. On that day,
15 two prosecution witnesses testified and the case was adjourned to 20th February, 2018 for further hearing. Today, the accused has chosen to change his plea and the indictment has been read to him afresh. It is alleged that on 15th and 16th October 2016 at Marinyo village in Adjumani District, being a person infected with HIV, the accused performed a sexual act with Beya Brenda, a girl below the age of 18 years. When the indictment was read to him afresh, the
20 accused pleaded guilty.

The learned Resident State Attorney, Ms. Bako Jacqueline has narrated the following facts of the case; on 15th and 16th October, 2016 the accused who had lured the victim into a love relationship met her at his home and had sex with her. When the victim's guardian learnt about it he reported
25 a case to Pakele Police Post whereupon the accused person was traced and arrested. The victim was examined on police from 3A where she was found to be below 18 years or f age with multiple abrasions at the vaginal introitus. The accused was also examined ion Police Form 24A where he was found to be above 18 years and mentally Normal. He was also found to be HIV positive. He was accordingly charged with aggravated defilement 129 (3) and (4) (b) of *The*
30 *Penal Code Act*. 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) and (4) (b) of the *Penal Code Act*.

Submitting in aggravation of sentence, the learned Resident State Attorney stated that; although
5 he has no previous record of conviction, the offence is rampant in the community with specific
reference to this offence, being HIV positive, he exposed the victim to the danger of infection
with HIV. His conduct deserves a deterrent custodial sentence. He deserves 25 years to deter him
and other would be criminal about the seriousness of the offence from further committing such
offences.

10 On his part, Counsel for the accused on state brief, Mr. Lebu William, prayed for a lenient
custodial sentence on grounds that; the convict is deeply remorseful. He is aged 22 years and
thus a young person who still has his future ahead. He was a student at Bala Secondary School
and was due to sit "O" Level exams during that year. He by the offence was deprived of his
15 education. He prayed court to consider the fact that he has a chance to be educated and he will be
useful to society. The period proposed by the state would be too punitive. The court had the
opportunity to see the victim and listen to her. The offence did not have a very destructive effect
on the victim. She continued with her education uninterrupted and is a candidate this year. Her
health status was not affected. She was not infected. He submitted that these circumstances
20 mitigate the offence. He has been on remand for a year and he proposed that the accused be
sentenced to two years' imprisonment to enable him to get sufficient rehabilitation and come out
to continue with his life.

In his *allocutus*, the convict prayed for a lenient sentence because; he is an orphan who lost both
25 his parents. He was in Senior Four at the time of the incident and was due to sit for his
examinations. He prayed that the court be lenient. He ought not to have committed the offence.
He prayed for a sentence which will enable him to come out and continue with his education as
he has to find school fees as an orphan. He undertook not disturb the girl again. In his victim
impact statement, the maternal uncle and guardian of the victim Mr. Idha Christopher opined that
30 if the convict is released, he is likely to interfere with the girl. If that is put out of the question,
the period he has been on remand can then be considered

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 lured a school-going girl into sexual relations. 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 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 (seven years) but only a quarter (five years), hence reduce it to fifteen 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 who too was still in school. In performing the act, he took the precaution of using condoms which he paid for himself, and thus showed himself to be capable of behaving responsibly. In all circumstances, 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 fifteen years, proposed after taking into account his plea of guilty, now to a term of imprisonment of eight 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 eight years' imprisonment arrived at after consideration of the mitigating factors in favour of the convict, he having been charged in October 2016 and has been in custody since then, I hereby take into account and set off the one year and four months as the period the accused has already spent on remand. I therefore sentence the accused to six (6) years and eight (8) 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 Adjumani this 20th day of February, 2018

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Stephen Mubiru
Judge,
20th February, 2018.