

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ADJUMANI
CRIMINAL SESSIONS CASE No. 0007 OF 2018

UGANDA **PROSECUTOR**

5 **VERSUS**

MOINI STEPHEN **ACCUSED**

Before Hon. Justice Stephen Mubiru

SENTENCE AND REASONS FOR SENTENCE

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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) (a) of *The Penal Code Act*. He pleaded not guilty and the case was fixed for commencement of hearing on 27th February, 2018. Yesterday there were three prosecution witnesses in attendance ready to testify but the accused chose to change his plea and the indictment was read to him afresh. It was alleged that on 9th October, 2016 at Patabo village in Moyo District, the accused performed an unlawful sexual act on Moceruku Agnes, a girl under the age of 14 years. The accused pleaded guilty to the indictment.

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The learned Principal State Attorney, Mr. Okello Richard then narrated the following facts of the case; on 9th October, 2016 at around 8.00 pm when the victim and her other younger brothers and sisters were sleeping in the house and the mother was away, she had not returned from the market. They heard someone knock at the door and the victim thought it was her mother. She called her name and the person responded. She opened the door and to her surprise the person on entering grabbed her, holding her neck and warning her not to shout. She recognised the voice as that of the accused, a person she knew before who had been very frequent at their home. He went ahead to have sex with her after which he got up and left. The victim's mother returned later that night but she only reported to her the following morning and the mother informed the L.C 1 Chairman who immediately got the suspect and he admitted that it was him who had committed the act. The case was reported at Metu Police Post. The victim was examined from Logoba Health Centre III on 12th October, 2016 by Senior Clinical Officer Kiiza Francis. His opinion was the victim, a P.3 pupil at the time, was about 13 years old. The hymen was intact, no obvious

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signs of penetration. The same clinical officer also examined the accused on the same day and in his opinion the accused was 19 years old, born on 5th February, 1997 and was a pupil of primary five. He was of normal mental status, HIV negative and he was accordingly charged of aggravated defilement. Both police forms; P.F. 3A and P.F 24A were tendered as part of the
5 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) and (4) (a) of *The Penal Code Act*. Submitting in aggravation of sentence, the learned Principal State Attorney stated that
10 although he had no previous criminal record of the accused, and he has been on remand for a year and about five months, the victim was just below 14 years at the time. The offence is rampant. He prayed for a custodial sentence so that as a young man when he gets he will desist from such malpractices.

15 In response, the learned defence counsel Mr. Ndahura Edward prayed for a lenient custodial sentence on grounds that; the convict is a first offender. He has not wasted court's time by pleading guilty. He is remorseful. At the time he committed the offence he was barely an adult at 19 years. Counsel talked to the mother, grandfather and the victim herself. They expressed interest in forgiving the accused and suggested six years' imprisonment. He also prayed that the
20 time spent on remand be considered. In his *allocutus*, the convict prayed for lenience on grounds that he suffers from epilepsy. He proposed one year's imprisonment.

In his victim impact statement, Mr. Wayi Gwido Lolu, the grandfather of the victim stated that the accused is an uncle to the victim. He should serve the six years so that his horns are broken.
25 The witnesses came all the way from Metu at the border, and he had spent all the money he had to come to court and the victim was examined at a cost of shs. 50,000/= The offence has cost him money and time although the victim has forgotten the experience and is now alright and still in school.

30 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.

5 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
10 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
15 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
20 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
25 (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*
30 *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.

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.

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. The convict is related to the victim by blood and she was taken out of the safety of her parents' home by trickery of the convict thereby being exposed to the dangers of early sex. Accordingly, in light of those aggravating factors, I have adopted a starting point of fifteen 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* 5 [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), hence reduce it to twelve years.

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I have considered further the submissions made in mitigation of sentence and in his *allocutus*, specially the fact that he was only 19 years old at the time of the offence and consider that the convict deserves more of a rehabilitative than a punitive sentence and thereby reduce the period to six years' imprisonment. In accordance with Article 23 (8) of the Constitution and Regulation 15 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 19th October, 2016. I hereby take into account and set off one year and four months as the period the convict has already spent on remand. I therefore sentence 20 the convict to a term of imprisonment of four (4) years and eight (8) months, to be served starting today.

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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 28th day of February, 2018

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Stephen Mubiru
Judge,
28th February, 2018.