

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

CRIMINAL SESSIONS CASE No. 0477 OF 2015

UGANDA PROSECUTOR

5 **VERSUS**

KAYONDO DAVID ACCUSED

Before Hon. Justice Stephen Mubiru

SENTENCE AND REASONS FOR SENTENCE

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When this case came up this morning, 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. When the case came up for hearing, he chose to change his plea and the indictment was read to him afresh. It was alleged that on 26th 15 June, 2015 Mwoloola Stage at Nakulabye Suzana Zone, Kampala District, while he was a person with HIV, the accused performed an unlawful sexual act with the victim, a girl aged 8 years. The accused pleaded guilty to the indictment.

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The learned State Attorney then narrated the following facts of the case; the victim was aged 8 years at the material time. She knew the accused very well as a boda-boda rider at Mwoloola Stage at Nakulabye Suzana Zone where the victim used to live. On 26th June, 2015, the victim was left at home together with her siblings and they were playing as usual when the accused returned to pick his jacket that he usually kept on a wall near the home of the victim. He called out the victim and took her to his room near her home, gave her money sending her to buy him 25 something and when she returned the accused ordered her to remove her clothes, squeezed her against the wall and in that posture the accused rubbed his penis against the wall until he ejaculated. He then threatened to harm her if she told anyone. The victim kept quiet until one of the neighbours who had had her daughter abused in the same manner and had filed a police case

an informed the mother of the victim and when the mother of the victim interacted with her daughter, the victim opened up and narrated to the mother. The accused was arrested on 28th June, 2015. He was taken for medical examination by Dr. Oligo Michael of Mayfair Clinic and it was found that he was aged 24 at the time and he was of sound mental status. He advised for serology examination of the accused. It was done on 29th June, 2015 and it was found he was HIV positive. The victim was taken for medical examination and the Forensic examination and she was examined by Dr. Barungi and he found her to be aged 8 years at the time. He advised that the victim be tested for HIV and it was found that the victim was negative. The accused was charged with aggravated defilement for which he is before court now. Both police forms; P.F. 3A and P.F 24A as well as the sero-status slip 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 (b) of *The Penal Code Act*. Submitting in aggravation of sentence, the learned State Attorney stated that; the age of the victim was only 8 years old and the accused 24. His HIV status at the time he committed the offence. The accused lived with the victims and qualified to be their guardian and they trusted him in that capacity but he abused the status. He introduced the innocent mind of an 8 year old to a sexual act. He is a habitual offender and a convict in two previous convictions of similar offences. He was remanded on 21st September, 2015. She prayed for a deterrent sentence to deter people in the community from committing similar offences.

In response, the learned defence counsel prayed for a lenient custodial sentence on grounds that; the convict has pleaded guilty. He was youthful aged 24 years at the time. He should be given a second chance. Despite the fact that he was HIV positive, the victim did not contract it. He is remorseful. For the two other convictions of 25 and 17 years respectively. She prayed that under section 122 (1) of *The Trial on Indictments Act* the sentence in this case runs concurrently with the sentence he is already serving. In his *allocutus* the convict stated that; he is apologetic for the matters for which he is being accused, and for what he did. He had two children although he was not married and he was paying school fees for them. He prayed that the sentence runs concurrently with one of the previous sentences and that the remand period is considered.

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. Examples of such consequences
5 are provided by Regulation 22 of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* to include; where the victim was defiled repeatedly by the offender or 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. Since in this case death was not a very likely or probable consequence of
10 the act, and there is no evidence that the convict was aware of his sero status at the time, I have discounted the death sentence.

When imposing a custodial sentence on a person convicted of the offence of Aggravated Defilement c/s 129 (3) and (4) (b) of the *Penal Code Act*, the *Constitution (Sentencing
15 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.

20 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, especially because of age difference between him (24 years) and the victim (8 years). It was a repeated offence since he had committed similar acts with two other children of about the
25 same age. He worked from around that neighbourhood and he abused the trust of the parents and the victim as a neighbour. I have also to bear in mind the decision 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.

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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
5 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. In light of the sentencing
10 range apparent in those decisions and the aggravating factors mentioned before, I find that the aggravating factors outweigh what would have been mitigating factors and for that reason I have considered a starting point of thirty (30) years' imprisonment.

Against this, I have considered the fact that the convict has pleaded guilty. The practice of taking
15 guilty pleas into consideration at sentencing 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
20 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, hence reducing it by one
25 third to twenty (20) years.

The seriousness of this offence is mitigated by the factors stated in mitigation by his counsel and his own *allocutus*, which have been reproduced above. The severity of the sentence he deserves has been tempered by those mitigating factors and is reduced from the period of twenty (20)
30 years, proposed after taking into account the aggravating factors, now to a term of imprisonment of eighteen (18) 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 convict. Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*,
5 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 sixteen years’ imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 14th October, 2015 and has been in custody since then, I hereby take into
10 account and set off three years and two months as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of twelve (14) years and ten (10) months, to be served starting today.

Under section 122 (1) of the *Trial on Indictments Act*, where a person after conviction for an
15 offence is convicted of another offence, either before sentence is passed upon him or her under the first conviction or before the expiration of that sentence, any sentence of imprisonment which is passed upon him or her under the subsequent conviction is to be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or of any part of it. I have been availed a record of the convicts previous
20 conviction and sentence of twenty one (21) years and eleven (11) months in H.C.C. 0476 of 2015 passed on 9th August, 2018 on basis of a plea bargain.

The court may impose a concurrent sentence rather than a consecutive one;- when the accused is convicted of (or pleads guilty to) multiple offenses in the same case; when all the convictions are
25 connected to the same or similar facts; situations where imposing consecutive sentences will result in a cumulative sentence that is too high so as to be disproportionate to the level of the convict's culpability; to avoid a multiplication of penalties for the same criminal conduct; where act or omission is punishable in different ways by different criminal statutes, so as to ensure it is be punished under either but not both, and so on. In order to reduce the possibility of imposing
30 excessive punishment in the instant case, the sentence imposed is to run concurrently with the

previous conviction and sentence of twenty one (21) years and eleven (11) months in H.C.C. 0476 of 2015 passed on 9th August, 2018 on basis of a plea bargain.

5 Having been convicted on his own plea of guilty, the convict is advised that he has a right of appeal against the legality and severity of the sentence and order, within a period of fourteen days.

Dated at Kampala this 9th day of January, 2019.

Stephen Mubiru

Judge.

10 9th January, 2019.