

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT LUWERO

CRIMINAL SESSIONS CASE No. 0085 OF 2016

UGANDA

PROSECUTOR

VERSUS

KYALIGAMBA STEPHEN

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) and (4) (a) of the *Penal Code Act*. He pleaded not guilty and the case was fixed for commencement of hearing on 31st January, 2018. Today, there are three prosecution witnesses in attendance ready to testify but the accused has chosen instead to enter into a plea bargain with the prosecution. It is alleged that on 21st September, 2014 at Luzzi Zone in Luwero District, the accused performed an unlawful sexual act with Mutonyi Jesca, a girl aged 12 years.

When the case was called, the learned Resident State Attorney, Ms. Beatrice Odongo reported that she had successfully negotiated a plea bargain with the accused and his counsel. The court then allowed the State Attorney to introduce the plea agreement and obtained confirmation of this fact from defence counsel on state brief, Mr. Kamugisha Gastone. The court then went ahead to ascertain that the accused had full understanding of what a guilty plea means and its consequences, the voluntariness of the accused's consent to the bargain and appreciation of its implication in terms of waiver of the constitutional rights specified in the first section of the plea agreement. The Court being satisfied that there was a factual basis for the plea, and having made the finding that the accused made a knowing, voluntary, and intelligent plea bargain, and after he

had executed a confirmation of the agreement, went ahead to receive the agreement to form part of the record. The accused was then allowed to take plea whereupon a plea of guilty was entered.

The court then invited the learned State Attorney to narrate the factual basis for the guilty plea, whereupon she narrated the following facts; the victim was at that time aged 12 years and she was living with her sister called Mbabazi Peace at Luzzi in Wobulenzi Town Council. On 21st September, 2014 the victim was sent by her sister to do some domestic work at home. She went to the home of Prosy a neighbour to do some work who sent her to go and buy charcoal. She came back home late and this annoyed the sister who sent her back to the home of Prosy. She never found Prosy at home but decided to sit at the veranda of Prosy's house. At about 3.00 pm the accused who is a neighbour to Prosy invited the victim into his house. He then had sexual intercourse with her and after that he let her go to her friend Nabunya where she spent the night and she narrated to Nabunya her ordeal. The next day in the morning at 8.00 am the victim's sister who had spent the whole night searching for her found her hiding in Nabunya's toilet and began beating her. Nabunya intervened and narrated what had happened to the victim at the home of the accused. The sister went and reported to the police. The victim was examined on P.F. 3A and on 22nd September, 2014 at Luwero Health Centre IV by Senior Clinical Medical Officer Obbo James. She was found to be 12 years old at the time. She had a ruptured hymen and with an inflammation on the private parts. He stamped and signed on the form. The accused too was arrested and examined on 1st October, 2014 at Luwero Health Centre IV by the same doctor. He was found to be 24 years and his mental status normal. Both 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) and (4) (a) of *The Penal Code Act*. In justification of the sentence of ten (10) years' imprisonment proposed in the plea agreement, the learned State Attorney adopted the aggravating factors outlined in the plea agreement which are that; the victim was only twelve years old and she was physically and emotionally traumatised.

In response, the learned defence counsel adopted the mitigating factors outlined in the plea agreement which are that; the convict is a first offender, he has not wasted court's time, he is capable of reform and has spent three years and four months on remand. In his *allocutus*, the convict prayed that the sentence is lenient because he has responsibilities at home. He has children who are no longer going to school. He is sickly due to the time he has spent on remand. He was involved in an accident and he prayed that the remand period be considered.

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.

Where the death penalty is not imposed, the next option in terms of gravity of sentence is that of life imprisonment. None of the aggravating factors prescribed by Regulation 22 of the Sentencing Guidelines, which would justify the imposition of a sentence of life imprisonment, is applicable to this case. For that reason that 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) (a) 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.

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. At the time of the offence, the accused was 24 years old and the victim 12 years old. The age difference between the victim and the convict was 12 years. He took advantage of the

victim who at the time was in a desperate situation. 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.

The victim opted not to make an impact statement but intimated off record that she had been consulted during the plea negotiation and found the sentence proposed in the plea agreement appropriate. 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.

In light of the sentencing range apparent in those decisions, the aggravating and mitigating factors mentioned before and 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*, I have considered the sentence proposed in the plea agreement to be appropriate in the circumstances. I accordingly sentence the convict to a term of imprisonment of ten (10) 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 31st day of January, 2018.

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Stephen Mubiru

Judge.

31st January, 2018.