

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA SITTING AT LUWERO**

**CRIMINAL SESSIONS CASE No. 0323 OF 2014**

**UGANDA .....**

**PROSECUTOR**

**VERSUS**

**SERUGO JULIUS ..... ACCUSED**

**Before Hon. Justice Stephen Mubiru**

**SENTENCE AND REASONS FOR SENTENCE**

When this case came up on 3<sup>rd</sup> 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 30<sup>th</sup> January, 2018 one witness testified and the case was adjourned to 1<sup>st</sup> February, 2018 for further hearing. Today, there is no prosecution witness in attendance but the accused has chosen instead to enter into a plea bargain with the prosecution. It is alleged that on 18<sup>th</sup> May, 2013 at Katale-ka-mese in Nakaseke District, the accused performed an unlawful sexual act with Kalve Phiona, a girl aged under 18 years, while he was HIV positive.

When the case was called, the learned Resident State Attorney, Mr. Ntaro Nasur reported that he 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; on 18<sup>th</sup> May, 2012 the victim left her home with the mother to the trading Centre. As they were in the bar the accused came and caught the victim by hand and took her to the house of one Mwanje. He told her to remove her knickers and he played sex with her. Her mother got annoyed and reported the matter to the police. The accused was arrested a year later and was examined and found to be HIV +ve. Both P.F. 3A and the Nakaseke Hospital Lab report dated 30<sup>th</sup> December, 2013 have been 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 (c) 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 is remorseful and capable of reform and has spent five years on remand. In his *allocutus*, the convict prayed that he needs to return to his wife and three children. His wife was expecting and he was a tenant. He was not aware at the time that he was HIV +ve. He got to know it in 2014 when he was taken to the Nakasongola when he was remanded.

According to section 129 (3), the maximum penalty for the offence of Aggravated Defilement c/s 129 (3) and (4) (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. 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. 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 convict was HIV positive but he was unaware of that fact. For that reason 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) (c) 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. The accused could have transmitted HIV to the victim at such a tender age. 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.

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 30<sup>th</sup> 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 1<sup>st</sup> day of February, 2018.

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Stephen Mubiru

Judge.

1<sup>st</sup> February, 2018.