

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CRIMINAL CASE No. 0116 OF 2019

UGANDA **PROSECUTOR**

VERSUS

ORYEM BOSCO **ACCUSED**

Before: Hon Justice Stephen Mubiru.

PROCEEDINGS

10th July, 2020

8.48 am

Attendance

Mr. Kilama Stephen, Court Clerk.

Mr. Omia Patrick, Resident State Attorney for the Prosecution.

Mr. Abore Patrick, Counsel for the accused.

The accused is present in court

Accused: I speak Acholi.

Court: The Indictment is read and explained to the accused in the Acholi language.

Details; Aggravated Defilement C/s 129 (3) and (4) (a) of *The Penal Code Act*. It is alleged that the accused on the 31st day of July, 2018 at Lamit West village in Agago District performed an unlawful sexual act with Atimango Rita, a girl aged 4 ½ years.

Accused: I have understood the indictment. It is true.

Court: A plea of guilty is entered.

.....
Stephen Mubiru
Judge
10th July, 2020.

State Attorney: On the 31th July, 2018 the mother of the victim left for the garden and the children at home. On return at around 9.00 am she found the accused in

her house lying on top of the victim performing a sexual act. She caused the arrest if the accused and forwarded him to the police. The victim was examined on the same day and found to be 4.5 years old. There was some redness in the vulva and a whitish substance was seen around the genitals. The hymen had ruptured that morning. The accused was examined on the same date and his age was estimated as being 18 years. The medical practitioner counted his teeth but the figures on the form are tampered with. He was HIV negative.

State Attorney: I pray to tender in the medical forms.

Defence Counsel: I have no objection.

Court: They are received as part of the facts and are marked P. Ex.1 and P. Ex.2 respectively.

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Stephen Mubiru
Judge
10th July, 2020.

Accused: I have understood the facts. They are correct.

Court: The accused is 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*.

.....
Stephen Mubiru
Judge
10th July, 2020.

State Attorney: the aggravating factors are that the accused took advantage of the victim's age, she was also injured including breaking a hymen.

Counsel for the accused: the mitigation is that he readily pleaded guilty, he is 19 years old and remorseful, he is a first offender and capable of reform. He was a juvenile at the time of the offence

Accused: My step mother arrested me and she did not like me, just because my mother was dead. I have grown up as an orphan since my father died in the

1980s. I pray for a lenient sentence. I have four siblings at home to look after.

SENTENCE AND REASONS FOR THE SENTENCE

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Before sentencing the convict, it is necessary to make an age determination as to what his true age was at the time he committed the offence. According to section 107 (1) of *The Children Act*, where a person charged with an offence is brought before any court otherwise than for the purpose of giving evidence and it appears to the court that he or she is under eighteen years of age, the court shall make an inquiry as to the age of that person. In making that inquiry, the court may take any evidence, including medical evidence, which it may require.

In the charge sheet preferred on 5th September, 2018, the convict was charged as an adult aged 18 years. Upon medical examination done on 31st August, 2018 (exhibit P. Ex.2), the examining Medical Officer opined that the convict had 16 teeth in the upper jaw and 16 teeth in the lower jaw, but the figures have obvious alterations. Upon further medical examination done on 27th June, 2019 the convict claimed to be 17 years old but the examining Medical Officer opined that he was an adult since he had a full set of 32 teeth. While the general physical development of a person, including height, weight, secondary sexual characteristics are helpful in the estimation and determination of that person's age, eruption and maturity of teeth are quite reliable data too for estimation of age, the evidence in this case is most unsatisfactory. The report following the medical examination that was undertaken closest to the day of the offence (that of 31st August, 2018 - exhibit P. Ex.2), has the recorded findings tampered with. The one done a year later (that of 27th June, 2019), is too far removed from the date of the incident to be very helpful.

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Medical evidence of this type as to age is from its very nature based upon estimates and cannot be relied upon to determine with precision the exact age of a person (see *Sarkar on Evidence*, 9th Edn. at p. 443). A doctor's opinion as to the age of a person based on his or her height, weight and teeth, on its own, does not amount to legal proof of the age of that person. Such evidence alone might not be sufficient to establish a person's exact age. In borderline cases such as this, age determination by clinical examination done by doctors may not be conclusive.

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In any event, even the more reliable age determination method of X-rays interpreted by an expert radiologist based on the developments of the bones, and epiphyses which have in fact, taken place in the subject, as revealed in X-ray photographs, is not infallible. Although reputed to be more scientific and accurate, age determination based on the developments of the bones too is renowned for being susceptible to a two year margin of error. It is so well known as to be within the judicial knowledge of the court that, even with the aid of X-rays, age cannot be assessed exactly (see *Sangu and another v. Republic* [1971] 1 EA 539 at 541). There is consequently a real doubt in this case as to whether the convict had attained the age of 18 years at the date of the offence. It is an established practice in criminal trials for courts to construe evidential ambiguities in favour of the accused. It is for that reason that the convict is hereby given the benefit of that doubt as to his age at the time he committed the offence. In the light of the available evidence and of the impression which I myself have formed from his appearance and demeanour in court, I am not satisfied beyond reasonable doubt that the accused had attained the age of 18 years by 31st July, 2018, and accordingly I hold so.

Section 108 (1) of the Act provides that the age presumed or declared by the court to be the age of that person shall be deemed to be that person's true age for the purposes of the proceedings. 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, according to section 94 (1) (d) of *The Children Act*, where the charges have been admitted or proved against a child, the court may order detention of the child, in the case of an offence punishable by death, for a maximum period of three years. In the instant case, although he has been convicted as an adult, the accused was a child at the time he committed the offence and therefore would have been liable to a period of detention not exceeding three years.

In accordance with Article 23 (8) of the Constitution and Regulation 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, and section 94 (3) of *The Children Act*, to the effect that where a child has been remanded in custody prior to an order of detention being made in respect of the child, the period spent on remand shall be taken into consideration, I note that

the convict was charged 5th September, 2018 and been in custody since then, a period of one (1) year and ten (10) months.

In accordance with Article 23 (9) of the Constitution and Regulation 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, and section 94 (3) of The Children Act stating that where a child has been remanded in custody prior to an order of detention being made in respect of the child, the period spent on remand shall be taken into consideration when making the order,

I note that the convict was charged on 5th September, 2018 and been in custody since then. I hereby take into account and set off one (1) year and ten (10) months as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of one (1) year and two (2) months 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 Gulu this 10th day of July, 2020.

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Stephen Mubiru,
Judge.
10th July, 2020.



**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN**

TO: AT GULU

**The Officer in Charge,
Government Prison, Gulu.**

WARRANT OF COMMITMENT

WHEREAS on the **10th** day of **July** 2020, **ORYEM BOSCO** the
Prisoner in Criminal Session Case No.**0116** of the Calendar Year for
2019 was convicted before me: Hon. Justice **MUBIRU STEPHEN, a**
Judge of the High Court of Uganda, of the offence of
AGGRAVATED DEFILEMENT C/s 129 (3) and (4) (a) of The Penal
Code Act and was sentenced to **ONE (1) YEAR AND TWO (2)**
MONTHS' IMPRISONMENT.

THIS IS TO AUTHORISE AND REQUIRE YOU, the Superintendent to
receive the said **ORYEM BOSCO** into your custody in the said prison
together with this **Warrant** and there carry the afore said sentence into
execution according to Law.

GIVEN under my Hand and the Seal of the court this **10th** day of **July,**
2020.

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JUDGE.