

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CRIMINAL CASE No. 0007 OF 2019

5 **UGANDA** **PROSECUTOR**

VERSUS

10 **OCAN ERICK** **ACCUSED**

Before: Hon Justice Stephen Mubiru.

PROCEEDINGS

15 10th July, 2020
10.31 am

Attendance

Mr. Kilama Stephen, Court Clerk.
Mr. Omia Patrick, Resident State Attorney for the Prosecution.
Mr. Abore Patrick, Counsel for the accused.
20 The accused is present in court

Accused: I speak Acholi.

State Attorney: we have negotiated a plea bargain and accordingly executed a plea agreement which I pray to present to court.

25 **Counsel for the accused:** That is correct.

Accused: I signed the agreement willingly at pages 5. My constitutional rights were explained to me and I willingly waived them fully cognisant of the consequences of signing the plea agreement.

Court: The agreement is received and hereby forms part of the court record.

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Stephen Mubiru
Judge
10th July, 2020.

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

Details; Aggravated Defilement C/s 129 (3) and (4) (b) of *The Penal Code Act*. It is alleged that the accused between 15th day of January, 2018 and May 2018 at Alero Trading Centre, in Nwoya District, being a person afflicted by HIV, performed an unlawful sexual act with Labara Patience, a girl aged 16 years.

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

Court: A plea of guilty is entered.

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Stephen Mubiru
Judge
10th July, 2020.

State Attorney: During the fateful time the accused took the victim and cohabited with her and they would have sex with her. The accused was arrested upon a report made by the victim's father to the police and on examination of the victim she was found to be of the apparent age of 16 years. She was of normal mental status and her hymen had been ruptured. She was at that time found to be HIV negative. The accused was examined by a clinical officer from Anaka General Hospital and found to be HIV positive. He told the Clinical officer that he had ben cohabiting with the victim. The victim has since begotten a child by the accused.

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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.

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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) (b) of *The Penal Code Act*.

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

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State Attorney: the aggravating factors are that the accused took advantage of the victim's age and cohabited with her as husband and wife for four months. He also exposed her to the danger of infection with HIV.

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Counsel for the accused: the mitigation is that he readily pleaded guilty, he is 23 years old and remorseful, he is a first offender and capable of reform. He was a second year university student at the time of his arrest.

Accused: I request the court to have mercy on me and have a lenient sentence so that I support the child and the mother.

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Victim impact statement: I am Lajara Patience, 21 years old, the parents of the accused are looking after me from Ayuwe. I have been living with them for two years now since the accused was arrested. The accused is my husband. Before he was brought here he had married me. I was born 23rd January, 1999. I do not know why he was arrested. I was 18 years old and some months at the time he was arrested. It is my father who instigated his arrest yet he had not done anything wrong to me. My father has never been in my life. He lives and works in Kampala and has never paid school fees for me. It is my mother who has struggled to maintain me until I met the accused and we began to live together. He only emerged to make this accusation. We now have a child together and I need my husband to leave prison so that he looks after his child. This child is not the responsibility of the parents of the accused who are now looking after her. Although both of us are HIV positive our child is not. We know how to handle ourselves.

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SENTENCE AND REASONS FOR THE SENTENCE

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According to section 129 (3), the maximum penalty for the offence of Aggravated Defilement c/s 129 (3) and (4) (b) of *The Penal Code Act*, is death. However, this punishment is by sentencing convention reserved for the most extreme circumstances of perpetration of the offence such as

where it has lethal or other extremely grave consequences. Examples of such consequences 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
5 HIV/AIDS, or resulting in serious injury, or by an offender previously convicted of the same crime, and so on. I construe these factors as ones which imply that the circumstances in which the offence was committed should be life threatening, in the sense that death is a very likely or probable consequence of the act. I considered the circumstances in which the offence was committed which were not life threatening, in the sense that death was not a very likely
10 consequence of the convict's actions, for which reason the death sentence was discounted, giving way to a plea bargain.

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
15 Sentencing Guidelines, which would justify the imposition of a sentence of life imprisonment, is applicable to this case. A sentence of life imprisonment may as well be justified by 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
20 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*). The convict in this case does not fit that description and therefore I do not consider the sentence of life imprisonment to be appropriate in this case. Although the circumstances of the case neither justify the death penalty nor a sentence of life imprisonment, they are sufficiently grave to
25 warrant a deterrent custodial 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 Guidelines for Courts of Judicature) (Practice) Directions, 2013* stipulate under Item 3 of Part I
30 (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. In doing so, the court must take into account current sentencing practices for purposes of comparability and uniformity in sentencing. I have therefore reviewed and taken into account the current sentencing practices in relation to cases of this nature as well. I have accordingly adopted a starting point of
5 a range of 15 – 20 years’ imprisonment.

From this, the convict is entitled to a discount for having 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*
10 *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
15 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 readily pleaded guilty as one of the factors mitigating his sentence.

The sentencing guidelines leave discretion to the Judge to determine the degree to which a sentence will be discounted by a plea of guilty. As a general, though not inflexible, rule, a
20 reduction of one third has been held to be an appropriate discount (see: *R v. Buffrey (1993) 14 Cr App R (S) 511*). Similarly in *R v. Buffrey 14 Cr. App. R (S) 511*). The Court of Appeal in England indicated that while there was no absolute rule as to what the discount should be, as general guidance the Court believed that something of the order of one-third would be an
25 appropriate discount. In light of the convict’s plea of guilty, and persuaded by the English practice, because the convict before me pleaded guilty, I propose at this point to reduce the sentence by one third from the starting point of a range of 15 – 20 years to a range of 10 – 13 years’ imprisonment, before mitigation.

30 Having considered the sentencing guidelines and the current sentencing practice in relation to offences of this nature, the aggravating and mitigating factors outlined above, I hereby accept the

submitted plea agreement entered into by the accused, his counsel, and the State Attorney and in accordance thereto, find the proposed sentence of seven (7) years' imprisonment as befitting the circumstances of the case and the antecedents of the convict.

5 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, I note that the convict was charged on 16th May, 2018 and been in custody since then. I hereby take into account and set off one (1) year and two
10 (2) months as the period the convict has already spent on remand. The court would therefore have sentenced the convict to a term of imprisonment of five (5) years and ten (10) months.

However, victim impact statements introduced during the sentencing phase allow family members of the victim or the victim to describe the financial, emotional, psychological, and
15 physical effects the crime has had on their lives. They are intended to result in sentences more congruent with the harm done to victims. The statement has to be considered alongside the aggravating and mitigating factors in the case. The principal victim in this case is vehemently opposed to further punishment of the convict. She would clearly be a hostile witness for the prosecution had this case gone to trial. Although a victim impact statement is not meant to be a
20 substitution of the victim's subjective approach for the objective one by the court, courts are mindful of restorative justice in deserving cases. Harm, even if initially acknowledged to be inherently serious, loses some of its aura of seriousness over time. Considering the criminological purpose of sentencing, there appears to be no public good that may be obtained by the further incarceration of the convict in this particular case, despite what is contained in the
25 plea agreement. In the circumstances of this case, I find that the "time served" is an appropriate punishment for the convict. He should accordingly be set free forthwith unless he is being held for other lawful reason. 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.

30 Dated at Gulu this 10th day of July, 2020.

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Stephen Mubiru,
Judge.10th July, 2020.

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UGANDA **PROSECUTOR**

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VERSUS

OCAN ERICK **ACCUSED**

10 **To whom it may concern**

CERTIFICATE OF DISCHARGE

15 **THIS IS TO CERTIFY** that on this **10th** day of **JULY**, 2020 **OCAN ERICK** the Prisoner in the above mentioned case appeared before me: Hon. Justice **STEPHEN MUBIRU, a Judge of the High Court of Uganda**, Indicted with the offence of **AGGRAVATED DEFILEMENT C/s 129 (3) and 4 (b)** of The Penal Code Act, in a plea bargaining session.

20 He has however been **DISCHARGED** for “Time Served” on account of the fact that the period already served on remand awaiting trial or a plea of guilty is sufficient punishment for the offence in the light of his antecedents and the circumstances of the offence for which he has pleaded guilty and convicted.

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

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JUDGE

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