

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CRIMINAL CASE No. 0278 OF 2019

UGANDA **PROSECUTOR**

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VERSUS

OMARA TONNY **ACCUSED**

10 **Before: Hon Justice Stephen Mubiru.**

PROCEEDINGS

10th July, 2020

2.40 pm

15 Attendance

Mr. Kilama Stephen, Court Clerk.

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

Mr. Walter Okidi Ladwar, Counsel for the accused.

The accused is present in court

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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.

Counsel for the accused: That is correct.

25 **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.

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 on the 9th day of November, 2018 at Kulu Otit village, Bobi sub-county, in Omoro District, being a person infected with HIV/AIDS performed an unlawful sexual act with Akot Monica, 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: On the fateful day the accused then aged 19 seduced the victim Akot to cohabit with him. The victim accepted and went to live with him. Her parents looked for her and later found her with the accused and had him arrested. The victim was examined and found to be approximately 16 years old with a ruptured hymen and brownish vaginal discharge. The accused was found to be HIV positive. He performed sex with her during the cohabitation.

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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*.

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Stephen Mubiru
Judge
10th July, 2020.

State Attorney: the aggravating factors are that the accused seduced the victim into a relationship.

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Counsel for the accused: the mitigation is that he readily pleaded guilty, he is 20 years old and remorseful, he is a first offender and capable of reform.

Accused: I have nothing to add. I was not aware I was HIV positive until examination at the police. I lived with her for four months. She lived about three kilometres away. I pray that I should be forgiven. I will never do this again if I go back home. I can do something for my country.

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SENTENCE AND REASONS FOR THE SENTENCE

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 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 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 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 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 warrant a deterrent custodial sentence.

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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 (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 a range of 20 – 25 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 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 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 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 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 20 – 25 years to a range of 13 – 17 years' imprisonment, before mitigation.

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 fifteen (15) years' imprisonment as befitting the circumstances of the case and the antecedents of the convict.

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 12th November, 2018 and been in custody since then. I hereby take into account and set off one (1) year and eight (8) months as the period the convict has already spent on remand. I therefore sentence the convict to a term of imprisonment of thirteen (13) years and four (4) 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.

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

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TO: AT GULU

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

WARRANT OF COMMITMENT

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WHEREAS on the **10th** day of **July** 2020, **OMARA TONNY** the
Prisoner in Criminal Session Case No.**0278** 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) (b) of The Penal
Code Act and was sentenced to **THIRTEEN (13) YEARS AND FOUR
20 (4) MONTHS' IMPRISONMENT.**

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

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

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JUDGE.