

5

**THE REPUBLIC OF UGANDA,
IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL
CRIMINAL APPEAL NO 240 OF 2017**

(Coram: Egonda – Ntende, Obura & Madrama, JJA)

MUSINGUZI APPOLLO}APPELLANT

10

VERSUS

UGANDA}RESPONDENT

*(Appeal from the judgment of the High Court of Uganda at Fort Portal
(Oyuko Ojok, J) delivered on the 3rd of July, 2017 in High Court Criminal
Session Case No 0246 of 2013)*

15

JUDGMENT OF THE COURT

20

The facts of this appeal are that the appellant pleaded guilty to the charges of Aggravated Robbery contrary to sections 285 and 286 (2) of the Penal Code Act and Murder contrary to sections 188 and 198 of the Penal Code Act. He was sentenced to 30 years imprisonment. Being aggrieved with the sentence, he appealed to this court on the sole ground that:

The sentence of 30 years is illegal, harsh and excessive in the circumstances

In the memorandum of appeal the appellant prays that the sentence of 30 years imprisonment be reduced.

25

Representation

At the hearing of the appeal the appellant was represented by learned counsel Mr Businge Asiimwe Victor while the respondent was represented

5 by learned Senior State Attorney Ms Asiku Nelly. The appellant was present
in court

Submissions of the appellant

10 With the leave of court, the appellant was allowed to proceed with an
appeal against sentence only under the provisions of section 132 (1) (b) of
the Trial on Indictment Act. Before proceeding with his submissions,
learned counsel for the appellant informed the court that he had
discovered that there was no conviction on the court record and the
appellant had been sentenced without a conviction. He submitted that it
was an illegality.

Submissions of the respondent

15 In reply Ms Asiku Nelly conceded that there was no conviction on the
record but also informed court that there was a plea bargain agreement on
record. Failure to have a conviction on record was an illegality and she
conceded that in the circumstances the remedy was to send the matter
20 back for re-trial.

Consideration of the appeal

We have carefully considered the point of law raised by the appellant's
counsel and the concession by the Senior State Attorney that there was an
illegality on record. We have accordingly considered the law relating to plea
25 taking and plea bargains.

We have perused the record of appeal and it reveals that the matter initially
proceeded on a plea of not guilty and six prosecution witnesses were called
and they all testified. The last hearing was on 2nd June 2017. Thereafter the
record has a plea bargain agreement which provides in part as follows:

30 I hereby freely and voluntarily pleaded guilty to the charges above and agreed to
be sentenced to 30 years excluding the period spent on remand.

5 This was part of the form which was filled by the appellant and an advocate. The advocate who signed on behalf of the accused is Ruth Ongom and her signature is dated 3rd July, 2017. We note that Counsel on record is Businge Victor and not Ruth Ongom. The agreement itself does not show when the plea bargain agreement was filed in court. What is material is that the
10 record only reveals the court finding and order in the following words:

The court, having reviewed this form and addenda, and having questioned the accused concerning accused's constitutional rights, finds that the accused has expressly, knowingly, understandingly, and intelligently waived and give up his or her constitutional and statutory rights. The court finds that the accused's plea(s)
15 and admission(s) and freely and voluntarily made with an understanding of the nature and consequences thereof, that any allegations as indicated in this form are true, and that there is a factual basis for the plea(s) and admission(s). The court accepts the accused's plea(s). The court orders that this form be filled and incorporated in the docket by reference as though duly set forth therein.

20 This paragraph was endorsed with a signature below by the learned trial Judge on 3rd July, 2017. There is no record of any conviction entered or sentence passed by court. What is on record is a warrant of commitment indicating that on 3rd July, 2017 the appellant was convicted of the offences indicated therein as charged and sentenced to 30 years imprisonment. It is
25 apparent that there is no record of conviction or sentence and therefore because the learned trial Judge had signed the above orders in the plea bargain form on 3rd July 2017, he took that as the conviction and sentence by reference to the plea bargain form which had been filled.

Plea bargaining is a recent innovation in Uganda and for practice is
30 governed by the **Judicature (Plea Bargain) Rules, 2016**. Rule 6 thereof clearly provides for the scope of the plea bargain agreement and provides that the plea bargain may be in respect of a promise to plead guilty to a charge in exchange for the recommendation for a lesser offence. Secondly,

- 5 it may be for a promise to cooperate as a witness for the prosecution in exchange for reduced charges or a reduced sentence or both.

Rule 9 thereof provides for the form of the plea bargain agreement. Among other things Rule 12 of the **Judicature (Plea Bargain) Rules** provides that the charge shall be read and explained to the accused in a language that he
10 or she understands and the accused shall be invited to take plea. Secondly, the prosecution shall lay before the court the factual basis contained in the plea bargain agreement and the court shall determine whether there exists a basis for the agreement. Thirdly, the accused person shall freely and voluntarily without threat or use of force execute the agreement with full
15 understanding of all matters. Of further interest is Rule 12 (5) of the **Judicature (Plea Bargain) Rules** which provides that:

(5) A plea Bargain Confirmation shall be signed by the parties before the presiding judicial officer in the form set out in the Schedule 3 and shall become part of the court record and shall be binding on the prosecution and the accused.

- 20 Rule 14 of the **Judicature (Plea Bargain) Rules** provide that either party may at any stage of the proceedings before the court passes sentence withdraw the plea bargain agreement.

We have carefully considered the provisions of the **Judicature (Plea Bargain) Rules, 2016** and the primary problem with the procedure
25 adopted by the learned trial Judge is that he did not record the proceedings relating to the bargain as required by the Rules for plea bargain. What is on record is a form which had been filled and the court order. Secondly, the statutory rules for plea taking have not been overtaken by the **Judicature (Plea Bargain) Rules** and were not followed.

- 30 The primary legislation for plea taking for offences triable by the High Court is still the Trial on Indictments Act, Cap 23 and specifically Section 60 thereof deals with pleading to an indictment. An accused person pleads to

5 an indictment which is read before the trial commences. Section 60 of the
Trial on Indictments Act provides as follows:

60. Pleading to indictment.

10 The accused person to be tried before the High Court shall be placed at the bar
unfettered, unless the court shall cause otherwise to order, and the indictment
shall be read over to him or her by the chief registrar or other officer of the court,
and explained if need be by that officer or interpreted by the interpreter of the
court; and the accused person shall be required to plead instantly to the
indictment, unless, where the accused person is entitled to service of a copy of
15 the indictment, he or she shall object to the want of such service, and the court
shall find that he or she has not been duly served with a copy.

Even where there is a plea bargain agreement, the accused is required to
take a plea. The indictment or charge is read over and he or she is required
to plead instantly to what has been read. The provision is clear. It requires
20 that:

...the indictment shall be read over to him or her by the chief registrar or other
officer of the court, and explained if need be by that officer or interpreted by the
interpreter of the court; and the accused person shall be required to plead
25 instantly to the indictment,

Where there is a plea bargain the accused shall still have to plead guilty
and the proceedings in plea taking should be on record. Under Section 63
of the Trial on indictment Act, where the accused pleads guilty, as in the
30 appellant's case, a plea of guilty shall be entered and recorded. This is a
preliminary stage to the proceedings because the plea of guilty can be
changed to one of not guilty subsequently or even withdrawn under the
Judicature (Plea Bargain) Rules. Section 63 provides as follows:

35 63. Plea of guilty.

5 If the accused pleads guilty, the plea shall be recorded and he or she may be convicted on it.

The question of whether the court will convict on a plea of guilty is a subsequent proceeding to the plea of guilt. A plea is taken by an accused person. It may be a plea of guilty or not guilty. It is a statement recorded
10 from what the accused says about the charge. Thereafter the court may find the accused guilty and convict him or her. In fact under section 63 of the TIA the court merely records the plea and thereafter provides that the accused may be convicted on it. The procedure for recording a plea of guilty was explained by the East African Court of Appeal in **Adan v**
15 **Republic [1973] 1 EA 445** where the court stated at pages 446 – 447:

We think the practice is desirable and should generally be followed throughout East Africa. So that there may be no doubt in the matter, we set out the procedure in the following paragraph. We would add also, with respect, that we
20 are in complete agreement with a further observation by the Chief Justice and Muli, J., also in Criminal Appeal No. 743, that a plea should not be taken unless the prosecution are in a position to state the facts. An adjournment between the plea and the statement of facts ought never to be necessary and is most undesirable.

25 When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence
30 charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts
35 or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed

5 to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded.

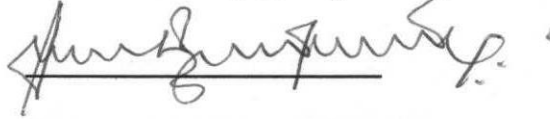
10 The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction.

In the appellant's case, it was necessary to record his plea to the charge or indictment and not just file a form containing the plea bargain agreement. Thereafter the court has an opportunity to establish whether the plea is equivocal or unequivocal. It will do this by establishing the veracity of the bargain and this should form part of the court record. I.e. what the accused says about the plea bargain should be part of the record. Thereafter, if the court is satisfied that the plea bargain agreement reflected the agreement of the parties, it would convict the accused and impose the appropriate sentence contained in the plea bargain. If the court does not agree with the sentence, the plea bargain agreement is rendered useless and the matter has to proceed for trial as stipulated in the plea bargain rules.

30 In the circumstances we find that there was no plea taken and there was no conviction or sentence on record. We agree that this was an irregularity that vitiated the commitment warrant purporting to state that the appellant had been sentenced to 30 years imprisonment.

5 In the premises, we allow the appeal and remit the file back to the High Court for re-trial without affecting the plea bargain agreement. The matter shall proceed afresh before another judge of the High Court.

Dated at Fort Portal the 19th day of June 2019



10

Frederick Egonda - Ntende

Justice of Appeal



Hellen Obura

Justice of Appeal

15



Christopher Madrama

Justice of Appeal