THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 858 OF 2014

LUWAGA SULEMAN ALIAS KATONGOLE::::::::::::::::::::::::::::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of Hon. Mr. Justice Namundi Godfrey in the High Court of Uganda at Mukono in Criminal Session Case No. 163 of 2014)

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE STEPHEN MUSOTA, JA

HON. LADY JUSTICE PERCY NIGHT TUHAISE, JA

JUDGMENT

This is an appeal from the decision of Namundi Godfrey, J in High Court Criminal Session Case No.163 of 2014 sitting at Mukono delivered on 28th October, 2014 in which the appellant was convicted of murder contrary to sections 188 and 189 of the Penal Code Act and sentenced to 16 years imprisonment following a plea bargaining agreement.

Prosecution alleged that the appellant, Luwaga Sulaiman alias Katongole and the deceased Nalubowa Margret Nabakoza were staying in Kikubankima Village

as wife and husband. The deceased had four children but had only one child, Nakibuule Sharon with the deceased. On the 29th day of September 2013 at around 8:00pm, when the appellant returned home, he found another man in the house who ran away on seeing the appellant. This annoyed the appellant who suspected infidelity by his wife with the man who had run out of their house.

On entering the house, the appellant started assaulting the deceased who was totally helpless since she was crippled in both her upper and lower limbs. The appellant cut off the deceased's hair, pushed a stick in her private parts after kicking her in the stomach and boxing her in the presence of her 4 young children. The following morning, the appellant picked all his clothes and some of the deceased's knickers and left. The deceased then sent her eldest daughter aged 8 years to call for help from Babirye Suzan who responded and found the deceased lying in blood with a swollen face.

Babirye Suzan rushed to the LC1 Chairlady, Kalanzi Teopista and informed her about the deceased's condition. On reaching the deceased's house, she was found dead. The LC1 Chairlady called the Police which took the body for examination at Kawolo Hospital. Later a one Seruwagi Stephen recovered a small bag containing the deceased's photographs, the appellant's clothes and shoes behind an unfinished house and this led to the arrest of the appellant on the 26th of October, 2013 from his hideout in Maziba Village. At the police, the appellant in his Charge and Caution Statement admitted that he had assaulted

the deceased. Subsequently, he was indicted and sentenced to 16 years imprisonment following a plea bargaining agreement.

Being dissatisfied with the decision of the learned trial Judge, the appellant with leave of this Court appealed against sentence only faulting the learned trial Judge for passing a manifestly harsh and excessive sentence against the appellant thereby failing to exercise his discretion judiciously.

At the hearing of this appeal, Mr. Mangeni Ivan Geoffrey appeared for the appellant while the respondent was represented by Mr. David Ndamulani Ateenyi, Senior Assistant DPP.

Learned Counsel for the appellant Mr. Mangeni sought leave of court under Section 132 (1) (b) of the Trial on Indictment Act to appeal against sentence only which was granted. He invited Court to adopt his written submissions where he stated that the trial Judge did not take into consideration mitigating factors in favour of the appellant to wit the age of the appellant. He added that the appellant pleaded guilty, was very remorseful throughout the trial, a first offender with no previous criminal record and was aged 30 years at the time of commission of the offence. He relied on ***Bikanga Daniel V Uganda, Court of Appeal Criminal Appeal No.38 of 2014*** where this Court held that the age of an accused person is always a material consideration that ought to be taken into account before a sentence is imposed.

In response, counsel for the respondent submitted that the sentencing of the appellant was done following the Judicature (Plea Bargain) Rules, 2016 and the appellant in the instant case voluntarily pleaded to the offence charged and further agreed to be sentenced to the present term of imprisonment. Counsel invited Court to look at page 14 of the record of appeal where the appellant did affix his right hand thumb print below the pre-bargain agreement and the same was counter signed by his counsel, Allan Nshimye. Counsel added that one Vicent Kato who described himself as being a cousin to the appellant also agreed to the sentence that had been accepted by both the prosecution and the appellant.

Counsel further submitted that the discretion of the presiding Judge under the plea bargain proceedings is limited than in an ordinary trial where an accused is guilty. He submitted that the trial Judge is not meant to alter the sentence agreed upon by the parties but can reject it under rule 15(3) of the Judicature (Plea Bargain) Rules, 2016 if Court is of opinion that a particular case deserves a more severe sentence. Counsel added that for that reason, the trial Judge cannot be faulted for not having taken into account the mitigating factors. He invited Court to uphold the sentence.

In rejoinder, counsel for the appellant submitted that the trial Court remains with the mandate even if the parties have agreed on the sentence. He further submitted that the learned trial Judge would have considered both the aggravating and mitigating factors rather than just sentencing the appellant to

16 years. He added that the plea bargain agreement was not put into consideration.

We have considered the submissions of both counsel and studied the Court record. As a first appellate Court, we are required to re-appraise the evidence adduced and make our own inferences. ***See Rule 30(1) of the Rules of this Court and Kifamunte Henry V Uganda, Supreme Court Criminal Appeal No.10 of 1997.***

It was submitted for the appellant that the learned trial Judge did not take into consideration the mitigating factors in sentencing the appellant. In reply, counsel for the respondent submitted that the learned trial Judge did not have to consider the mitigating factors since the sentence of 16 years emanated from a plea bargaining agreement in which the trial Judge was not supposed to alter the sentence as agreed to by the parties.

The practice of plea bargaining is regulated by the Judicature (Plea Bargain) Rules, 2016. ***Rule 4 of the Judicature (Plea Bargain) Rules, 2016*** defines plea bargaining to mean the process between an accused person and the prosecution, in which the accused person agrees to plead guilty in exchange for an agreement by the prosecutor to drop one or more charges, reduce a charge to a less serious offence, or recommend a particular sentence subject to approval by Court.

Once parties conclude the plea bargaining process, the said process is reduced into a plea bargain agreement which is defined ***under rule 4 of the Judicature (Plea Bargain) Rules, 2016*** to mean an agreement entered into between the prosecution and an accused person regarding a charge or sentence against an accused person. This means that the plea bargaining process is intended to benefit the accused, the victim and the state.

In the instant appeal, the appellant was on his own plea of guilt convicted of murder and sentenced to 16 years imprisonment following a plea bargain agreement.

Rule 8 of the Judicature (Plea Bargain) Rules, 2016 provides for Court's participation in plea bargaining discussions. Of specific interest in ***Rule 8(2)*** which provides that the parties shall inform Court of the ongoing plea bargain negotiations and shall consult the Court on its recommendations with regard to possible sentence before the agreement is brought to Court for approval and recording.

In **R versus Turner [1970] 2 All ER 281 at page. 285**; the English Court of Appeal laid down a principle to the effect that a judicial officer should never indicate the type of sentence he will impose on an accused because he intends to plead guilty. Any indication of this nature meant that a judicial officer's participation in any plea bargain of any kind would be a thrust of his office's full force and majesty to induce the accused to yield his trial.

In **R versus Goodyear 2005 (WLR), para 53, 57, 63 and 64**; the Court held that a judge should not give an advance indication of sentence unless one is sought by the accused and retains unfettered discretion to refuse to give one. In addition, the court added that the defendant has to initiate the plea bargain process of seeking an indication of the sentence in case he wishes to fore go his right to trial. Where an accused was represented, his attorney would only seek an indication with written authority signed by his client that he wishes to do so.

We are persuaded by the Court's decision in **Inensko Adams versus Uganda, HCCA No. 004 OF 2017** where it was stated that:

"Like the name suggests, ideally plea bargain should be at the time of plea taking to enable the state, the accused and defence counsel agree on amending the charge sheet or indictment where necessary with a view of dropping some counts if they are multiple, reducing the charge to a minor cognate offence, using accused as state witness or taking responsibility of the criminal conduct early enough etc. before taking plea. It is very important that an accused who wishes to plead guilty whether under plea bargain or not should be explained properly about his or her constitutional rights to a fair trial and confirm that his plea is unequivocal with full knowledge of the consequences there of. The court is obliged under the rules to embrace plea bargain any time before sentence when either party before it expresses interest in the process unless it is intended to pervert the cause of justice."

The court found that the trial Magistrate erred in law and in fact when she failed to follow the Judicature (plea bargain) rules 2016 which came into force on 1/4/2016. She ought to have assigned an advocate to the Appellant and encouraged the state Attorney to consult the victim with a view of settling the matter under plea bargain.

The proceedings of the lower Court in the instant appeal indicate as follows;

Prosecution:-

We have reconsidered the sentence in view of the circumstances of the case.

Victim's relatives:

Vincent Kato:-

The deceased was my niece. A sentence of 16 years was appropriate.

Sentence:-

The offence was very serious.

The accused is sentenced to serve sixteen (16) years in prison.

Our reading of the above excerpt indicates that the parties did not consult the Court on its recommendations with regard to possible sentence before the agreement was brought to Court for approval and recording as per the law. However, from the above cited cases the discretion still remains with the judicial

officer to indicate the possible sentence to be passed with the accused's advocate as part of their participation in the plea bargaining process.

Rule 13 of the Judicature (Plea Bargain) Rules, 2016 provides for rejection of plea bargain agreement. The said rule states that;

1) The Court may reject a plea bargain agreement where it is satisfied that the agreement may occasion a miscarriage of justice.
2) Where the Court rejects a plea bargain agreement-

a) It shall record the reasons for the rejection and inform the parties;

b) The agreement shall become void and shall be inadmissible in subsequent trial proceedings or in any trial relating to the same facts; and

c) The matter shall be referred for trial, subject to sub rule 8(3).

We note that although the appellant did affix his right hand thumb print below the pre-bargain agreement and the same was counter signed by his counsel, Allan Nshimye, the agreement was not complete because the record is silent on whether Court ascertained that the appellant had full understanding of what a plea of guilty meant and its consequences, the voluntariness of the appellant's consent to the plea bargain and waiver of his Constitutional rights specified under Rule 12 of the Judicature (Plea Bargain) Rules, 2016.

It is our considered view that the learned trial Judge ought to have taken that into consideration. For the above reasons, we find the said Plea Bargain

Agreement defective. We accordingly quash the appellant's conviction, set aside his sentence and order a retrial.

In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it. ***See Fatehali Manji v The Republic [1966] 1 EA 343.***

In ***Rev. Father Santos Wapokra V Uganda, Court of Appeal Criminal Appeal No.204 of 2012,*** this Court stated as follows;

> *"The overriding purpose of a retrial is to ensure that the cause of justice is done in a case before Court. A serious error committed as to the conduct of a trial or the discovery of new evidence, which was not obtainable at the trial, are the major considerations for ordering a retrial. The Court that has tried a case should be able to correct the errors as to the manner of the conduct of the trial, or to receive other evidence that was then not available. However that must ensure that the accused person is not subjected to double jeopardy, by way of expense, delay and inconvenience by reason of the retrial. Other considerations are; where the original trial was illegal or defective, the rule of law that a man shall not be twice vexed for one and*

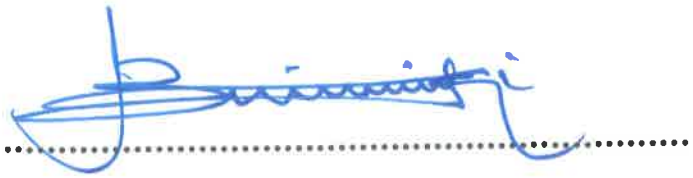
the same cause ((Nemo bis vexari debet pro eadem causa), where an accused was convicted of an offence other than the one with which he was either charged or ought to have been charged, strength of the prosecution case, the seriousness or otherwise of the offence, whether the original trial was complex and prolonged, the expense of the new trial to the accused, the fact that any criminal trial is an ordeal for the accused, who should not suffer a second trial, unless the interests of justice so require and the length of time between the commission of the offence and the new trial, and whether the evidence will be available at the new trial."

In the instant case, and having found that the Plea Bargain Agreement was defective, we find that the interest of justice will best be served by ordering a retrial in the following terms.

1. That the sentence of 16 years be and is hereby set aside.
2. A retrial of the said case is hereby ordered.
3. The Registrar of this Court is directed to bring this matter to the immediate attention of the Resident Judge at Mukono so that a retrial is conducted in the next convenient criminal session taking into consideration the provisions of ***Rule 8(3) of the Judicature (Plea Bargain) Rules, 2016***

We so order

Dated at Jinja this.....17th.....day of ....May.....2019



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HON. MR. JUSTICE BARISHAKI CHEBORION

JUSTICE OF APPEAL

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HON. MR. JUSTICE STEPHEN MUSOTA

JUSTICE OF APPEAL

.....

HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUSTICE OF APPEAL

17.7.19

Appellant present.
Mr. Mwesigwa for the appellant.
Mr. Mugisa for the respondent.
Mr. Owen: Clerk.
CA: Judgment delivered in the presence of the above.

17.7.19