

THE REPUBLIC OF UGANDA**IN THE COURT OF APPEAL OF UGANDA AT MBALE****CRIMINAL APPEAL NO.231 OF 2016****SWALIKI GGUTA:.....APPELLANT****VERSUS**10 **UGANDA:.....RESPONDENT**

(Appeal from the decision of the High Court of Uganda at Mukono before Mutonyi Margaret, J dated 3rd September, 2016 in High Court Criminal Session No.057 of 2016)

CORAM: HON. MR. JUSTICE F.M.S EGONDA-NTENDE, JA15 **HON. MR. JUSTICE CHEBORION BARISHAKI, JA****HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA****JUDGMENT OF COURT**

The appellant was convicted on his own plea of guilty by the High Court of aggravated defilement contrary to sections 129(3) & (4) (a) of the Penal Code Act
20 Cap 120. According to the charge, the appellant on 31st July, 2013 at Buyego Mpumude Village in Buvuma District performed a sexual act with Naigaga Faisi of 3 years. He was sentenced to 18 years imprisonment following a plea bargaining agreement.

5 He now appeals against both the conviction and sentence on the following ground;

1. *That the learned trial Judge erred in law and fact when she endorsed the plea bargain agreement yet the appellant had changed his mind thereby occasioning a miscarriage of justice to him.*

10 At the hearing of the appeal, Mr. Kyabakaya Enock Thompson appeared for the appellant while the respondent was represented by Ms. Tumwikirize Joanita. Counsel prayed that their written submissions be adopted.

Counsel for the appellant submitted that the appellant was indicted with the offence of aggravated defilement contrary to sections 129(3) & (4) of the Penal Code Act and sentenced to 18 years imprisonment following a plea bargain agreement. He invited Court to look at page 9 of the Record of proceedings where the appellant requested the learned trial Judge to reduce his sentence and the learned trial Judge objected to the appellant's request. In counsel's view, the appellant having requested the learned trial Judge to reduce his sentence meant that he had withdrawn his plea bargain agreement and therefore the learned trial Judge ought to have exercised her power under Rule 13 of the Judicature (Plea Bargain) Rules, 2016 to reject the plea bargain agreement and subject the accused to a full trial. He prayed that the appeal be allowed, quash the sentence and order a retrial.

25 In reply, counsel for the respondent submitted that there was no error in law because Rule 14 of the Judicature (Plea Bargain) Rules, 2006 provides that any

5 party may at any stage before sentence is passed withdraw the agreement. She invited Court to look at page 8 of the Record of Appeal where the appellant was asked by the learned trial Judge whether he understood the contents of the agreement and he answered in the affirmative and the appellant further agreed to the endorsement of the agreement by the learned trial Judge. She added that
10 by the appellant accepting the agreement to be endorsed, the sentence had been passed and Court was functus officio.

Counsel further submitted that it would be a misdirection by the appellant to assume that the agreement remained open for amendment even after all the necessary parties had signed. Counsel invited Court to look at the aggravating
15 factors to wit; the victim was only 3 years old and the appellant was 45 years of age. According to counsel, the sentence of 18 years was too lenient and this honorable Court should exercise its powers and enhance the sentence.

In rejoinder, counsel for the appellant submitted that the functus officio rule did not apply in the instant case because the said rule only applies where the Judge
20 has made a final pronouncement of the sentence or judgment. He added that when asked by the trial Judge whether he agreed to the agreement, the appellant asked the trial Judge to reduce on his punishment and in counsel's view, this did not mean he had accepted the agreement but rather meant that he had withdrawn his consent to the Plea Bargain Agreement. Counsel added that owing
25 to the fact that the appellant asked for a lesser punishment, the learned trial

5 Judge ought to have cancelled the plea bargain agreement and proceed with a full trial.

This being a first appellate Court, it has a duty to re-evaluate the evidence, weighing conflicting evidence, and reach its own conclusion on the evidence, bearing in mind that it did not see and hear the witnesses. **See Rule 30(1) of**
10 **the Rules of this Court and Kifamunte Henry V Uganda, Supreme Court Criminal Appeal No.10 of 1997.**

The learned trial Judge is faulted for endorsing a plea bargain agreement yet the appellant had changed his mind and withdrawn his consent to the agreement thereby occasioning a miscarriage of justice. In reply, counsel for the respondent
15 submitted that by the appellant accepting the agreement to be endorsed, the sentence had officially been passed and Court was functus officio.

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

Court:-

20 *You are Swaliki Gutta, 50 years old, you are charged with Aggravated Defilement contrary to section 129(3) & (4) (a) of the Penal Code Act where it is alleged that you Swaliki Gutta on the 31st July, 2013 at Buyengo Mpumudde Village in Buvuma District performed a sexual act to Naigaga Faisi a girl aged 3 years old.*

Court:-

Have you understood the case?

25 **Accused:-**

I have understood the case.

Court:-

What do say about it?

5 **Accused:-**

I accept it is true.

Court:-

A plea of guilty is entered.

State:-

10 *My Lord the brief facts are that on the 31st day of July 2013, the accused person had unlawful sexual intercourse with Naigaga Faisi, a girl aged 3 years. My Lord the matter was reported to Lukoma Police Post. The victim was examined medically and her hymen was found to be ruptured with perennial bruises at vulva. The accused person was also examined and found to be 45 years old with sound*
15 *mental status. My Lord I hereby tender in the medical documents.*

Court:-

Do you understand those facts?

Accused:-

I understand the facts of the case.

20 **Court:-**

Are they correct?

Accused:-

They are true.

Court:-

25 *The accused is convicted on his own plea of guilty.*

State:-

My Lord we entered into a Plea Bargain Agreement with the accused and his counsel and considering both aggravating and mitigating factors we agreed that the accused person be given 18 years of imprisonment effective today.

30 **Court:-**

Do you understand the contents of this Agreement?

Accused:-

I understand my Lord.

5 **Court:-**

You have accepted to serve the sentence of 18 years for defiling a 3 year old baby. You defiled a child of 3 years. Her hymen was ruptured. This child was fit to be your grandchild and you still feel 18 years from today is a long time. I would give you 50 years here. Should I endorse this agreement?

10 **Accused:-**

Yes my Lord

Court:-

Because you have pleaded guilty they agreed on 18 years; because you are remorseful. If I am to adjust I will increase.

15 *Amooti was that the position?*

Accused:-

My Lord that is the position.

Court:-

I want you to tell me in your own words that you have agreed to this Agreement.

20 **Accused:-**

I am requesting my Lord to reduce on the punishment.

Court:-

25 *I am not reducing, you agreed on it and I have already blamed them for agreeing on this. 3 years and you really penetrate a child of 3 years with a penis of an adult man of more than 45 years and you can afford to say this is harsh. Even a finger alone for a 3 year old child is painful, what about a child of 3 years?*

Accused:-

I request to be forgiven.

30 Our reading of the above excerpt of the proceedings shows that the appellant went through a plea bargaining process where he bargained for a sentence of 18 years himself in the presence of his counsel and the State Attorney. The appellant pleaded guilty to the offence and informed Court that he understood

5 the contents of the Plea Bargain Agreement. The appellant having allowed the Judge to endorse the agreement cannot turn around and request for a reduction of the sentence because the Judge was *functus officio* and could not revisit his decision.

Black's Law Dictionary, 9th Edition, defines *functus officio* to mean without
10 further authority of legal competence because the duties of the original commission have been fully accomplished.

In a persuasive decision from Botswana of ***Magdeline Makinta V Fostina Nkwe, Court of Appeal No.26 / 2001***, Akiwumi, JA quoting the South African case of ***Odneste Monanyana V The State, Criminal Appeal No.8 of 2001***
15 ***(unreported)*** held;

*"The general principle now well established in South Africa as well as Botswana is that once a Court has duly pronounced a final judgment or order it has itself no authority to correct, alter or supplement it. The reason is that it becomes thereupon functus officio, its jurisdiction in the case having
20 been fully and finally exercised its authority over the subject matter has ceased."*

The record of proceedings indicate that the appellant requested the learned trial Judge to reduce on his sentence after he had agreed that the Plea Bargain Agreement be endorsed. The appellant should have challenged the Plea Bargain
25 Agreement at the time it was presented to the Judge and before she endorsed

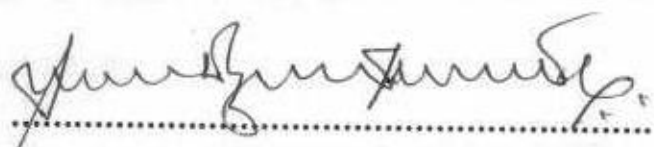
5 the same. The Judge could not revisit the issues after she had ruled. We therefore uphold the Plea Bargain Agreement.

The sentence of 18 years imprisonment imposed on the appellant following the plea bargain agreement is hereby confirmed.

In conclusion, we find no merit in this appeal and dismiss it.

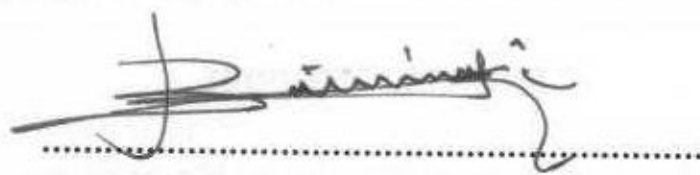
10 **We so order**

Dated at Mbale this.....15th.....day of September 2020



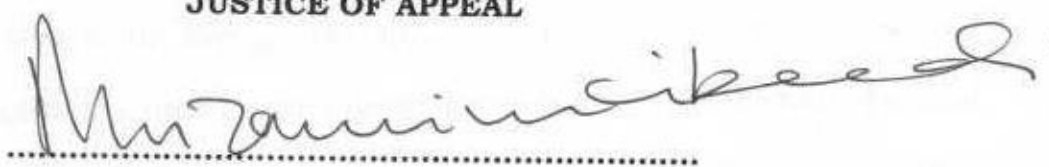
15 **HON. MR. JUSTICE F.M.S EGONDA-NTENDE**

JUSTICE OF APPEAL



20 **HON. JUSTICE CHEBORION BARISHAKI**

JUSTICE OF APPEAL



HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEEDI

25 **JUSTICE OF APPEAL**