THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

CRIMINAL APPEAL NO. 531 OF 2016

LWERE BOSCO::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mukono before Mutonyi Margret, J dated 20th December, 2016 in High Court Criminal Case No.117 of 2016)

CORAM: HON. MR. JUSTICE F.M.S EGONDA-NTENDE, JA

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA

JUDGMENT OF COURT

This is an appeal from the decision of the High Court in Criminal Case No.117 of 2016 sitting at Mukono in which the appellant was convicted of murder contrary to section 188 and 189 of the Penal Code Act and sentenced to 25 years imprisonment following a plea bargain agreement.

The background to the institution of appeal is that;

The appellant on the 3rd day of October 2011 hired a taxi Reg No. UAG from a one Kapo, went to Seeta and picked his girlfriend, Nankya Sarah the deceased and drove her to Sezibwa bridge and while the deceased was asleep, the appellant stopped the car and strangled her to death and dumped the body by the road side.

The appellant after the killing, ran to his mother`s home and told her that he had killed his wife but the mother chased him away. He relocated to Kiboga District and later to Kakiri where he was tracked and arrested. Upon interrogation, he confessed having murdered the deceased and led police to the scene of crime. A post mortem report revealed that the deceased had bruises, lacerations and a fractured neck and the cause of death was found to be strangulation.

At the trial, the appellant opted to enter a plea bargain agreement in which he pleaded guilty and agreed to a custodial term of 25 years which was approved by court.

Later, the appellant with leave of this Court appealed against sentence only faulting the learned trial Judge for passing a sentence which he said was manifestly harsh and excessive.

At the hearing of the appeal, Mr. Nangulu appeared for the appellant while the respondent was represented by Ojok Micheal Assistant Director of Public Prosecutions.

Counsel for the appellant submitted that the learned trial judge admitted the plea bargain agreement without considering the mitigating factors to wit; the appellant was a first time offender, remorseful, had pleaded guilty and saved court's time and resources and was aged 27 years. He contended that had the trial judge considered the mitigating factors, she would have granted a more lenient sentence. He cited the case of **Luwaga Sulaiman Vs Uganda Criminal Appeal No. 858 of 2014** for the proposition that the trial court retained unfettered discretion to refuse or accept a plea bargain agreement especially in circumstances where admitting the same would occasion a miscarriage of justice and that the age of the convict is a fundamental mitigating factor that ought to have been taken into consideration by the trial court.

In reply, counsel for the respondent submitted that in arriving at the sentence of 25 years, the learned trial Judge considered the plea bargain agreement entered into between the appellant and the respondent. That the appellant had voluntarily pleaded guilty to the charge of Murder and agreed to be sentenced to 25 years. The appellant's advocate explained to him in the local language to the best of his knowledge and information what he was pleading to and he thereafter had voluntarily accepted to sign the plea bargain agreement He cited **Karisa Moses VS Uganda SC Crim Appeal No. 23 of 2016** where the Supreme Court referred to **Kiwalabye Bernard Vs Uganda SC Crim Appeal No. 142 of 2007** where court stated that an appellate court should not interfere with the sentencing discretion of the trial court unless the exercise of the discretion was such that it resulted into the sentence imposed being manifestly excessive or so

low as to amount to a miscarriage of justice or where the trial court ignored an important matter or circumstances which ought to have been considered while passing a sentence or where the sentence imposed was wrong in principle.

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.***

The learned trial Judge is faulted for not taking into account the appellant's mitigating factors before passing the sentence under the plea bargain arrangement.

Counsel for the respondent submitted that nothing had been brought before the appellate court to warrant interference with the sentence passed under a plea bargain agreement. He contended that the learned trial Judge considered the 25 years imprisonment in the plea bargain agreement entered into between the appellant and the respondent freely and voluntarily executed.

Plea Bargaining is regulated by the Judicature (Plea Bargain) rules, 2016.

Rule 4 of the Judicature (Plea Bargain) Rules, 2016 defines plea bargaining as 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 offense, or recommend a particular sentence subject to approval by Court.

It further defines a plea bargain agreement to mean an agreement entered into between the prosecution and an accused person regarding a charge or sentence against an accused person.

Rule 8 of the same Rules provide for Court's participation in plea bargaining negotiations. Rule 8(2) provides that 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.

The record shows that, the learned trial judge read the charge and facts to the appellant but it does not show that court was informed of the ongoing plea bargain negotiations or consulted on its recommendations with regard to the possible sentence prior to court's approval.

Severity of the sentence as a ground of appeal cannot arise out of Plea bargain procceedings because parties negotiate and agree voluntarily. A convict cannot later change his mind on appeal faulting the trial Judge whose discretion in the plea bargain proceedings is limited to confirming a sentence voluntarily initiated and agreed to by the parties to the agreement. The appellant cannot turn round and argue that the sentence so approved was harsh and excessive for non-consideration of mitigating factors because these factors are part of the negotiation. The accused person or his counsel must labor to inform court about the ongoing plea bargain negotiations and also consult court on its

recommendations especially on the possible sentence before the agreement is brought to court for approval and recording.

This would be the appropriate stage in the proceedings for court to recommend to the parties to consider the mitigating factors and the period an accused person would have spent on remand.

Allowing convicts to appeal against sentences they freely and voluntarily agreed to in the first place without good reason would in our view undermine the relevancy and the objectives of Plea bargaining in our criminal justice system. Rule 12(5) of the same rules makes the plea bargain agreement binding on the parties. Even then, Rule 14 gives an accused person an opportunity to withdraw a plea bargain agreement before court passes sentence.

Rule 12 which provides the procedure of recording a plea bargain agreement by Court states that;

1) *The Court shall inform the accused person of his or her rights, and shall satisfy itself that the accused person understands the right to plead guilty or not and the effect of that plea.*

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.*

It is important that an accused who wishes to plead guilty whether under plea bargain agreement or not should be explained to 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. See: ***Inensko Adams V Uganda, HCCA No.004 of 2017*** cited with approval by this court in ***Luwaga Sulaiman Vs Uganda Supra.***

Although the record shows that the appellant took plea and pleaded guilty it is silent as to whether the appellant had a full understanding of the plea bargaining procedure. The court was by the provisions of Rule 12 of the plea bargain rules under duty to explain this to him but did not do so.

In our view, the failure to follow the procedure of recording a plea bargain agreement by Court occasioned a miscarriage of justice which this court cannot condone. We find the said Plea Bargain Agreement defective. We accordingly set it aside.

The learned trial Judge stated that the convict had been sentenced to 25 years imprisonment inclusive of the period of remand as per the plea bargain agreement. We find that this sentence was vague because the words used by the learned trial Judge did not mean that the period spent on remand had been taken into account.

In ***Tatyama Fred V Uganda, Court of Appeal Criminal Appeal No.107 of 2012***, the learned trial Judge while sentencing that appellant noted that she had considered all the circumstances of the case and the period spent on remand before sentencing the appellant to twenty years imprisonment. This Court found that the said sentence was vague as the trial Judge was silent on whether the period of 3 years that the appellant had spent on remand had been deducted from the final sentence. This Court reduced the sentence to 17 years and 4 months after taking into account the period that the appellant had spent on remand.

Because the appellant had properly taken plea at the beginning of the trial and was convicted of murder on his own plea of guilty, we invoke the provisions of ***section 11 of the Judicature Act*** that grants this Court the same powers as that of the trial Court to impose a sentence we consider appropriate. The section provides;

> *"For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."*

The appellant strangled the victim who was his girlfriend to death and dumped her body on the road side. There is need to deter the re-occurrence of such crimes in society. However, the appellant pleaded guilty a sign that he was remorseful and did not waste Court's time and resources, he is married with two wives and

has been on remand for 3 years and eleven months, he was aged 27 years and capable of reforming. There is need to accord him an opportunity to reform and re-join his family and community.

In ***Mbunya Godfrey V Uganda, SCCA No.04 of 2011*** the Supreme Court pointed out that although no two crimes are identical, Courts should try as much as possible to have consistency in sentencing. In this case the appellant had murdered his wife. He was convicted and sentenced to death. The Supreme Court set aside the death sentence and imposed a sentence of 25 years imprisonment.

In ***Atuku Margret Opii vs Uganda: Court of Appeal Criminal Appeal No. 123/2008***, this Court reduced the sentence from death to 20 years in imprisonment. The appellant was a single mother of 8 children and the victim had been killed by drowning.

In ***Kamya Abdullah and 4 others versus Uganda, SCCA No. 24 of 2015***, the appellants were convicted of murdering a one Ayubu Sokoma for allegedly stealing household items of one Naluwooza Annet. They were sentenced to 40 years imprisonment each by the trial court. On appeal to this court, their sentence was substituted with 30 years imprisonment. On the second appeal, the Supreme Court reduced the sentence to 18 years imprisonment for each appellant.

After considering both the aggravating and mitigating factors, and having taken into account the 3 years and 11 months period the appellant spent on remand

we hereby sentence the appellant to 18 years imprisonment commencing from 20th October, 2016 when he was convicted.

We so order

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

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

JUSTICE OF APPEAL

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HON. MR. JUSTICE CHEBORION BARISHAKI

JUSTICE OF APPEAL

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HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI

JUSTICE OF APPEAL