

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA**  
**SITTING AT MBALE**

(Coram: Egonda- Ntende, Cheborion Barishaki and Muzamiru Kibeedi, JJA)

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**CRIMINAL APPEAL NO. 523 OF 2016**

**KANYAKOLE SULAIMAN alias SOOSO ESAU ::::::::::::::: APPELLANT**  
**VERSUS**

**UGANDA ::::::::::::::: RESPONDENT**

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*[Appeal from the decision of the High court of Uganda holden at Mukono (Hon. Lady Justice Mutonyi Margaret) made on 21. 12. 2016 in Criminal Case No. 204 of 2016]*

**JUDGEMENT OF THE COURT**

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This is an appeal from the decision of the Hon. Lady Justice Mutonyi Margaret in High Court Criminal Session Case No. 204 of 2016 sitting at Mukono dated the 21<sup>st</sup> of December 2016 in which the appellant was convicted of aggravated defilement contrary to Sections 129(3) & (4) of the Penal Code Act and sentenced to 20 years' imprisonment following a Plea Bargain Agreement.

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The prosecution case was that the appellant was a resident of Kasozi Kiyunji in Mukono District where the victim, Nanyunja Flavour, aged 3 years old, was staying with her grandmother. On the 25<sup>th</sup> of August 2015 at about 8 PM when the victim and her siblings had gone to the latrine for a short call, she met the appellant who carried her in the presence of the victim's siblings. He then put her on his thighs and put his penis in her vagina.

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The matter was reported to the victim's grandmother who examined her private parts. She found her vulva traumatized but the hymen still intact. The

appellant had previously taken the victim to his house where he had put her on his bed and performed a sexual act with her.

30 The victim's grandmother then reported the matter to Nagalama Police Station and the appellant was arrested.

On the 26<sup>th</sup> of August 2015, the victim was medically examined on Police Form 2A and was found to be of the apparent age of 3 years. Her vulva was traumatised and the hymen intact.

35 At the police the appellant, in his Charge and Caution Statement, admitted to having hosted the victim in his house on the 25.08.2015 but denied having had sex with her.

The appellant was subsequently indicted for aggravated defilement and sentenced to 20 years imprisonment following a Plea Bargain Agreement  
40 (PBA).

Being dissatisfied with the decision of the learned Trial Judge, the appellant appealed to this court against both the conviction and sentence on the following grounds:

- 45 1. "That the learned Trial Judge erred in law and fact when she admitted a PBA without ascertaining if the accused comprehended the nature and implication of the same;
2. The learned Trial Judge erred in law and fact when she sentenced the Appellant to twenty (20) years imprisonment which sentence was manifestly harsh and excessive."

50 At the hearing the appellant was represented by Mr. Nanguru Eddie of N-Mugoda Advocates, on State Brief, while the respondent was represented by

Ms. Nakafeero Fatinah, a Chief State Attorney in the office of the Director of Public Prosecutions.

55 Both sides adopted their written submissions which they had previously filed in court.

### **The Appellant's Arguments**

60 Counsel submitted that the PBA that formed the basis of the conviction of the appellant on a plea of guilty and the sentence of 20 years' imprisonment had been thumb printed by the appellant who was an illiterate person. That the Trial Judge was under an obligation to first ascertain whether the appellant comprehended the contents of the PBA, its consequences and the voluntariness of his plea of guilty. But she did not do so which, according to Counsel, was a fatal omission the effect of which rendered the PBA vitiated by mistake and the conviction null and void. In support of his argument, 65 Counsel referred us to rules 8, 12 and 13 of the Judicature (Plea Bargain) Rules, 2016 and the case of Luwaga Sulaiman Vs Uganda, Court of Appeal Criminal Appeal No. 858 of 2014.

70 With regard to ground No. 2, Counsel faulted the Trial judge for admitting the PBA on the terms presented without considering the mitigating factors which would have earned the appellant a more lenient sentence namely: he was a first offender, he was remorseful, had pleaded guilty to save the court's time and resources and was between 34-40 years of age.

75 Counsel further faulted the trial judge for not considering the sentencing practice of this court in relation to offenses of this nature. Counsel cited the case of Agaba Job Vs Uganda, Court of Appeal Criminal Appeal No. 230 of 2003 where this court upheld the sentence of 10 years imprisonment in

respect of an appellant who had been convicted on his own plea of guilty to the indictment of aggravated defilement of a six-year-old girl.

80 Counsel also referred us to the case of Abot Richard Vs Uganda, Court of Appeal Criminal Appeal No. 190 of 2004 where this court upheld the sentence of 8 years' imprisonment for the defilement of a 13-year-old girl.

Counsel concluded by inviting us to allow the appeal, set aside and/or quash the custodial term and issue a considerable sentence in the interest of justice and fairness.

### 85 **The Respondent's Arguments**

Counsel for the respondent conceded to the appeal since the record of the trial court was silent as to whether the trial court had ascertained if the appellant had fully understood what a plea of guilty meant and its consequences.

90 Counsel prayed that the case be referred back to the High Court for the trial before another judge so as to attain the ends of justice.

### **Consideration by Court**

95 As a first appellate Court, our duty is to reconsider all material evidence that was adduced before the trial court and come to our own conclusions of fact and law while making allowance for the fact we neither saw nor heard the witnesses. See Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions, Bagumo Fred Vs Uganda SCCA No. 7 of 2004, Kifumante Henry Vs Uganda SCCA No. 10 of 1997, and D.R Pandya Vs R [1957] EA 336.

100 At the centre of this appeal is the procedure to be followed by the trial court in recording of a PBA and the consequences of non-compliance.

Schedule 2 to the Judicature (Plea Bargain Rules), 2016 sets out a comprehensive 18 steps procedure for Plea Bargain in Court thus:

1. *"Party called;*
2. *Representative introduced;*
- 105 3. *State introduces the Plea Bargain Agreement;*
4. *Defence confirms the Plea Bargain Agreement;*
5. *Court informs the accused of his or her rights in a criminal trial and the effect of a plea of guilty;*
6. *Court finds out from the accused whether he voluntarily signed the agreement after it had been explained to him or her and translated to*  
110 *him or her in a language he or she understands;*
7. *If the accused so confirms, he or she is invited to execute a confirmation;*
8. *If the agreement is accepted by court the same is received on court*  
115 *record;*
9. *The charge is read and explained to the accused in the language he or she understands;*
10. *If he or she confirms that he or she understands the charge he or she is invited to plead to it;*
- 120 11. *Plea is recorded;*
12. *If he or she pleads guilty, state summarises the facts;*
13. *If accepted to be true by the accused, he or she is found guilty and convicted on his or her own plea of guilty;*
14. *State is heard in aggravation;*
- 125 15. *Defence is heard in mitigation;*



16. *Convict is heard in allocutus;*

17. *Victim or complainant's views on sentence are heard; and*

18. *Convict is sentenced."*

130 The purpose for the above elaborate procedure is for court to satisfy itself that the accused person freely and voluntarily executed the PBA with a full understanding of its contents and the consequences of signing it, especially the waiver of several Constitutional rights conferred upon by an accused person as detailed in Rule 12 of the Judicature (Plea Bargain) Rules, 2016.

135 We have closely looked at the record of the Trial Court, there is no record that the trial court complied with the procedure for the recording of the PBA. Even the respondent's counsel rightly concedes to that point.

The consequence of non-compliance with the laid-out procedure for recording a PBA by the trial court was handled by this court in Luwaga Sulaiman alias Katongole Vs Uganda, Court of Appeal Criminal Appeal No. 140 858 of 2014 where the facts are on all fours with those of this appeal:

In that the said appeal, the appellant had been charged and convicted of murder and sentenced following a PBA. The trial record indicated that the appellant did affix his right-hand thumb print onto the PBA and the same was counter signed by his counsel. The court record was silent on whether court 145 had before endorsing the PBA ascertained whether 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 the waiver of his constitutional rights specified under Rule 12 of the Judicature (Plea Bargain) Rules, 2016. Court held that those omissions rendered the PBA 150 defective and accordingly quashed the appellant's conviction, set aside his sentence and ordered a re-trial by another judge.

We likewise set aside the conviction and sentence of the appellant. However is an order for re-trial appropriate in the circumstances of this case?

155 We think not. In ordering for a re-trial court must make a delicate balance of addressing the interests of the key stakeholders in our criminal justice system namely: the complainant, the accused and society. We note that the appellant was tried after about 1 year and 6 months on remand. He was sentenced in December 2016. It is now almost 4 years that he has been serving a sentence. Those 4 years will roughly translate into 6 years with  
160 remission. In effect, in the event of a re-trial order, he would be credited with a minimum of about 7 years in prison. But even then, with the current Covid - 19 Pandemic which has also taken its toll upon our criminal justice system, no one can tell with certainty as to when the retrial can practically commence.

165 Given that the appellant had pleaded guilty, in our view it would not be just to order a retrial in the circumstances. He is not responsible for the mishaps in the criminal justice system that have rendered his trial a nullity. And he has already taken considerable punishment.

In the result, we decline to order a retrial in the circumstances of this case.  
170 We order that the appellant be discharged and set free immediately unless held on other lawful charges.

We further order a stay of prosecution on this charge.

We so Order.

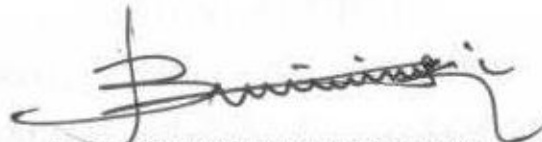
Signed, dated and delivered at Mbale this 15<sup>th</sup> day of September 2020.

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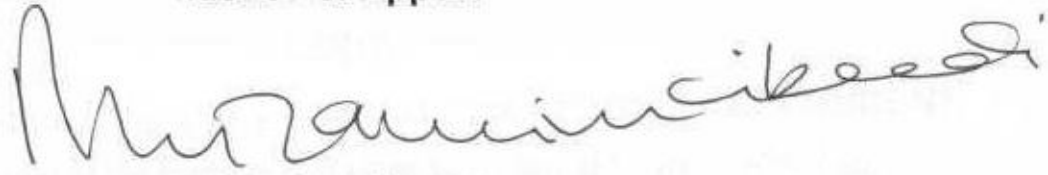
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**FREDRICK EGONDA-NTENDE**  
**Justice of Appeal**

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**BARISHAKI CHEBORION**  
**Justice of Appeal**

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**Muzamiru Kibeedi**  
**Justice of Appeal**