THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 439 OF 2015

ARIA ANGELO::APPELLANT

VERSUS

UGANDA:::RESPONDENT

[Appeal from the decision of the High Court holden at Nakawa (The Honourable Lady Justice Elizabeth Nahamya) dated the 13th day of January 2015 in Criminal Session Case No. 50 of 2012).

CORAM: HON. MR. JUSTICE RICHARD BUTEERA, DCJ

HON. LADY JUSTICE ELIZABETH MUSOKE, JA

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

JUDGMENT OF THE COURT

This appeal is from the decision of the High Court of Uganda sitting at Nakawa in High Court Criminal Session Case No. 050 of 2012, in which Elizabeth Nahamya, J convicted the Appellant on his own plea of guilty on four counts of murder contrary to sections 188 and 189 of the Penal Code Act on count 1, aggravated robbery contrary to *sections 285 and 286* (2) of the Penal Code Act Cap 120 on count 2, attempted murder contrary to sections 204 (a) of the Penal

Code Act on count 3 and aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act on count 4 and sentenced him to 36 years and 8 months imprisonment.

The facts as established by the prosecution before the trial court were that on the 30th day of May 2011, the Appellant was deployed at Master Industries Banda Nakawa to guard the premises together with the deceased Kuchan Robert and Yuma Mawa. That night at about 11:00pm, the Appellant and others still at large with malice aforethought unlawfully killed Kuchan Robert and robbed him of a mobile phone Nokia 1200. They also robbed Yuma Mawa of a mobile phone, earphones, charger, shs. 20,000/= and immediately before or thereafter severely beat him up, tied his legs and hands, cello taped his mouth and attempted to murder him. The Appellant was later in August arrested in Hoima. He was found in possession of a Nokia phone belonging to the deceased.

The Appellant being dissatisfied with the sentence has now appealed against sentence alone, having been granted leave by this Court to do so under *Section 132(1) (b) of Trial on Indictments Act.* The Appellant in his sole ground of appeal contends:

> *THAT the learned trial Judge erred in law and fact when she failed to consider the mitigating factors thereby imposing a harsh and excessive sentence upon the Appellant and thus occasioning a miscarriage of justice.*

Representation

At the hearing of this appeal, the Appellant was represented by *Mr. Mugweri Ambrose* holding brief for *Mr. Richard Kumbuga,* learned Counsel on state brief while *Mrs. Emily Mutuuzo Sendawula* and *Ms. Caroline Nabaasa Hope* learned Senior Assistant Director of Public Prosecutions represented the Respondent. The Appellant was in attendance via video link to Luzira Prison by reason of the restrictions put in place due to COVID 19 pandemic.

Both parties sought, and were granted, leave to proceed, by way of written submissions.

Appellant's case

Counsel for the Appellant submitted that the sentence of 36 years and 8 months imposed for one count of murder, two counts of Aggravated Robbery and one count of attempted murder was harsh and excessive in the circumstances as to amount to an injustice since the Appellant pleaded guilty.

Counsel contended that the Appellant had executed a plea bargain agreement which was presented to court for confirmation of sentence. The sentences agreed upon were 40 years on count 1 (murder), 35 years on count 2 (aggravated robbery), 20 years on count 3 (attempted murder), 35 years on count 4 (aggravated robbery) hence a total of 40 years to run concurrently.

Counsel contended that following the Appellant's plea of guilty, the learned trial Judge accepted the terms of the plea-bargaining agreement. She reduced the period of 3 years and 4 months spent on remand and sentenced the Appellant to 36 years and 8 months.

Counsel referred court to **Rule 4 of the Judicature (Plea Bargain) Rules 2016,** for the definition of plea bargain to mean a situation where an accused agrees to plead guilty in exchange for an agreement from the prosecutor to drop one or more charges, reduce a charge to a less serious offence and/or recommend a particular sentence subject to approval of court.

According to Counsel, it is the practice of Courts in Uganda, to exercise leniency where an accused person pleads guilty to any charge in order to encourage others to do the same by owning up to the criminal responsibility.

Counsel faulted the learned trial Judge for having failed to consider the principle of uniformity and proportionality in sentencing whilst passing sentence against the Appellant. Counsel submitted that had she done so, she would have ascertained from the authorities of this Court and the Supreme Court that, the sentencing ranges in respect of the offence of murder in similar circumstances is between 20 and 35 years. See **Ndyomugenyi Patrick v Uganda Supreme Court Criminal Appeal No. 057 of 2016.**

Counsel referred us to **Tom Sazi Sande *alias* Hussein Saddam v Uganda Criminal Appeal No. 127 of 2009**, for the proposition that in murder cases

where an accused person pleads guilty, the Court has previously considered a term of 18 years' imprisonment as appropriate for a charge of murder.

Counsel referred to **Naturinda Tamson v Uganda, Criminal Appeal No. 025 of 2015** and submitted that in cases of aggravated robbery where the accused pleads guilty, court has previously confirmed a sentence of 16 years following a full trial.

According to Counsel, the learned trial Judge abdicated her role to participate in the plea bargain negotiations and further erred in law when she failed to apply the principles relating to the sentencing criteria for accused persons who have pleaded guilty thereby imposing an illegal, harsh and excessive sentence. **See also Rule 8 of the Plea Bargain Rules supra and Luwaga Suleman alias Katogole v Uganda, Criminal Appeal no. 858 of 2014.**

Counsel prayed that this appeal be allowed and court be pleased to invoke *section 11 of Judicature Act Cap 13* to set aside the sentence and substitute it with 18 years considering the time that the Appellant has spent in lawful custody.

Respondent's reply

The Respondent did not agree. It was submitted that the matter was conducted under the plea bargain arrangement in accordance with the **Judicature (Plea Bargain) Rules, 2016** and the court considered all the mitigating factors. According to Counsel, the allegations that the Judge was harsh and did not offer

leniency to the Appellant did not arise since the discretion of the trial Judge in such cases is minimal as opposed to an ordinary trial.

Counsel referred court to **Agaba Emmanuel and 2 Others v Uganda, Criminal Appeal No. 139 of 2017; Wange Robert v Uganda, Criminal Appeal No. 572 of 2014 and Sempijja Brian v Uganda, Criminal Appeal No. 566 of 2014,** where the trial judges departed from the sentences agreed upon in the plea bargain and this court found that the sentences imposed on the Appellants outside the agreed terms of the plea bargain agreement were illegal.

Counsel referred court to **Agaba Emmanuel and others v Uganda, Criminal Appeal No. 139 of 2017** for the proposition that plea bargaining creates an agreement between the prosecutor and the accused with all the features of an agreement in the law of contract and the court plays the role of a regulator of the agreement to ensure that the agreement conforms to the needs of justice of the case. Further that court is not privy to the agreement and the court may reject the agreement where it is satisfied that the agreement may occasion a miscarriage of justice.

Counsel contended that because of the seriousness accorded to a plea bargain, rules prohibit the substitution of a judge-imposed sentence in the context of the plea bargain. As a result, the learned trial Judge can neither be faulted for being harsh, nor for failing to give a lenient sentence because the sentences were

agreed upon by the parties, and any alteration of the plea bargain would not have been in contravention of the Judicature (Plea Bargain) Rules, 2016.

Counsel further contended that maximum penalty for murder and aggravated robbery under the Penal Code Act Cap 120 is death whilst the maximum sentence for attempted murder is life imprisonment. She argued that considering the facts of the case and following negotiations, the Appellant was spared the maximum sentence and given a custodial sentence regardless of the fact that life was lost, property stolen and one other person was severely injured.

Counsel concluded that the sentence of 36 years and 8 months' imprisonment should be maintained and the appeal be dismissed.

Resolution

This is a first appeal and as such this Court is required under **Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions** to re-appraise the evidence and make its inferences on issues of law and fact while making allowance for the fact that we either saw nor heard the witnesses. See: **Pandya v R [1957] E.A 336, Bogere Moses and another v Uganda, Supreme Court Criminal Appeal No. 1 of 1997 and Kifamunte 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 and the principle of parity in sentencing the Appellant. In reply, Counsel for the Respondent submitted that the learned trial

Judge considered the mitigating factors and came to the right conclusion that a term of 36 years and 8 months imprisonment was a sufficient sentence as agreed upon by the parties in the plea-bargaining arrangement.

The practice of plea bargaining is regulated by the Judicature (Plea Bargain) Rules, 2016. Rule 4 of the Judicature (Plea Bargain) Rules 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 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 one count of murder, two counts of aggravated robbery, and one count of attempted murder and sentenced to 3years imprisonment following a plea bargain agreement.

In order for an 'agreement to plead guilty' to be valid, the accused must (i) accept the plea bargain in full awareness of the facts of the case; (ii) accept the plea bargain with full awareness of the legal consequences; and (iii) accept the plea bargain in a genuinely voluntary manner.

Rule 8 of the Judicature (Plea Bargain) Rules provides for Court's participation in the plea-bargaining discussions. It provides that;

> *'the parties shall inform Court of the ongoing plea bargain negotiations and shall consult the Court on its recommendations with regard to the possible sentence before the agreement is brought to Court for approval and recording.'*

The rules give the judicial officer the opportunity to superintend over the proceedings to ensure there is no miscarriage of justice or abuse of the process making it a mockery of justice. The judge or judicial officer may recommend a particular sentence which in his or her opinion serves the justice of the case. The above notwithstanding, the judicial officer does not have the discretion to impose his or her own sentence.

We note that under the rules, an accused person is at liberty to reject the proposal by the trial judge if it is not in his favour and opt out of plea bargain. In other words, plea bargain limits the discretionary sentencing powers of the judicial officer. However, where the court is satisfied that the agreement may

occasion a miscarriage of justice, it may reject it under rule 13 of the Rules and refer the matter for trial subject to Rule 8(3).

We are persuaded by the High Court's decision in **Inensko Adams v 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."*
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> [Emphasis, Ours].

See also **Luwaga Suleman *alias* Katongole v Uganda, Criminal Appeal No. 163 of 2014**.

From the review of the Rules, the same do not provide for a particular form of consultation with the court. Further from evidence on record, there is no indication at all that the parties consulted the trial Court on its recommendations with regard to the possible sentence before the agreement was brought to Court on the 23rd June 2015 for approval and recording contrary to the provisions of Rule 8(2) which are couched in mandatory terms. Nonetheless, the Plea-bargaining agreement was presented in court in the presence of the Appellant and the trial Judge still remained with the discretion to either allow or reject the sentences proposed for each count under the plea bargain arrangement.

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

> *"The Court may reject a plea bargain agreement where it is satisfied that the agreement may occasion a miscarriage of justice."*

While sentencing the Appellant, the learned trial Judge agreed entirely to the sentences as agreed by the parties in the plea bargain agreement on each count of the offences for which the Appellant was charged with. She proceeded to consider both the mitigating and aggravating factors of the case and finally

sentenced the Appellant to a total sentence of 40 years on one count of murder, two counts of aggravated robbery and one count of attempted murder.

It is now settled that for the Court of Appeal, as a first appellate court, to interfere with the sentence imposed by the trial court which exercised its discretion, it must be shown that the sentence is illegal, or founded upon a wrong principle of the law; or where the trial court failed to take into account an important matter or circumstance, or made an error in principle; or imposed a sentence which is harsh and manifestly excessive in the circumstances. **See: Kamya Johnson Wavamuno v Uganda, Supreme Court Criminal Appeal No. 016 of 2000 (unreported); Kiwalabye Bernard v Uganda, Supreme Court Criminal Appeal No. 143 of 2001 (unreported) and Kalyango Achileo and Another v Uganda, Court of Appeal Criminal Appeal No. 637 of 2015.**

We find that the sentence agreed upon by the parties in their plea bargain agreement was valid. The Appellant was sentenced to a custodial term of imprisonment which he agreed to in the plea bargain agreement and which sentences were less than the maximum sentences for the offences committed. Had the learned trial Judge found the same to be harsh or excessive, she would have rejected the same with reasons and ordered a full trial.

In the instant case, and having found that the Plea Bargain Agreement was valid, we find that the interest of justice will best be served by maintaining the sentence agreed upon by the parties under the plea bargain arrangement.

Having deducted the period of 3 years and 4 months that the appellant had spent on remand, the learned trial Judge sentenced the appellant to 36 years and 8 months on all the 4 counts to run concurrently. We find no reason to interfere with the said sentence and we hereby maintain the same.

We so order.

Dated at **Kampala** this 11th day of February 2022.

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RICHARD BUTEERA

DEPUTY CHIEF JUSTICE

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ELIZABETH MUSOKE

JUSTICE OF APPEAL

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CHEBORION BARISHAKI

JUSTICE OF APPEAL