

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA CRIMINAL APPEAL NO.
0540 OF 2015**

KATUMBA ALAWI:.....APPELLANT

VERSUS

UGANDA:.....RESPONDENT *(Appeal from the decision of the High Court of Uganda at Mubende before Mukasa, J. delivered on 29th May, 2014 (conviction) and 6th June, 2014 (sentencing in Criminal Session Case No. 266 of 2014)*

CORAM: HON. MR. JUSTICE RICHARD BUTEERA, DCJ HON. LADY JUSTICE ELIZABETH MUSOKE, JA

HON. MR. JUSTICE CHEBORION BARISHAKI, JA JUDGMENT OF THE

COURT

On 29th May, 2014, after the appellant pleaded guilty, the High Court (Mukasa, J.) convicted him of two counts of the offence of Aggravated Defilement contrary to **Section 129 (3) and (4) (a) of the Penal Code Act, Cap. 120 (as amended)**. On 6th June, 2014, the High Court sentenced the appellant to consecutive sentences of 14 years and 21 years imprisonment on the respective counts of which he was convicted, for a combined sentence of 35 years imprisonment.

The High Court decision followed trial on the appellant on an indictment alleging in two separate counts that the appellant had in the month of January, 2013 at Bufuma L.C.I in Mityana District had sexual intercourse with two minor girls, namely N.A aged 12 years (count one) and N.N aged 6 years (count two).

The appellant and the prosecution executed a plea bargain agreement by which the appellant agreed to plead guilty to the indictment and the prosecution to propose certain sentences. The facts as per the plea bargain agreement to which the appellant pleaded guilty, are as follows. N.A lived

with her mother and N.N, her younger sister in Bufuma Village, Kakindu SubCounty in Mityana District. In the month of January, 2013, the appelland performed sexual acts with N.A on at least two separate occasions - first, when the victim was on her way to fetch water, and the appelland met her and took her to a maize plantation and had sexual intercourse with her, and the second, when she was going to school and the appelland took her to his house and also had sexual intercourse with her. The appelland performed sexual intercourse with N.A on other occasions, however, N.A did not report the abuse. In the same month, the appelland also performed a sexual act with N.N, as she was on her way to buy salt from a shop owned by the appelland's mother. N.N reported the abuse to her mother immediately she got home. N.A subsequently also reported the abuse she had suffered to her mother. The area police were accordingly notified and the appelland was arrested and charged. The victims were taken for medical examination and signs consistent with sexual abuse were found on the victims - N.N had a foul smelling discharge from her vagina while N.A had a ruptured hymen.

As stated earlier, when the appelland pleaded guilty, he was charged and sentenced as earlier mentioned. The appelland is dissatisfied with the sentences that were imposed on him and now appeals, with leave of this Court, on the sole ground that:

"That the learned trial Judge erred in law when he sentenced the appelland to 14 and 21 years imprisonment consecutively contrary to the plea bargain agreement which sentence was based on wrong legal principles, harsh and excessive leading to a miscarriage of justice."

The respondent conceded to the appeal.

Representation

At the hearing, Mr. Mugweri Ambrose, learned counsel appeared for the appelland, on State Brief. Ms. Nabasa Caroline Hope, learned Senior Assistant DPP and Ms. Emily Mutuzo Sendawula learned State Attorney in the DPP's office, jointly appeared for the respondent.

Due to restrictions attributed to the COVID-19 pandemic, the appellant remained at the prison premises and followed the hearing via Zoom Video Conferencing Technology.

Appellant's submissions

In support of the appeal, counsel for the appellant referred to the principles upon which an appellate Court will be justified to interfere with a sentence imposed by a trial Court as articulated in the authority of **Kizito Senkula vs. Uganda, Supreme Court Criminal Appeal No. 24 of 2001 (unreported)**, to the effect that inter alia, an appellate court will interfere where the sentence imposed by the trial Court is illegal or is based on a wrong principle or is manifestly harsh and excessive or where the trial Court overlooked a material factor while sentencing.

Counsel argued that in the present case, the trial Court passed illegal sentences in that it overlooked the sentences agreed upon by the prosecution and the appellant in the relevant plea bargain agreement, wherein the parties had agreed upon concurrent sentences of 14 years and 22 years on each count, yet the learned trial Judge imposed consecutive sentences totaling to 35 years imprisonment. Counsel submitted that it was not open for the learned trial Judge to impose a harsher sentence than was agreed upon by the party, and the only option was for him to reject the plea bargain agreement under **Rule 13 (2) of the Judicature (Plea Bargain) Rules, 2016**. In the circumstances, according to counsel, the sentence imposed by the learned trial Judge was illegal, null and void.

It was further submitted that the sentences imposed were also disproportionate considering the circumstances of the case. Counsel relied on the authority of **Magala Ramathan vs. Uganda, Supreme Court Criminal Appeal No. 01 of 2014 (unreported)**, where it was held that in ordering sentences to run consecutively, the total sentence must be proportionate to the offence and circumstances surrounding the case. He also relied on **Guideline 8 of the Constitution (Sentencing Guidelines for Court of Judicature) (Practice) Directions, 2013**, which

emphasizes the proportionality principle. Counsel contended that in the circumstances of the case showed that the appellant pleaded guilty and did not waste Court's time; he was respectful and remorseful and that the offences occurred within the same period, called for leniency by imposing a concurrent sentence.

Counsel also submitted the totality of 35 years imprisonment for Aggravated Defilement were harsh and excessive considering that shorter sentences have been imposed in similar previously decided cases. He referred to the case of **Naturinda Tamson vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2015 (unreported)** where the Supreme Court deemed appropriate and imposed concurrent sentences of 10 years for Rape, 13 years for Defilement and 16 years for Aggravated Defilement. He asserted that the sentences in the present case ought to have been ordered to run concurrently.

In view of the above submissions, counsel urged this Court to substitute an order for the sentences imposed on the appellant to run concurrently as agreed upon in the relevant plea bargain agreement.

Respondent's submissions

Counsel for the respondent agreed with the submission that the sentences imposed by the trial Court were illegal as the learned trial Judge departed from the relevant plea bargain agreement where the parties agreed upon concurrent sentences and instead imposed consecutive sentences. It was submitted that the departure was contrary to the decisions of this Court calling for trial Courts to refrain from departing from the terms of a plea bargain agreement, such as; **Agaba Emmanuel and 2 Others vs. Uganda, Criminal Appeal No. 139 of 2017, Wangwe Robert vs. Uganda, Criminal Appeal No. 0572 of 2014 and Sempijja Brian vs. Uganda, Criminal Appeal No. 566 of 2014 (all unreported)**. Counsel also conceded that under **Rule 13 of the Judicature (Plea Bargain) Rules, 2016**, a trial Judge has no power to alter the terms of the plea bargain agreement and can only alter it. Therefore, counsel urged this

Court

to follow the course taken in the above cases where the Courts restored the sentences on terms as set out in the relevant plea bargain agreements.

Resolution of the Appeal

We have carefully studied the Court record, and considered the parties' submissions and the law and authorities cited in support thereof. Other relevant law and authorities not cited have also been considered.

We note that on a first appeal from a decision of the High Court, this Court will be expected to reappraise the evidence and draw inferences of fact. **(Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.113-10)**. A first appellate Court has a duty to review the evidence of the case and to reconsider the materials before the trial Court and make up its own mind. **(See: Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported))**. We shall bear the above principles in mind as we consider this appeal.

This appeal is against sentence only and the principles on appellate intervention against a sentence imposed by a trial Court have been set out in many cases. In **Kizito Senkula vs. Uganda, Criminal Appeal No. 24 of 2001 (unreported)**, the Supreme Court stated:

"...the Court of Appeal, rightly in our view, followed the principle in Ogalo s/o Owoura - vs- R (1954) 24 EACA 270, which is that in exercising its jurisdiction to review sentences, an appellate court does not alter a sentence on the mere ground that if the members of the appellate court had been trying the appellant they might have passed a somewhat different sentence; and that an appellate court will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in James -vs- R f 1950) 18 EACA 147, it is evident that the judge has acted upon some wrong principle or over-looked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case."

An appellate Court will also interfere if the sentence passed by the trial Court is illegal. **(See: Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1995 (unreported))**. It has been submitted

by the appellant and conceded to by the respondent that the sentences imposed by the learned trial Judge were illegal for violating the principle of non-departure from the terms of a plea bargain agreement. In the relevant plea bargain agreement, it was agreed that the appellant would be sentenced to two concurrent sentences of 15 years imprisonment and 22 years imprisonment, but the learned trial Judge, after deducting the relevant remand period, ordered for the sentences to run consecutively.

We find that the order of consecutive sentences amounted to disregarding the parties' plea bargain agreement, and this was illegal. In the case of **Agaba and 2 Others vs. Uganda, Court of Appeal Criminal Appeal No. 0139 of 2017 (unreported)**, this Court stated that an accused person is entitled to assurances that a sentence agreed upon in plea bargaining will be respected, and not substituted by a judge-imposed sentence. It was also emphasized that when sentencing under a plea-bargain, a trial judge cannot substitute his/her own sentence and the only course open if the judge deemed the sentence inappropriate was to reject the plea bargain agreement and forward the matter to trial. We are alive to the fact that the sentencing of the appellant took place before coming into force of the pleabargain rules, but we find that the spirit of the plea bargain arrangement was already applicable then and that the learned trial Judge was required to respect the sentences agreed upon by the parties. Therefore, we agree that the sentences that the learned trial Judge imposed on the appellants were illegal, and we hereby set them aside.

We, therefore, hereby invoke **Section 11 of the Judicature Act, Cap. 13** which gives this Court the powers of the High Court, in order to determine an appropriate sentence. In the present case, we find that the appropriate course is to enforce the terms of the relevant plea bargain agreement and impose the sentences agreed upon therein, namely 14 years imprisonment on count one and 22 years imprisonment on count two. We shall then deduct the period spent by the appellant on remand prior to sentencing, which was 1 year, 3 months and 15 days, thus the appellant shall serve a sentence of 12 years, 8 months and 15 days imprisonment on count one and 20 years, 8 months and 15 days imprisonment on count two. The sentences shall run



concurrently from 29th May, 2014, the date of the appellant's conviction by the trial Court.

We so order.

Dated at Kampala this

 day of  2022.




Richard Buteera

Deputy Chief Justice

Elizabeth Musoke

Justice of Appeal



Cheborion Barishaki

Justice of Appeal