THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 0400 OF 2015

(Coram: Bamugemereire, Madrama & Luswata, JJA)

OPIO PAUL} ..... APPELLANT

VERSUS

UGANDA} ..... RESPONDENT

(Appeal from the sentence of Ibanda Nahamya J of the High Court of Uganda at Nakawa Central Circuit Criminal Session Case No 179 of 2013 imposed on 27th of May 2014)

JUDGMENT OF COURT

This is an appeal against the decision of the learned trial judge imposing a sentence of 18 years' imprisonment less the period spent in lawful custody of one year and seven months on the appellant.

The appellant was indicted for murder contrary to sections 188 and 189 the Penal Code Act. It was alleged in the charge sheet that the appellant, a security guard attached to Hash Security Company Ltd in Entebbe Municipality on 8th October 2012 at Bugonga Village in Entebbe Municipality with malice aforethought unlawfully killed Anviko Christine.

The prosecution and the defence executed a plea bargain agreement in which the appellant admitted the offence and agreed to be sentenced according to the agreement.

The record of proceedings disclose that the facts as stated in the summary of case of the prosecution were admitted. The deceased was a casual labourer and appellant had on several occasions tried to have an affair with the deceased who refused whereupon the appellant often threatened to kill her if she continued to refuse his advances. On 8th October 2012, the appellant was armed and on duty and at 1 PM at the site the deceased went and served food and told one of her workmates that the appellant was threatening to kill her because she refused his advances. The deceased went alone and started serving lunch and in a

short time gunshots were heard whereupon she was found lying in a pool of blood and the appellant was seen running away with his gun.

The appellant boarded a motorcycle and was ridden to Entebbe police station for safe custody where he reported himself. The appellant was examined and found to be of sound mind.

Pursuant to a plea bargain agreement, the learned trial judge accepted the plea bargain therein but stated that she would accept it with a difference in the sentence whereupon she sentenced the appellant to 16 years and five months' imprisonment having amended the sentencing agreement to read 18 years' imprisonment. The learned trial judge then deducted the period of one year and seven months that the appellant had spent on remand before his sentence before imposing sentence.

The appellant was aggrieved and with the leave of this court, appealed to this court on one ground of appeal namely:

> That the trial judge erred in law and in fact when she imposed a sentence of 18 years' imprisonment on the appellant who had pleaded guilty to the offence, which is deemed to be harsh taking into account the circumstances of the case and considering the mitigating factors before sentencing.

At the hearing of the appeal, the appellant was represented by learned counsel Ms. Nalule Shamim on state brief while the respondent was represented by the learned Chief State Attorney Mr. Kyomuhendo Joseph. The court was addressed in written submissions.

In the written submissions, the appellant submitted that the issue for determination in ground one is whether the sentence imposed by the learned trial judge was harsh, excessive and illegal considering the circumstances and the mitigating factors.

We do not have to set out all the submissions of the appellant's counsel but will first deal with the question of illegality.

Appellant's counsel submitted that it is evident from the record that the trial judge ignored the sentence agreed upon in the plea bargain agreement and sentenced the appellant to 18 years' imprisonment. She relied on the plea bargain procedures governed by the **Judicature (Plea Bargain) Rules, 2016** and rule 4 thereof which defines a plea bargain 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, or to reduce a charge to a less serious offence or recommend a particular sentence subject to approval by court.

She contended that once parties conclude the plea bargaining process, the said process is reduced into a plea bargain agreement which is meant to benefit the state and the accused person as well as the victim. The appellant's counsel further relied on rule 13 of the Plea Bargain Rules, 2016 which provides that the court may reject a plea bargain agreement when it is satisfied that the agreement may occasion a miscarriage of justice and where the court rejects the agreement, it shall record the reasons and the agreement would become void and inadmissible. Further the matter would be referred for trial. She submitted that in the case of the appellant, the agreement was amended to increase the sentence from 12 years to 20 years' imprisonment without the consent of the appellant. This meant that the appellant did not benefit from the agreement.

The appellant's counsel relied on **Wangwe v Uganda; Criminal Appeal No 572 of 2014** where the accused had been sentenced to 18 years and 10 months' imprisonment which was beyond the sentence agreed upon by the prosecution of 15 years' imprisonment. The Court of Appeal found that the learned trial judge erred when she sentenced the appellant outside the plea bargain agreement to his prejudice. They set aside the sentence. Counsel also relied on several other authorities to the same effect.

In reply, the respondents counsel conceded that the sentence of 18 years and 10 months' imprisonment offended rule 13 of the Judicature (Plea Bargain) Rules and further conceded that the enhanced sentence is an illegality according to the authority submitted by the appellant's counsel. In the premises, the respondent's counsel prayed that the court invokes section 11 of the Judicature Act to substitute the sentence of 18 years and 10 months with a sentence of 12 years' imprisonment that had earlier been agreed upon.

Consideration of appeal.

We have carefully considered the appellant's appeal which was argued with the leave of court against sentence and partially on a point of law. The matter for consideration in the appeal is whether the sentence imposed on the appellant is an illegality. Where a sentence is illegal, it has to be set aside.

The facts of this case as far as is relevant to the ground of appeal is that the parties executed a plea bargain agreement. In the plea bargain agreement under paragraph 5.2 thereof, it was agreed that the appellant would serve 12 years' imprisonment. The learned trial judge added "plus eight (8) years". The addition was not part of the agreement. The record also clearly demonstrates that the learned trial judge inter alia stated as follows:

> In this particular matter, the prosecution and the defence counsel have submitted at length on aggravated factors and mitigating factors. The plea bargain agreement is well articulated. I will accept the plea bargain agreement but with a slight adjustment in the sentence....
>
> I will reduce two years from the agreed sentence between you and the lawyers view under the Plea Bargain Agreement.
>
> I therefore sentence you to a term of imprisonment of 18 (eighteen) years. If the period spent on remand of 1 year and 7 months is deducted. You will serve 16 years 5 months' term of imprisonment.

It is quite clear that the plea bargain agreement recommended a sentence of 12 years' imprisonment. The learned trial judge could not accept the plea bargain agreement without the sentence and she had no power to amend the agreement to read 18 years' imprisonment. Rule 13 of the **Judicature (Plea Bargain) Rules, 2016** is quite clear in providing *inter alia* that the court may reject a plea bargain agreement where it is satisfied that the agreement may occasion a miscarriage of justice. Secondly, it provides that where the court rejects the plea bargain agreement, it shall record the reasons for rejection and inform the parties. Further that the agreement shall become void and shall be inadmissible. Lastly the matter shall be referred for trial.

In the circumstances of this appeal, the learned trial judge did not follow the Plea Bargain Rules and instead of rejecting the agreement which she implicitly did, she accepted the agreement but tried to amend it by enhancing the period of imprisonment. By amending the agreement unilaterally, it was no longer a plea bargain agreement and it imposed a sentence of the court without due process. The due process is that the indictment would be read and the accused would be requested to plead to the indictment and the court would establish whether, if the accused pleads guilty, the plea is equivocal or unequivocal. If it is equivocal, the matter shall proceed for trial. In this matter, the appellant undertook to plead guilty on the basis of an agreement in which he would accept a maximum penalty of 12 years' imprisonment. Enhancing the sentence by the trial judge nullified the plea bargain agreement and the matter was supposed to be sent for trial in the ordinary way.

The counsel of the parties agreed that the decision of this court in **Wangwe v Uganda (Criminal Appeal Number 572 of 2014**) was good law in that the court found inter alia that:

> With due respect, we find that the learned trial judge erred when she sentenced the appellant outside the plea bargain agreement, to his prejudice. According to the court record, the parties had participated in plea bargain agreement whereby they agreed upon a sentence of 15 years' imprisonment by the trial judge enhanced the sentence to 18 years and 10 months. Having done so, we find that the learned trial judge imposed an illegal sentence on the appellant. The sentence is, therefore hereby set aside.

The respondent's counsel prayed that we substitute the sentence of 18 years and 10 months with a sentence of 12 years' imprisonment earlier agreed upon.

We agree that it is clear that the parties agreed on 12 years' imprisonment and unless the matter is sent back for trial upon rejection of the plea bargain agreement, the only sentence that the court can impose is 12 years or less as that would not be prejudicial to the appellant. If the learned trial judge was of the view that the sentence of 12 years' imprisonment was so low as to amount to an injustice, she ought to have rejected the plea bargain agreement in its entirety and the agreement itself would be inadmissible to even prove the guilt of the appellant. The

appellant would be presumed innocent until found guilty after trial in terms of article 28 (3) (a) of the Constitution which provides *inter alia* that:

> (3) Every person who is charged with a criminal offence shall –
>
> (a) be presumed to be innocent until proved guilty or until that person as pleaded guilty.

The appellant could not have pleaded guilty on the basis of an agreement which is rejected or amended. He pleaded guilty on the basis of an agreement to be sentenced to 12 years' imprisonment. This was a compromise between the state and the accused person. The state did not have to call witnesses thereby saving not only costs but avoiding the possibility that some witnesses may be unable to prove the offence thereby letting the appellant go scot-free. The agreement benefited both the accused as well as the state. It was up to the court to assess the reasonableness of the agreement in terms of the sentence imposed and in relation to the gravity of the offence. The court cannot accept one part of the agreement and reject the others. To do so would upset the objectives underlying the plea bargain process which include the objectives inter alia to save the state the uncertainty of the trial, the costs of the trial and use of the courts time and resources. Where a case is for trial, the safeguards for plea taking would be applied to ensure that the plea, if one of guilty, is unequivocal. In the circumstances of this appeal, the sentence was illegal and we accordingly allow the appeal and set aside the sentence.

Exercising the powers of this court under section 11 of the Judicature Act, which gives us the powers of the original court, we accept the plea bargain agreement. We would accordingly impose on the appellant sentence of 12 years' imprisonment as agreed. In accord with article 23 (8) of the Constitution, we are obliged to deduct from the agreed period, the period that the appellant spent in pre-trial detention before his conviction and sentence. Article 23 (8) of the Constitution provides that:

> (8) Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.

In this case, because an agreed sentence is on record, the only way of taking into account the period of one year and seven months that the appellant spent in lawful custody before his sentence is by deducting it from the 12 years agreed upon. In the premises, the appellant shall serve a sentence of 10 years and 5 months' imprisonment with effect from the date of his conviction and sentence by the High Court on the 27th of May 2014.

Dated at Kampala the 4th day of October 2022

Catherine Bamugemereire

Justice of Appeal

Christopher Madrama

Justice of Appeal

Eva K. Luswata

Justice of Appeal