THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

Coram; Buteera DCJ, Mulyagonja & Luswata, JJA

CRIMINAL APPEAL NO. 456 OF 2014

TAMUZADDE HAMIDU :: APPELLANT

AND

UGANDA :: RESPONDENT

(Appeal from the decision of Masalu Musene, J., delivered on 27th May 2014, in Fort Portal High Court Criminal Session Case No. HCT-01-CR-SC-0140 of 2013)

Introduction

This appeal arose from the judgment of the High Court in which the appellant was convicted of the offence of Murder contrary to sections 188 and 189 of the Penal Code Act and sentenced to 20 years' imprisonment on his own plea of guilty, on the basis of a plea bargain agreement.

Background

The facts that were read out and admitted by the appellant were as stated in the plea bargain agreement. They were that the deceased was the wife of the appellant's brother. The appellant married her after his brother's death.

However, the appellant and the deceased had a conflict that arose from the deceased brother's *kibanja*. It was alleged that as a result of this conflict, the appellant got an accomplice to help him to execute his plan. And that in the night of 21st September 2007, the appellant and his accomplice obtained and sharpened a *panga*, broke into the house of the deceased's father where she was asleep and cut her up causing her

death. That in the process, the deceased's father raised an alarm but the two assailants also attacked him and cut him on the head and also cut off four of his fingers. The deceased's father, Mzee Ssali, identified the appellant because he knew him before the attack. The appellant was then arrested and indicted for murder, convicted and sentenced as it is stated above. He now appeals against both conviction and sentence on the following grounds:

1. The learned trial judge erred in law and fact when he failed to properly take the appellant's plea and this occasioned him a serious miscarriage of justice.
2. The learned trial judge erred in law and in fact when he disregarded the agreed sentence in the plea bargain agreement and passed a stiff sentence against the appellant, or in the alternative the sentence given to the appellant was harsh and manifestly excessive in the circumstances.

The appellant prayed that the appeal be allowed and that the conviction and sentence be set aside. The respondent opposed the appeal.

Representation

At the hearing of the appeal on 6th September 2022, the appellant was represented by learned counsel on State Brief, Mr Richard Bwiruka. The respondent was represented by Ms Kyomuhendo J. appearing with Mr Akatukunda Joel Kakuru, State Attorney, holding a brief for Ms Vicky Nabisenke, A/DPP.

Counsel for both parties filed written arguments as directed by court. They each prayed that court adopts them as their submissions to dispose of the appeal and their prayers were allowed. This appeal was therefore disposed of on the basis of written submissions only.

Determination of the Appeal

The duty of this court as a first appellate court is stated in rule 30 (1) of the Court of Appeal Rules. It is to reappraise the whole of the evidence before the trial court and draw from it inferences of fact. The court then comes to its own decision on the facts and the law but must be cautious of the fact that it did not observe the witnesses testify. (See **Bogere Moses & Another v Uganda, Supreme Court Criminal Appeal No. 1 of 1997**)

In resolving this appeal, we considered the submissions of both counsel and the authorities cited and those not cited that are relevant to the appeal. We reviewed the submissions in respect of each of the grounds immediately before we disposed of each of them. Just as counsel for both parties did, we addressed the grounds of appeal in their chronological order.

Ground 1

In this ground of appeal, the appellant complained about the manner in which his plea was taken and asserted that it occasioned a miscarriage of justice.

Submissions of Counsel

Mr Bwiruka for the appellant submitted that while taking the appellant's plea, the trial judge did not follow the procedure that is set out in sections 60 and 63 of the Trial on Indictments Act (TIA). He added that the proper procedure was explained in **Bangizi Godfrey v Uganda, Court of Appeal Criminal Appeal No. 337 of 2017**, where the case of **Adan v Republic [1971] EA 445** was cited with approval. He reproduced the relevant passage from that case. Counsel then faulted the trial judge for reading out the facts as they were set out in the plea bargain agreement, as a substitute for the requirements set out in the law and concluded that it was illegal.

Counsel went out to point us to a passage in the case of **Bangizi Godfrey** (supra) where this court held that the Plea Bargain Rules did not replace the provisions of the TIA on plea taking. Further that the two should be read in harmony. He drew it to our attention that the appellant is an illiterate person who, according to the contents of the plea bargain agreement, stopped his education in Primary One. That it was for that reason that the appellant used a thumb mark to sign the agreement. That however, there is no indication in the agreement, which is in the English language, that there was a translator to explain the contents to him. He opined that the plea bargain agreement contravened sections 2 and 3 of the Illiterates Protection Act. He thus concluded that the plea bargain agreement was void and prayed that ground one of the appeal be allowed.

In reply, counsel for the respondent referred us to the case of **Adan v Republic** (supra) for the procedure of taking pleas of guilt which he reproduced verbatim. Counsel submitted that the trial judge did not breach any of the aspects of the procedure stated therein. That the appellant appeared in court and the indictment was read and explained to him and he stated that it was true that he killed the deceased upon which the trial judge entered a plea of guilty. That the prosecution then introduced the plea bargain that had been agreed upon by the prosecution, the appellant and his counsel. The facts were read to the appellant from the agreement and explained to him, upon which he confirmed that they were true and correct. That it was on that basis that the trial judge convicted him.

Counsel went on to submit that there is no hard and fast rule as to where the prosecutor should record the facts. That the procedure laid out in **Adan v Republic** (supra) only directs that the facts should be read out to the accused person and he/she should be given the opportunity to dispute, explain or add to them.

Counsel further submitted that the appellant exercised his right to be represented by counsel under Article 28 of the Constitution. That Mr. Alan Nshimye represented him and it is he that signed as counsel in the plea bargain agreement. Further, that under rule 10 of the Plea Bargain Rules, the advocate is also under an obligation to explain the contents of the agreement to the accused, where he is represented. And that the same provision requires any interpreter that was present during the negotiations to certify that the interpretation was accurately done. Counsel went on to submit that for as long as the appellant was represented by counsel, there was no need for an interpreter to certify that the agreement was interpreted to him. That the interpreter would only be necessary if the appellant entered into the agreement on his own, unrepresented by counsel.

Counsel added that the plea bargain agreement was also read out in court and explained by the Court Clerk, as it is evident at page 7 of the record of appeal. He charged that the appellant did not dispute the facts as read out; all he said was that the facts were true. He prayed that we dismiss this ground of appeal.

Resolution of Ground 1

The Trial on Indictments Act provides for the procedure to be followed on the taking of the plea on an indictment in section 60 thereof as follows:

> **60. Pleading to indictment.**
>
> **The accused person to be tried before the High Court shall be placed at the bar unfettered, unless the court shall cause otherwise to order, and the indictment shall be read over to him or her by the chief registrar or other officer of the court, and explained if need be by that officer or interpreted by the interpreter of the court; and the accused person shall be required to plead instantly to the indictment, unless, where the accused person is entitled to service of a copy of the indictment, he or she shall object to the**

want of such service, and the court shall find that he or she has not been duly served with a copy.

The rendition of the law that is constantly referred to by the courts on the taking of the plea where an accused person pleads guilty was in **Adan v Republic** (supra), where the East Africa Court of Appeal stated thus:

> *"When a person is charged with an offence, the charge and the particulars thereof should be read out to him, so far as possible in his own language, but if that is not possible in the language which he can speak and understand. Thereafter the Court should explain to him the essential ingredients of the charge and he should be asked if he admits them. If he does admit his answer should be recorded as nearly as possible in his own words and then plea of guilty formally entered. The prosecutor should then be asked to state the facts of the case and the accused be given an opportunity to dispute or explain the facts or to add any relevant facts he may wish the court to know. If the accused does not agree with the facts as stated by the prosecutor or introduces new facts which, if true might raise a question as to his guilt, a change of plea to one of not guilty should be recorded and the trial should proceed. If the accused does not dispute the alleged facts in any material respect, a conviction should be recorded and further facts relating to the question of sentence should be given before sentence is passed."*

The record of appeal, at page 7, shows that the indictment was read out to the appellant as is required by section 60 of the TIA. Though it is not indicated that it was translated, the trial judge recorded that: *"Charge read and explained."* The appellant responded in an unequivocal manner that: *"It is true I killed Restituta Nalukwago."* The trial judge then entered the plea in these words: *"Plea of Guilty entered."*

Counsel for the appellant complained about the next stage of the process because the facts were read from the plea bargain agreement rather than from elsewhere; but he does not state where they ought to have been read from. However, we note that in cases where there is a plea bargain agreement, rule 12 of the Plea Bargain Rules, in part, provides as follows:

(2) The charge shall be read and explained to the accused in a language that he or she understands and the accused shall be invited to take plea.

(3) *The prosecution shall lay before the court the factual basis contained in the plea bargain agreement and the court shall determine whether there exists a basis for the agreement.*

(4) The accused person shall freely and voluntarily, without threat or use of force, execute the agreement with full understanding of all matters.

{Emphasis added}

It is clear that rule 12 (3) above requires the prosecution to lay before the court the facts that have been agreed in the plea bargain agreement. Mr Ojok for the State in this case stated that the facts were *"as per the plea bargain agreement"* that was already on record. These facts were accordingly read out to the appellant. In the words of the judge the court notes, at page 8 of the record that: *"Facts read out and explained to the accused."* The appellant responded that, *"The facts are true and correct."* The trial judge then entered the plea of "Guilty."

We reviewed the summary of the case that was presented with the indictment, at page 4 of the record of appeal. We find that the summary that was laid out in the plea bargain agreement and read out to the court and the appellant is similar to what was stated in the summary of the case. In view of that and the law that we have set out and emphasized above, we do not find any error on the part of the trial judge and the prosecution with regard to the manner in which the facts were read out to the appellant. Indeed, the appellant admitted the facts unequivocally as it is required by law and its interpretation in the case of **Adan v Republic** (supra).

Counsel for the appellant further complained about the absence of the signature of an interpreter at the foot of the plea bargain agreement, at

page 13 of the record of appeal. He referred us to sections 2 and 3 of the Illiterates Protection Act, which provide as follows:

> **2. Verification of signature of illiterates.**
> **No person shall write the name of an illiterate by way of signature to any document unless such illiterate shall have first appended his or her mark to it; and any person who so writes the name of the illiterate shall also write on the document his or her own true and full name and address as witness, and his or her so doing shall imply a statement that he or she wrote the name of the illiterate by way of signature after the illiterate had appended his or her mark, and that he or she was instructed so to write by the illiterate and that prior to the illiterate appending his or her mark, the document was read over and explained to the illiterate.**
>
> **3. Verification of documents written for illiterates.**
> **Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her.**

While this is still the law which protects illiterate persons who execute documents in this jurisdiction, we are also cognisant of the fact that the Plea Bargain Rules have a specific provision that applies to the process of entering an agreement in circumstances where interpretation is required. Rule 10 thereof thus provides as follows:

> **10. Plea bargain agreement to be explained to accused person.**
> **A plea bargain agreement shall, before being signed by the accused, be explained to the accused person by his or her advocate or a justice of the peace in a language that the accused understands and if the accused person has negotiated with the prosecution through an interpreter, the interpreter shall certify to the effect that the interpretation was accurately done during the negotiations and execution in respect of the contents of the agreement.**

It is evident from the plea bargain agreement that the appellant was represented by counsel in the plea bargaining process. Mr. Alan Nshimye signed the agreement as the lawyer for the accused, immediately after his thumb mark, as it is shown at page 13 of the record. It is therefore to be inferred from the document itself that before the appellant signed it, counsel explained the contents thereof. We also take note of the implied fact that had not counsel explained the contents of the agreement to him, the appellant could not have pleaded guilty to the offence indicted, as he unequivocally did before the court.

In addition, we observed that the plea bargain agreement is provided for in a standard form contained in Schedule One (1) of the Plea Bargain Rules. The form includes all the possible contents of such an agreement. We do not understand that to mean that even parts of the Form that are not relevant to a particular accused person must be filled in and signed against. In view of the fact that the appellant was represented by an advocate at his trial, we reject the submission that the absence of the signature or certification of an interpreter makes the plea bargain agreement on record void.

The trial judge therefore made no error at all when he relied upon the contents of the plea bargain agreement to convict the appellant of the offence of murder. Ground 1 of the appeal therefore fails.

Ground 2

In this ground of appeal, the appellant complained that the trial judge disregarded the sentence that had been agreed upon in the plea bargain agreement and instead imposed a stiff sentence against him. In the alternative, which really amounted to the same thing, the appellant complained that the sentence that was imposed was manifestly harsh and excessive in the circumstances of the case.

Submissions of Counsel

In this regard, counsel for the appellant submitted that in the event that the trial judge does not approve the sentence agreed upon in the plea bargain agreement, he/she would have recourse to rule 13 (1) and (2) of the Plea Bargain Rules to reject it. That the agreement then becomes void and the trial judge must return the case for trial before another judge. He went on to submit that the learned trial judge acted contrary to the law when he enhanced the sentence that had been agreed upon and so handed down a harsh and excessive sentence in the circumstances. Further that the sentence that he passed was illegal and should be set aside. In conclusion, counsel prayed that the conviction be quashed and the sentence be set aside.

In reply, counsel for the respondent referred us to the definition of the term *"plea bargain"* in rule 4 of the Plea Bargain Rules and the term *"plea bargain agreement"* in the same provision. He also referred us to rule 15 (2) of the Plea Bargain Rules which provides that the court shall not impose a sentence that is more severe than the maximum recommended in the plea bargain agreement. He conceded that when the trial judge imposed a sentence of 20 years instead of the agreed 15 years' imprisonment, the sentence was excessive, illegal and contrary to the Plea Bargain Rules. He referred us to the decisions of this court in **Pande Fred v Uganda, Criminal Appeal No. 233 of 2015** and **Agaba Emmanuel & 2 Others v Uganda, Criminal Appeal No. 139 of 2017** to support his submissions.

Counsel went on to submit that by disregarding the sentence that was agreed upon in the plea bargain agreement, the trial judge essentially rejected the whole agreement. That after doing so, he ought to have referred the case back for a full trial as it is required by rule 13 (2) (c) of the Plea Bargain Rules, where the appellant would have had to take a fresh plea. He further submitted that the record does not show that the

trial judge rejected the plea bargain agreement. That this means he accepted the agreement as a whole and it became part of the court record and therefore binding on both parties. That as a result, this court has the powers vested in it under section 11 of the Judicature Act to enforce it, as it was done in the case of **Pande Fred** (supra). He explained that in that case, this court did not find it necessary to set aside the agreement, but it set aside the sentence that was contrary to the agreement and substituted it with the sentence that was agreed upon therein.

Counsel then referred us to the case of **Katumba Alawi v Uganda, Criminal Appeal No 540 of 2015**, where this court invoked section 11 of the Judicature Act and determined an appropriate sentence. The court found that the appropriate sentence was the one that was agreed upon in the plea bargain agreement. The court also deducted the period that was spent by the appellant on remand and then sentenced the appellant accordingly. Counsel then prayed that this court finds that the sentence of 15 years' imprisonment that was agreed upon was appropriate. And that having done so, the court should deduct the two years spent in custody before conviction, as well as the further period of 8 years spent in custody after the unlawful sentence, and sentence the appellant to the balance. He prayed that the conviction be upheld and sentence varied accordingly.

Resolution of Ground 2

We observed that after the mitigating and aggravating factors were read out to the appellant, he stated that he understood them. The trial judge then went on to sentence him as follows:

> *"If it were not for the spirit of Plea Bargaining Concept (sic) whereby courts are magnanimous or lenient to persons who plead guilty in Capital Offences all over the country, this was a case which deserved the maximum penalty of death or life imprisonment. This is because the*

murder in question was planned by the convict who hired another to assist him in accomplishing the mission. It resulted into loss of life.

So whereas the recommended sentence is 15 years, I am inclined to increase the same by 7 years, making it 22 years. I reduce it by 2 years of remand and do hereby sentence you to serve 20 years' imprisonment."

It is evident that the trial judge accepted part of the agreement between the parties, that is, that the appellant pleads guilty as he did. However, he did not accept the sentence that was recommended to the court. Rule 13 of the Plea Bargain Rules provides for the rejection of the plea bargain agreement in the following terms:

13. Rejection of plea bargain agreement by court.

(1) The court may reject a plea bargain agreement where it is satisfied that the agreement may occasion a miscarriage of justice.

(2) Where the court rejects a plea bargain agreement-

(a) it shall record the reasons for the rejection and inform the parties;

(b) the agreement shall become void and shall be inadmissible in subsequent trial proceedings or in any trial relating to the same facts; and

(c) the matter shall be referred for trial, subject to sub rule 8(3).

It is clear from sub-rule 1 above that the court may reject the plea bargain agreement it if will result in a miscarriage of justice. However, we note that the reasons that the trial judge gave for augmenting the sentence that was agreed upon in the plea bargain did not amount to a finding that there was a miscarriage of justice. The trial judge was simply of the opinion that the sentence that was agreed upon was too low, in view of the fact that the maximum sentence for the offence of murder is death.

The objectives of entering into plea bargains, are stated in rule 3 of the Plea Bargain Rules as follows:

The objectives of these Rules are-

(a) to enhance the efficiency of the criminal justice system for the orderly, predictable, uniform, consistent and timely resolution of criminal matters;

(b) to enable the accused and the prosecution in consultation with the victim, to reach an amicable agreement on an appropriate punishment;

(c) to facilitate reduction in case backlog and prison congestion;

(d) to provide quick relief from the anxiety of criminal prosecution;

(e) to encourage accused persons to own up to their criminal responsibility; and

(f) to involve the victim in the adjudication process.

It is evident in this case that the objectives were achieved because the appellant pleaded guilty to the offence after 2 years in prison. This was in consideration that the court would impose as lesser sentence than would have been due to him had he been tried for the offence, as it is provided for in clause (b) above. It is also clear that if the lesser sentence is imposed the person who pleads guilty will be discharged from prison earlier than he would have been if he had been subjected to a full trial, so reducing the congestion in the prison. But even in such circumstances, justice will still be seen to have been done.

This court in **Agaba Emanuel & 2 Others** (supra) held that an accused person is entitled to an assurance that a sentence agreed upon in the plea bargain agreement will be respected and will not be substituted with a judge-imposed sentence. Further that where a promise is made to an accused person in the plea bargaining process, that promise must be fulfilled as though it was a contract between the parties. The court held, and we emphasise, that:

> *"... plea bargaining creates an agreement between the prosecutor and the accused with all the features of an agreement in the law of contract. The court plays the role of a regulator of the agreement to ensure that the*

agreement conforms to the needs of the justice of the case. But the court is not privy to the agreement and cannot redefine it. What the court may do is to reject a plea bargain agreement where it is satisfied that the agreement may occasion a miscarriage of justice. ...

It is because of the seriousness accorded to a plea bargain that the rules prohibit the substitution of a judge imposed sentence in the context of plea bargain context." (sic)

In the more recent case of **Aria Angelo v Uganda, Criminal Appeal No. 439 of 2015**, in which judgment was handed down on 11th February 2022, this court observed that:

"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."

In the case now before us, the agreed sentence of 15 years' imprisonment appeared to have been on the lower side for the offence of murder which was committed in cold blood. It was premeditated and carried out with an accomplice. We therefore do not think that the sentence of 20 years' imprisonment that was imposed by the trial judge was harsh and excessive in the circumstances. However, the trial judge's only option in the circumstances where he was of the view that the sentence was too low was to reject the plea bargain agreement altogether, not to impose a sentence of his own. Having allowed the agreement to pass, it is now too late for it to be reversed or rejected. If it was, rejected, it would mean that the prosecution and the courts have to go through the trouble of sourcing for resources to hold the full trial that was supposed to have been held in May 2014, more than eight (8) years ago. The process is convoluted and may result in the accused person staying longer in prison than is fair or just. It may also result in no trial at all because of the absence of relevant witnesses for the

prosecution and other issues that arise from delayed trials. All these may result in injustice.

In addition, the complainants in the case seem to have acquiesced in the appellant being convicted on his own plea of guilty with the result that he would be imprisoned for 15 years. He was a relative, though only by marriage, 34 years old and with the responsibility of providing for a wife and two children who remained with the family when he was arrested and imprisoned.

In the circumstances therefore, we invoke the powers of this court under section 11 of the Judicature Act to bring the plea bargain agreement into effect. The period of 15 years' imprisonment agreed upon in the plea bargain agreement is hereby upheld. Pursuant to Article 23 (8) of the Constitution, we now deduct the period of 2 years that the appellant had spent in prison at the time he was convicted. The appellant is therefore hereby sentenced to a term of 13 years' imprisonment, with effect from the 27th May 2014, the date on which he was convicted.

Dated at Fort Portal this 25th day of Nov 2022.

Richard Buteera
DEPUTY CHIEF JUSTICE

Irene Mulyagonja
JUSTICE OF APPEAL

Eva Luswata

JUSTICE OF APPEAL