THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT FORT-POTRAL
CRIMINAL APPEAL NO. 0458 OF 2014
(Arising from Criminal Session Case No. 0133 of 2013)

SSOZI ABDALLA :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

CORAM: Hon. Mr. Justice Richard Buteera, DCJ
Hon. Lady Justice Irene Mulyagonja, JA
Hon. Lady Justice Eva K. Luswata, JA

JUDGMENT OF COURT

Introduction

This is an Appeal from the decision of the High Court of Uganda sitting at Kiboga (*Wilson Masalu Musene, J*) dated 28th May 2014. The appellant was convicted on four counts of **Aggravated Defilement c/ ss 129 (3) and (4)(a) of the Penal Code Act, Cap 120,** and sentenced to 20 years' imprisonment on each count, to run concurrently.

Back ground

The background of this Appeal is that the victims; N.S aged 8 years, K.M aged 9 years, N.J. aged 12 years, and N.B. aged 14 years were residing with their parents in Lutti village, Kiboga District and were all pupils of Back to God Primary School. The appellant was the Head Teacher of the said school.

During the month of August 2011, the appellant called N.B. to his home to cook for him. After eating, he asked if she wanted to be clever and she responded in the positive. He then asked her to remove her clothes and she did. He smeared her whole body with jelly. He asked her to climb the bed. He followed her there and had sexual intercourse with her.

Between the months of May and August 2012, the appellant called N.S, K.M and N.J. to his home telling them he wanted to make them bright. He smeared jelly on their bodies and had sexual intercourse with them.

On 4th September 2012, he called N.J. to have sexual intercourse with her again but she refused. He then threatened that he would rape her the next day. N.J. reported to her father who in turn reported the matter to the Local Council. The appellant was arrested, taken to the Police and investigations commenced.

The victims were each examined on PF3 and the results showed that they all had raptured hymens. The appellant's house was searched and containers of jelly were recovered and exhibited. The appellant was examined upon PF24, found normal and was charged with aggravated defilement.

When he was arraigned before court for plea- taking, the appellant pleaded guilty to all four counts of aggravated defilement. He was duly convicted and sentenced. He now appeals against that decision on one ground of appeal as follows:

> **That the appellant was wrongly convicted without properly taking plea on the indictment and this caused him a serious miscarriage of justice.**

He prayed that:

a) The appeal be allowed;
b) The conviction be quashed and sentence set aside;
c) In the alternative, a retrial be ordered;
d) Any other order be given to meet the ends of justice.

Representation

At the hearing of the Appeal, the appellant was represented by Mr. Bwiruka Richard, on state brief, while the respondent was represented by Mr. Joseph Kyomuhendo, Chief State Attorney and Mr. Akatukunda Joel Kakuru, State Attorney. Counsel for both parties applied that court adopts their written submissions earlier filed in court and the Applications were granted.

Case for the appellant

Counsel for the appellant submitted that on all the four counts, the indictment was read to the appellant and he admitted having sexual intercourse with the victims. That the prosecutor informed Court that the facts were as stated in the Plea Bargain Agreement and the Court read out and explained the facts to the appellant but there was no response from him to confirm whether the facts were true or not, but Court went ahead to convict him.

He cited Sections 60 and 63 of the Trial on Indictments Act on the procedure for taking pleas. He also cited the case of ***Adan v Republic (1973) 1 EA 445*** that lays down the procedure for taking a plea of guilty. He contended that even in a case of plea bargain, the said procedure was re- emphasized in the case of ***Bangizi Godfrey v Uganda; Court of Appeal Criminal Appeal No. 337 of 2017,*** where this Court stated thus:

> **"Where there is a plea bargain the accused still has to plead guilty and the proceedings in plea taking should be on record."**

He further cited the case of ***Musinguzi Apollo v Uganda; Court of Appeal Criminal Appeal No. 240 of 2017*** where this Court emphasised that it is necessary to record the accused's plea to the indictment and not just file a form containing the plea bargain agreement.

He thus contended that it was wrong for the learned trial Judge to record that the facts in the plea bargain agreement were read and explained to the appellant, without giving him the opportunity to reply and proceeding to convict him on all counts.

Counsel opined that the plea was not properly taken. That the appellant was, therefore, wrongly convicted and the appeal should be allowed, conviction quashed and the sentence set aside. He prayed that in the circumstances, a retrial be ordered.

Case for the respondent

Counsel for the appellant stated that this case arose out of a Plea Bargain Agreement made between the prosecution, the appellant, and defence counsel in which the appellant freely agreed to plead guilty in exchange for a sentence of 20 years' imprisonment. They submitted that the facts as stated in the Plea Bargain Agreement were agreed upon by the appellant and, therefore, he already knew the facts upon which his plea was premised and it could not be said that there was a miscarriage of justice.

Counsel contended that a miscarriage of justice is defined as a grossly unfair outcome in a judicial proceeding, as when a defendant (accused person) is convicted despite a lack of evidence on an essential element of the crime. He relied on ***Bryan A. Garner, Black's Law Dictionary, 8th Edition, Thomson West Publishers, at page 1019***.

It was counsel's argument that it could not be true that the learned trial Judge's failure to allow the appellant, in plea taking, to say something about the facts which he had already agreed to in a plea bargain agreement resulted in a grossly unfair outcome in the judicial process and to a serious miscarriage of justice.

Counsel referred to Section 139 of the Trial on Indictment Act which provides that no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission or irregularity or misdirection in the summons, warrant, indictment, order, judgment or other proceedings before or during the trial unless the error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice.

Counsel further cited ***Article 126*** of the Constitution that enjoins courts of law to dispense substantive justice instead of relying on technicalities. They also referred to the case of ***Uganda v Guster Nsubuga & Robinhood Byamukama; Supreme Court Criminal Appeal No. 92 of 2018***, where the Court found that the anomaly of the failure to have the respondents take

plea on an amended indictment could be overlooked in favour of the wider cause of substantive justice.

Counsel prayed that the fact that the appellant was not given a chance to say something about the facts be overlooked in favour of the wider cause of substantive justice, especially because he signed a plea bargain agreement from which the facts were read and explained to him. And that he would have just confirmed that the facts were true and correct if he had been given a chance to comment during trial. They also prayed that Court finds that there was no unfair outcome in the judicial proceedings and that the appellant was rightfully convicted and sentenced. And finally, that the Court finds that this Appeal lacks merit and dismisses the same.

Court's consideration of the appeal

Duty of the first appellate court

The duty of this court as a first appellate court was laid out in ***Kifamunte Henry v Uganda; S. C. Criminal Appeal No. 10 of 1997***, where the Supreme Court stated:

> **"The first appellate court has a duty to review the evidence of the case, to reconsider the materials before the trial judge and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."**

In ***Rwabugande Moses v Uganda; S.C. Criminal Appeal No. 25 of 2014***, the Supreme Court high-lighted the duty of the first appellate court as follows:

> **"It is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. In so doing, the first appellate**

court must consider the evidence on any issue in its totality and not any piece thereof in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court. [Baguma Fred vs. Uganda SCCA N0.7 of 2004]"

Resolution

The gist of the sole ground of Appeal here is that in not giving the appellant an opportunity to respond to the summary of the facts that was read from the plea bargain agreement, the appellant was wrongly convicted and that caused a miscarriage of justice. Plea- taking is governed by Section 60 of the Trial on Indictments Act, Cap 23 (TIA) 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."

Section 63 of the TIA provides for the plea of guilty as follows:

"63. Plea of guilty.

If the accused pleads guilty, the plea shall be recorded and he or she may be convicted on it."

The courts have explained the procedure that governs the manner in which a plea of guilty is to be recorded. In the case of ***Adan v Republic*** (supra), the Court held that:

(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

(iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

(iv) if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

(v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

The elaborateness of the procedure laid down in ***Adan v Republic*** (supra) is rather obvious. Nonetheless, the Kenyan case of ***Elijah Njihia Wakianda vs. Republic; Criminal Appeal No. 473 of 2010 [2016] eKLR***, states it more clearly, thus:

"Criminal proceedings have serious implications on the life and liberty of persons accused depending on the offence charged. The criminal process is designed for the forensic interrogation and determination of guilt with various rights and safeguards built into it to ensure that only the guilty get to be convicted. Thus the heart of a criminal trial is the tendering of evidence by the prosecution in an attempt to establish the charge. That evidence is given on oath and tested at trial through the process of cross-examination. The accused person essentially gets the opportunity, if he chooses to, to confront and challenge his accusers. He also gets to make submissions and to persuade the court that he

is not guilty of the matters alleged. He is also at liberty to testify on his behalf and call evidence on the matters alleged against him. He, of course, has no burden of any kind, the same resting on the prosecution to prove the charge against him beyond reasonable doubt.

Given all the safeguards available to an accused person through the process of trial, the entry of a plea of guilty presents a rare absolute capitulation; a throwing in of the towel and a giving of a walkover to the prosecution and often at great cost. A conviction comes with its consequences of varying gravity. Thus it is that the courts, at any rate appellate courts, would not accept a plea of guilty unless satisfied that the same has been entered consciously, freely and in clear and unambiguous terms. The process of ensuring this was well-captured in the oft-cited case of ADAN -VS- REPUBLIC (supra) and has been followed in many cases after it. See: LUSITI -VS- REPUBLIC [1976-80] 1 KLR 585; KARIUKI -VS- REPUBLIC [1984] KLR 809.

It is for the above reasons that Courts demand that a plea of guilty must be unequivocal. In the instant case, it has not been disputed by counsel for the respondent that upon reading the summary of the facts to the appellant, the appellant was not afforded an opportunity to make a response to them. The purpose of making such a response is to ascertain that the accused person does not deny the facts or seek to explain them in which case the plea of guilty would become equivocal and, therefore, necessitate that it is changed to a plea of not guilty. The East African Court held as much in the case of ***Adan v Republic*** (supra), thus:

"The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and

> **it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction.**

In the instant case, a look at the record of appeal shows what transpired in court at page 10 as follows:

> *Julies Tuhairwe: The facts are stated in the Plea Bargain Agreement*
>
> *Signed: Hon. Justice Wilson Masalu Musene JUDGE*
>
> *Court: Facts read out and explained to Accused.*
>
> *Court: I accordingly convict you on your own pleas of guilty in all the four counts*
>
> *Signed: Hon. Justice Masalu Musene JUDGE*

Clearly, the appellant did not respond to the summary of the facts. Given that an accused person can change their plea at any point of the trial, even at the time of sentencing is particularly important that a trial Court takes great care before accepting and relying on a plea of guilty to convict. It does not matter that the trial proceeded on a Plea Bargain Agreement. This Court stated as much in ***Musinguzi Apollo v Uganda*** (supra) when it held:

> **"Where there is a plea bargain the accused shall still have to plead guilty and the proceedings in plea taking should be on record... In the appellant's case, it was necessary to record his plea to the charge or indictment and not just file a form containing the plea bargain agreement. Thereafter**

the court has an opportunity to establish whether the plea is equivocal or unequivocal."

In this case, we find that the failure by the trial Judge to give the appellant an opportunity to respond to the summary of the facts that was read from the Plea Bargain Agreement leaves some doubt as to the finality of the plea of guilty upon which the trial Judge convicted the appellant.

Whereas counsel for the respondent sought to rely on ***Article 126*** of the Constitution and the case of ***Guster Nsubuga & another*** (supra), we find that case distinguishable from the instant one. This is because the plea therein was a plea of not guilty and is not subjected to the rigorous test of a plea of guilty. The Supreme Court emphasized that when it went ahead to hold that:

"It is our view that the amendments did not go to the root of the fundamentals of the respondents' case. They pleaded NOT GUILTY and would have, most likely, still pleaded not guilty had they been asked to plead to the amended indictment. This is evidenced by the fact that indeed they pleaded NOT GUILTY at the retrial."

In the end result, we find that the failure to have the appellant respond to the summary of the facts that were read to him rendered the plea of guilty equivocal. For the trial Court to base its decision on such a plea to convict the appellant was wrong, it occasioned a miscarriage of justice. We accordingly hereby quash the conviction and set aside the sentence.

Whereas the ordinary course of action would have been to send the file back to the High Court for the re- trial of the appellant, we are equally aware that the appellant was arrested on the 6th September 2012 and at the time of committing the offence, he was 26 years old. By now, the victims are aged 18, 19, 22 and 24 years respectively. To order a re- trial would require the disruption of their adult lives. There would be difficulties in the re- trial process with tracing witnesses whose interest to testify may

not be predictable. The inevitable delays in the re- trial will be prejudicial and may not be in the interest of justice.

In the circumstances, since the appellant did not deny the charges that were preferred against him and since the error occasioned during plea-taking was not of his own making, we find that the period of 10 years that he has so far spent in prison are sufficient to meet the ends of justice. He is therefore, accordingly set free unless he is held on any other charges.

Dated at Fort Portal this 9th day of December 2022

Richard Buteera
Deputy Chief Justice

Irene Mulyagonja
Justice of Appeal

Eva K. Luswata
Justice of Appeal