

5 **THE REPUBLIC OF UGANDA**

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: R. Buteera, DCJ, C. Gashirabake JA, O. Kihika, JA.)

CRIMINAL APPEAL NO. 0241 OF 2019

(Arising from Criminal Session No. HCT-00-CR-CS 0199/2018)

10 BETWEEN

MWESIGWA ROBERT.....APPELLANT

AND

UGANDA..... RESPONDENT

15 *(Appeal from the Judgment of the High Court of Uganda Holden at Kampala, by Susan Okalany, J. delivered on 13th December, 2018)*

JUDGMENT OF COURT

Introduction

1.] The appellant was indicted for Aggravated Defilement c/s 129(3)(4)(a)
20 and (c) of the Penal Code Act Cap 120.

2.] The facts from the lower court were that the appellant on the 13th June,
2015 at Gamba Village in Mukono district, performed a sexual act with
N.E, a girl of 5 years of age. The appellant initially pleaded not guilty to
the indictment when he was first arraigned before the High Court on 4th
25 December, 2018. He however changed his plea after the evidence of the
medical examination report of Dr. Daniel Ssegirinya was admitted as
PE1. He was convicted on his own Plea of guilty and sentenced to 9 years
and 4 months' imprisonment.

3.] The appellant being aggrieved with the decision of the High Court lodged
30 an appeal in this court. The appeal is premised on one ground set out in
the Amended Memorandum of Appeal as follows;



5 *The learned Judge erred in law when she exercised powers
injudiciously in entering plea of guilty without adequate scrutiny
of alleged offence, ingredients of alleged crime, date
inconsistencies in charge sheet 11/6/2015, indictment 13 /06/2015
alongside illegal plea bargain agreement before convicting
10 appellant occasioning miscarriage of justice.*

Representation

4.] At the hearing of the appeal, the appellant was represented by Mr. Seth Rukundo on state brief. The respondent was represented by Mr. Sam Oola, Senior Assistant DPP and Ms. Sarah Amony, Chief State Attorney.

15 **Ground one**

**The learned Judge erred in law when she exercised powers injudiciously in entering plea of guilty without adequate scrutiny of alleged offence ingredients, alleged crime date inconsistencies in charge sheet 11/6/2015, indictment 13 /06/2015 alongside illegal plea bargain agreement before
20 convicting appellant occasioning miscarriage of justice.**

Submissions for the appellant

5.] Counsel for the appellant submitted that the prosecution did not satisfy the burden of proof required by law.
6.] It was submitted for the appellant that there were inconsistencies in the
25 dates on the charge sheet and the indictment. The charge sheet had 11/06/2015, whereas the indictment had 13 / 06 / 2015. In counsel's view this was an indication that the ingredients of the offence were not proved beyond reasonable doubt. Counsel cited **Okale vs. Republic 1965 E.A.55.**

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5 7.] Counsel submitted that Section 11 of the Judicature Act Cap 13 gives
power to the Court of Appeal to act in original jurisdiction when
determining appeals. Rule 2(2) Court of Appeal Rules empowers Court
of Appeal to set aside judgments which have been proved null and void
after they have been passed and shall be exercised to prevent abuse of the
10 process of any court caused by delay.

8.] On Plea bargain, counsel argued that the agreement was illegal and could
not be enforced since the appellant signed it while in prison. In counsel's
opinion, the appellant did not have the freedom to contract which was
contrary to sections 2 and 10(1) of the Contracts Act, No. 7 of 2010.
15 Counsel further argued that the procedure of recording the plea bargain
was irregular and this occasioned a miscarriage of justice.

9.] Additionally, counsel for the appellant submitted that the indictment was
not read and explained to the appellant in the language he understood.

Submissions for the respondent

20 10.] On the burden and standard of proof on the offence of aggravated
defilement, counsel for the respondent submitted that the appellant's
advocate intimated to court that the appellant wished to change his plea,
the indictment was read afresh and he pleaded guilty. The brief facts were
then read to him by the prosecutor. When the court asked the appellant
25 whether the facts true were, he confirmed them and stated they were
correct.

11.] Counsel submitted that since the facts constituting all the essential
ingredients of aggravated defilement were admitted to be correct by the
appellant, the trial Judge rightly convicted the appellant on his own plea
30 of guilty in accordance with the law.

5 12.] As regards the inconsistencies in the date when the offence was
committed that is 11/06/2015 and 13/06/2015, counsel submitted that this
ground is without merit. It is merely an irregularity which does not go to
the root of the trial. The appellant affirmed that the facts were correct.
Counsel invoked section 139 of the Trial on Indictment Act, which
10 forbids this court from interfering with the decision of the High court on
grounds of irregularity, error or omission. Counsel submitted that the
important question to establish is whether there was injustice when court
refused to resolve the inconsistencies.

13.] On the proper procedure of plea taking, it was submitted for the
15 respondent that, the appellant raised two issues here in under, one on the
procedure of taking plea, and vitiation of the plea bargain agreement.

14.] On plea taking recording procedure, counsel for the respondent
concurred with counsel for the appellant on the correct procedure for
recording a plea of guilty as was laid down in **Adan vs. R, 1973 E.A 445**.
20 However, counsel's departure was that the trial Judge was alive to and
correctly followed the principles and procedure of recording a plea of
guilty. Counsel submitted that it was an afterthought for the appellant to
turn around and argue that the plea was not correctly recorded in
accordance with the test in **Adan(Supra)**.

25 15.] On the plea bargain agreement, counsel for the respondent
submitted that it is not true that the appellant did not understand the
ingredients of the offence. That the record shows that the appellant was
represented by an advocate. It is indicated that both the indictment and
plea bargain form were read to the appellant in Luganda by a clerk called
30 Bijule Rogers. This was in compliance with Rule 10 of the Judicature
(Plea Bargain) Rules, 2016. That the appellant confirmed before the trial

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5 Judge, his advocate and the State Attorney that he voluntarily signed the Plea Bargain Agreement. In compliance with rule 12.

16.] Counsel submitted that it is clear that the appellant understood the nature of the Plea bargain agreement, the consequences of the Plea bargain agreement on all his constitutional rights to a fair trial. This was
10 done voluntarily.

Rejoinder

17.] Counsel for the appellant submitted that there was no evidence to show that the appellant admitted each essential ingredient of the charge.

18.] Counsel reiterated the earlier submissions that the inconsistencies
15 in the charge and indictment made the trial illegal. Counsel cited **Mistry Amar vs. Kulubya (1963) 3 ALLER 489**, where court held that justice cannot be used to enforce illegality even if the parties entered into an illegality willingly.

Consideration of Court

20 19.] When this matter came up for hearing, there were two Memoranda of Appeal. The respondent had objected to the Amended Memorandum of Appeal because it was not filed with leave of court and the ground was argumentative. However, during the hearing, counsel for the respondent dropped the preliminary objections in the interest of justice.

25 20.] During the hearing, counsel for the appellant clearly stated that the appellant was not appealing against the sentence but only the conviction as stated in the Amended Memorandum of Appeal.

21.] This court therefore shall consider this appeal on the basis of the Amended Memorandum of Appeal and the submissions there under.

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5 22.] This being a first appellate court, it has a duty to re-evaluate the evidence, weighing conflicting evidence, and reach its own conclusion on the evidence, bearing in mind that it did not see and hear the witnesses. In **Kifamunte v Uganda, Supreme Court Criminal Appeal No. 10 of 1997**, Court stated that:

10 *We agree that on first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the*
15 *materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.*

20 23.] See also the cases of **Pandya v. R [1957] EA 336, Bogere Moses v. Uganda, SCCA No. 1 of 1997 and Rule 30(1) of the Court of Appeal Rules** that are of the same effect.

25 24.] The appellate court may, depending on its findings, quash, or uphold the decision of the lower court, come up with its own decision, address legal issues of unfairness or irregularity that are not contained in the memorandum but are glaring on the record which resulted into a miscarriage of justice and or order for a retrial in the interest of justice, bearing in mind that litigation whether civil or criminal must come to an end.

30 25.] It is also trite that even where court has erred, the Appellate court interferes with the decision of the lower court only where there has been a miscarriage of justice to any of the parties in the proceedings. The appellate Court is guided by the presumption of innocence under article

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5 28(1) (a) of the 1995 Uganda Constitution and the burden of proof as articulated in the case of **Woolmington Versus The DDP, 1936 AC 462.**

26.] The procedure for taking a plea is clearly set out in the case of **Adan Vs R, [1973] EA. 445** where the East African Court of Appeal (as it then
10 was) stated as follows;

15 *“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
20 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.”*

27.] The earlier case of **Tomasi Mufumu v. R, [1959] EA 625** decided by the same court had stated that;

30 *“...it is very desirable that a trial judge, on being offered a plea which he construes as a plea of guilty in a murder case, should not only satisfy himself that the plea is an unequivocal plea, but should satisfy himself*

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also and record that the accused understands the elements which constitute the offence of murder...and understands that the penalty is death."

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28.] Where the plea taken does not amount to an unequivocal plea of guilty to the offence to which the accused is convicted, the conviction must be quashed (see **R v. Tambukiza s/o Unyonga, [1958] EA 212**). We have borne the above principles in mind in the resolution of this appeal.

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29.] A study of the record shows that when the matter came up on the 13th December 2018 before the trial court for hearing, the indictment was read and explained to the appellant in Luganda. The appellant denied the charge and a plea of not guilty was entered by court.

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30.] On the same day after the evidence of Dr. Ssegirinya Daniel had been admitted as PW1, Mr. Ayorekere Arthur informed court that the appellant wanted to change his plea. This was the procedure of what happened in court that day;

"Mr. Ayorekere:

I have consulted with the clerk and state counsel. The accused would like to change his plea.

Court: indictment read and explained to the accused in Luganda

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Accused: I have understood the indictment. It is true.

Court: plea of guilty entered

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Ms. Gladys Nyanzi: The facts of this case are that N E was aged 5 years at the time - on 13/6/2015, the victim and Joyce Nabatanzi her sibling went to the accused's home to play. The accused summoned the victim to the house. He led her to his bedroom, undressed her, undressed too and had sexual intercourse with the victim. The victim



5 returned home and reported the matter to Nafuma Jackie who informed their mother Nandaula Rose. The victim was examined by Nandaula Rose who saw injuries on the victim's genitals as well as a discharge. - The matter was reported to Police (Seeta Nazigo) the accused was arrested and charged.

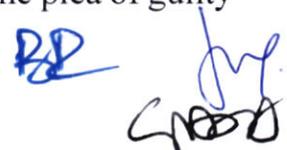
Accused: The facts are correct.

10 Court: The accused is convicted on his own plea of guilty”

31.] It is evident from the record that the clerk, Ms. Gladys Nyanzi, read the facts and explained to the appellant the indictment in the language he understood, that was Luganda. This gave him an opportunity to either dispute, explain or add any relevant facts. The appellant simply said the facts were correct. In our view, the plea was unequivocal. In **Adan vs R(Supra)** court explained the essence of facts in a plea of guilty, that is;

20 *“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.”*

32.] With regard to the issue of the plea bargain agreement, counsel’s arguments have no merit. The law does not specify where the plea bargain agreement should be signed from. So the argument that it was signed in prison does not hold water. It is an afterthought and an abuse of court process. Furthermore, counsel for the appellant is mixing up the plea of not guilty and that of plea bargain. This matter had both the plea of guilty



5 and plea bargain. It is clear from the record that the appellant first entered the plea of not guilty and he then entered a plea bargain agreement of the sentence as it is under Rule 5 of the Judicature (Plea Bargain) Rules 2016. Which provides that a party can initiate a plea bargain at any time before sentence.

10 33.] Regarding the discrepancy in the dates on the charge sheet and the indictment. The law on inconsistencies and contradiction was laid down by the Supreme Court in **Obwalatum Francis vs. Uganda, Supreme Court Criminal Appeal No. 30 of 2015**, where the Supreme Court held that;

15 “the law on consistency is to the effect that where there are inconsistencies and discrepancies/ contradictions between the witnesses which are minor and of a trivial nature, these may be ignored unless they point to the deliberate untruthfulness. However, where contradictions and discrepancies are grave,
20 this would ordinarily lead to the rejection of such testimony unless satisfactorily explained”

34.] In our view, the inconsistencies in the charge sheet on the date of commission of the offence reading 11/06/2018 and 13/06/2018 are minor. The appellant accepted the facts as read to him by the trial Judge
25 to be true. These inconsistencies in dates do not go to the root of this case.

Consequently, this appeal lacks merit. It fails. The sentence of the trial Court is upheld .

We so Order

Dated at Kampala this 7th day of Aug 2023

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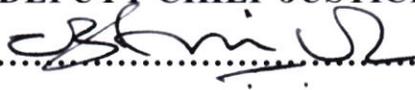
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RICHARD BUTEERA

DEPUTY CHIEF JUSTICE

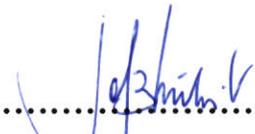
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CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

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OSCAR KIHKA

JUSTICE OF APPEAL

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