THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

CRIMINAL APPEAL NO.205 OF 2019

(Coram: Cheborion Barishaki, Christopher Gashirabake, Oscar John Kihika, JJA)

MALINGA JOHN ROBERT::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(An appeal from a decision of the High Court of Uganda at Soroti before Justice Batema N.D.A dated the 11th day of January, 2018 arising from Criminal Session Case No.0191 of 2016).

JUDGMENT OF THE COURT

Introduction

The appellant was indicted for the offence of murder contrary to sections 188 and 189 of the Penal Code Act, CAP 120. It was alleged that on the 17th day of February, 2015 at Komolo Village, Ongongoja Subcounty in Katakwi District, the appellant with malice aforethought unlawfully caused the death of Apolo Florence.

Background

The appellant was husband to the deceased, Apolo Florence and it was alleged that he had at all times been brutal to her. On the 17th of February, 2015 at

around 8pm, the appellant returned home from Aketa Health Centre, went to the house of his second wife, Opus Immaculate and ordered her to lock herself inside. The appellant then proceeded to the house of his first wife, the deceased and removed the radio that the deceased was listening to. The deceased resisted this move and the appellant started beating her until she collapsed and became unconscious.

The incident was witnessed by their children and their step-mother, Opus Immaculate who also heard the cry and wailing of the deceased as she was being beaten. When the victim died, the appellant ordered his second wife, Opus Immaculate never to reveal that it was him who killed the deceased but rather to say that the deceased committed suicide. The appellant then went with his second wife to his father who handed him over to Police. The appellant was consequently indicted, pleaded guilty following a plea agreement and was convicted and sentenced to 17 years imprisonment.

Being dissatisfied by the decision of the learned trial Judge, the appellant appealed to this Court on a sole ground that;

> ***"The learned trial Judge erred in law and fact when he sentenced the appellant to 17 years imprisonment in disregard of the plea bargain agreement wherein the appellant had bargained or consented to 15 years imprisonment making the sentence illegal."***

Representation

At the hearing of the appeal, Mr. Mooli Allan appeared for the appellant while the respondent was represented by Ms. Immaculate Angutoko, Chief State Attorney holding brief for Oola Sam.

Submissions of counsel

Counsel for the appellant submitted that the appellant had informed Court that he had bargained for a sentence of 7 years through the plea bargaining process and this was because he was sick and had a bullet wound. Further that the Court advised the appellant to sign for a higher sentence as the term of 7 years was so low. The appellant then consulted his lawyer and while praying for leniency increased the term to 9 years and the same was refused by Court. He added that counsel for the appellant informed Court that the appellant had bargained and agreed on 15 years and the Court advised the parties to sign the agreement but with the remand period inclusive to make 17 years and the appellant serves 15 years. Indeed, a plea bargain agreement in respect of manslaughter was signed by the parties and endorsed by the learned trial Judge.

Counsel further submitted that it was not indicated anywhere in the record that the appellant accepted to serve a sentence of 17 years as enhanced by the learned trial Judge save for the alterations that appeared on the plea bargain form. He added that neither the appellant nor his lawyer counter signed on the alteration changing the agreed sentence from 15 years to 17 years imprisonment. Counsel further submitted that in light of Article 23(8) of the Constitution, the appellant had agreed to serve a period of 15 years on

which the period spent on remand was to be deducted and thus the enhanced sentence of 17 years was illegal and in contravention of rule 15(2) and (3) of the Judicature (Plea Bargain) Rules, 2016. He relied on ***Emwodu Amos V Uganda, Court of Appeal Criminal Appeal No.148 of 2016*** where this Court set aside the sentence of 20 years' imprisonment since the appellant had not bargained for it but rather for a sentence of 15 years. He prayed that this Court sets aside the sentence of 17 years and substitutes it with 15 years less the period that the appellant had spent on remand.

Respondent's submissions

In reply, counsel for the respondent conceded to the appeal and submitted that the learned trial Judge did not follow the procedure for taking a plea and the resultant sentence was therefore illegal. Counsel further submitted that it was the duty of Court to subject the record to a fresh and exhaustive scrutiny and draw its own conclusion of facts. That from the record, it was not clear what charge the appellant was convicted of and neither does it indicate whether the facts of the case were read by the prosecutor. Counsel added that section 60 of the Trial on Indictments Act required that the indictment be read over and explained to the accused and the accused person is required to plead instantly to the indictment and further section 63 of the same Act states that if the accused pleads guilty, the plea shall be recorded and he or she may be convicted on it. He relied on ***Adan V Republic (1973) EA 445*** for the procedure of recording a plea of guilty.

Counsel further submitted that the learned trial Judge did not comply with the procedure for executing a plea bargain agreement under the Judicature

(Plea Bargain) Rules, 2016. Counsel submitted that the learned trial Judge did not enter a conviction against the appellant. That the learned trial Judge only stated that the parties should sign the agreement but with the remand period inclusive that is 17 years and the appellant serves 15 years. He relied on ***Oroni Basil V Uganda, Court of Appeal Criminal Appeal No.0142 of 2018*** where this Court quashed the appellant's conviction and remitted the file back to High Court to take the Appellant's plea afresh.

Submissions in rejoinder

Counsel for the appellant submitted in rejoinder that it was on record that the Appellant was represented by Counsel Ariko who was on State Brief and it was reflected at page 16 of the record of appeal that the said Counsel signed the plea bargain agreement as counsel for the Appellant as well as the Appellant. Counsel further submitted that in the instant appeal, the charge of manslaughter was read and explained to the Appellant in a language which he understood and agreed to the facts and the authority of ***Oroni Basil V Uganda, Court of Appeal Criminal Appeal No.142 of 2018*** was distinguishable from the instant appeal.

Counsel contended that the case of **Oroni (supra)** envisaged plea taking in the normal hearing unlike in the instant Appeal where there was a plea bargain agreement showing that the charge had been reduced from murder to manslaughter and the same had been explained to the Appellant. Further that page 17 of the record of appeal indicated that the charge had been translated to the Appellant through an interpreter. Counsel further contended that the charge of manslaughter was explained to the Appellant during trial

and that there was no objection raised by Counsel on state brief although the learned trial Judge omitted to record the same. He added that the appellant conceded to the fact that there was lapse on the side of the trial Judge when he did not comply with Rule 12 of the Plea bargain Rules that require recording the plea bargain proceedings.

Counsel submitted that the appellant was not challenging the conviction but rather the trial Judge's disregard of the 15 years' imprisonment that was agreed upon in the Plea Bargain Agreement. He prayed that this Court sets aside the 17 years imprisonment and substitutes it with 15 years imprisonment agreed upon in the plea bargain agreement and further remits the file to the High Court for purposes of recording the plea bargain proceedings as was in the case of ***Wesamba Adam V Uganda, Criminal Appeal No.101 of 2020*** where this Court directed that the matter be heard by another Judge for the purpose of recording the proceedings of plea bargain.

Resolution of Court

We have studied the Court record, carefully considered the submissions for both counsel and the authorities availed to this Court.

The duty of this Court is to reappraise the evidence and draw inferences of fact. Further, the first appellant Court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must then make up its own mind, not disregarding the judgement appealed from, but carefully weighing and considering it. See ***Rule 30(1) of the Rules of this Court and Kifamunte Henry V Uganda, Supreme Court Criminal Appeal No.10 of 1997.***

The learned trial Judge is faulted for sentencing the appellant to 17 years imprisonment in disregard of the plea bargain agreement wherein the appellant had bargained or consented to 15 years imprisonment making the sentence illegal.

Counsel for the respondent submitted that not only did the learned trial Judge disregard the 15 years sentence that the Appellant had bargained for in the Plea Bargaining Agreement but also did not follow the procedure for taking plea and the resultant sentence was therefore illegal.

In his rejoinder, counsel for the appellant submitted that the charge of manslaughter was read and explained to the appellant during trial but the learned trial Judge omitted to record the same. He conceded that there was lapse on the part of the learned trial Judge when he did not comply with Rule 12 of the Plea Bargain Rules that require recording the plea bargain proceedings.

The record of proceedings indicates as follows;

"11/01/2018: ***Accused in the dock***

Seera for State

Ariko on State Brief

Ecutu interpreter

Accused: ***I plead guilty to the murder of Apolo Florence, my wife at Komolo Village, Katakwi.***

Court: ***Plea of guilty entered***

BATEMA N.D.A

JUDGE

Accused: ***The facts are true and correct. My two wives fought over a radio, in the process of separating them I pushed her away she fell down and died.***

Ariko: ***We bargained on charges of manslaughter. They fought over a radio.***

Accused: ***I bargained for 07 years. He is sickly and has a bullet wound.***

Court: ***Sign for a higher term, 07 is so low.***

Accused: ***(Consults lawyer) I increase. I pray for leniency 09 years.***

Court: ***No bargain again case stood over***

BATEMA N.D.A

JUDGE

11/01/2018

Later:

Ariko: ***We bargained and agreed on 15 years.***

Court: ***Sign the agreement but with remand inclusive. That is 17 years serve 15 years at Luzira Upper prison.***

BATEMA N.D.A

JUDGE

11/01/2018"

We note from the record that the learned trial Judge did not record the fact that the charges had been read to the appellant however the Appellant's response was recorded as; "I plead guilty to the murder of Apolo Florence, my wife at Komolo Village, Katakwi" and the learned trial Judge noted, "Plea of guilty entered". This in our view implied that the Appellant was responding to the charges that had been read to him. Further, the Appellant stated, "the facts are true and correct. My two wives fought over a radio, in the process of separating them I pushed her away, she fell down and died." We therefore, agree with counsel for the Appellant that the charge was read and facts explained to the Appellant during trial but the learned trial Judge omitted to record the same.

The procedure for recording a plea of guilty was laid down in ***Adan V Republic (1973) EA 445 at page 446*** as follows:

> *"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all the essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a*

plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded."

We note that although the learned trial Judge omitted to record that the charge and facts had been read and explained to the Appellant, the appellant's responses on record indicate that the charge and facts had been read to him. We therefore do not agree with counsel for the Respondent that the learned trial Judge did not follow the procedure for plea taking.

Section 139(1) of the Trial on Indictments Act provides that subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission, 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.

It was submitted for the Appellant that they were mindful of the mandatory requirement which is intended to preserve the Appellant's non derogable

constitutional right to a fair hearing but the Appellant was not challenging the conviction but rather the trial Judge disregarding the 15 years period bargained for in the Plea Bargain Agreement. This in our view meant that failure by the learned trial Judge to record that the charges had been read to the appellant did not occasion a miscarriage of justice.

Counsel for the Appellant submitted that there was a lapse on the side of the learned trial Judge when he failed to comply with Rule 12 of the Judicature (Plea Bargain) Rules, 2016 that require recording of the plea bargain proceedings.

Rule 12 of the Judicature (Plea Bargain) Rules, 2016 provides as follows:

1) Subject to the procedure prescribed in the schedule 2, the Court shall inform the accused person of his or her rights, and shall satisfy itself that the accused understands the following-

a) the right-

i. to plead not guilty, or having already so pleaded, the effect of that plea;

ii. to be presumed innocent until proved guilty;

iii. to remain silent and not to testify during the proceedings

iv. not to be compelled to give self-incriminating evidence

v. to a full trial; and

vi. to be represented by an advocate of his or her choice at his or her expense or in a case triable by the High Court, to legal representation at the expense of the state

b) that by accepting the plea bargain agreement, he or she is waiving his or her right as provided for under paragraph (a);

c) the nature of the charge he or she is pleading to;

d) any maximum possible penalty, including imprisonment, fines, community service order, probation or conditional discharge;

e) any applicable forfeiture;

f) the Court's authority to order compensation and restitution or both; and

g) that by entering into a plea bargain, he or she is waiving the right to appeal except as to the legality or severity of sentence or if the Judge sentences the accused outside the agreement.

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.

5) A plea Bargain Confirmation shall be signed by the parties before the presiding Judicial Officer in the Form set out in the Schedule 3 and shall become part of the Court record and shall be binding on the prosecution and the accused.

It is important that an accused person who wishes to plead guilty whether under a plea bargain agreement or otherwise should be explained to properly about his or her constitutional rights to a fair trial and confirm that his plea is unequivocal with full knowledge of the consequences thereof. The Court is obliged under the rules to embrace plea bargain any time before sentence when either party before it expresses interest in the process unless it is intended to pervert the cause of justice. See ***Inensko Adams V Uganda, HCCA No.004 of 2017*** cited with approval by this Court in ***Luwaga Sulaiman V Uganda, Criminal Appeal No.858 of 2014***

Although the record shows that the Appellant took plea and pleaded guilty, it is silent as to whether the appellant had a full understanding of the plea bargain procedure. The Court was by the provisions of Rule 12 of the Plea Bargain Rules under duty to explain this to him but it did not do so.

The issue before this Court is whether the learned trial Judge can in the presence of a plea bargain agreement substitute a sentence agreed to by the parties in plea bargaining for his or her own sentence arrived at his discretion. We shall analyse the said Plea Bargain Agreement.

Rule 8 of the Judicature (Plea Bargain) Rules, 2016, provides for the Court's participation in the plea bargain negotiations. Rule 8(2) provides that parties shall inform Court of the ongoing plea bargain negotiations and shall consult the Court on its recommendations with regard to possible sentence before the agreement is brought to Court for approval.

The record shows that the learned trial Judge was informed by counsel Ariko on State Brief that the parties had bargained on charges of manslaughter.

There was no consultation on Court's recommendations with regard to possible sentence prior to Court's approval. The learned trial Judge rejected the bargained sentence twice without offering any recommendation for a possible sentence. Further, there were no mitigating factors taken into consideration as page 13 of the record does not indicate that any mitigating factors were considered. The same agreement indicates that the parties had agreed to a sentence of 7 years but the same was cancelled and replaced with 17 years. There was no evidence to show that the Appellant ever agreed to this sentence because neither him nor his advocate counter signed on the alteration to the proposed sentence of 17 years. The Appellant's Lawyer informed Court that the parties had bargained and agreed on a sentence of 15 years but the learned trial Judge told the parties to sign the agreement for a sentence of 17 years with the remand period inclusive and that the Appellant serves a 15-year sentence at Luzira Upper prison.

The objectives of the Plea Bargain process are enumerated under rule 3(b) (c) (d) (e) (f) of the Plea Bargain Rules (Supra) as follows;

> *"To enable the accused and the prosecution in consultation with the victim to reach an amicable agreement on an appropriate punishment, to facilitate reduction in case backlog and prison congestion, to encourage the accused persons to own up to their criminal responsibility and to involve the victim in the adjudication process."*

Rule 4 of the Plea Bargain Rules defines plea bargaining as 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 of the charges, reduce a charge to a less serious offence or recommend a particular sentence subject to approval by Court.

The Plea Bargain Agreement indicates that the parties had amended the offence charged to manslaughter but the learned trial Judge indicated in the warrant of commitment that the Appellant had been convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act and sentenced to 17 years from which he shall serve a sentence of 15 years. We note that the learned trial Judge did not enter a conviction against the Appellant. He merely stated that "sign the agreement but with remand inclusive. That is 17 years serve 15 years at Luzira upper prison". Not only was this sentence vague but was also merely imposed on the Appellant despite the plea bargain process. There was evidence to show that the appellant indeed bargained for a sentence of 17 years. The process on Plea Bargain is intended to serve the interests of the appellant, the victim and the State.

We note that in the record counsel Ariko Charles informed Court that the parties had bargained and agreed on 15 years. However the said 15 year sentence was not indicated anywhere in the Plea Bargain Agreement. The said agreement indicates a sentence of 7 years which was later cancelled and replaced with 17 years.

In our view, the Plea Bargain Agreement was filled with glaring errors and failure to follow the procedure of recording a plea bargain agreement by Court. This occasioned a miscarriage of justice which this Court cannot condone. We find that the said Plea Bargain Agreement was defective. We accordingly set it aside.

Counsel for the appellant prayed that this Court sets aside the sentence of 17 years imprisonment and substitutes the same with 15 years' imprisonment less the time the appellant had spent on remand.

Counsel for the respondent proposed that this Court sets aside the sentence against the appellant and order that the file be remitted back to the High Court to take the appellant's plea afresh.

This Court was faced with a similar situation in the case of ***Sempijja Brian V Uganda, Court of Appeal Criminal Appeal No.566 of 2014*** where Court set aside the sentence of 23 years imprisonment imposed by the trial Court for murder for being illegal because it was longer than the sentence of 18 years agreed to in the Plea Bargain Agreement.

In ***Wangwe Robert V Uganda, Court of Appeal Criminal Appeal No.0572 of 2014,*** the trial Court had sentenced the appellant to a higher sentence than the one agreed to in the Plea Bargain Agreement. This Court set aside the said sentence and proceeded to impose a sentence equivalent to what had been agreed to in the Agreement.

Because the appellant had properly taken plea at the beginning of the trial and was convicted of murder on his own plea of guilty, we invoke the provisions of section 11 of the Judiccature Act that grants this Court the same powers as that of the trial Court to impose a sentence we consider appropriate. In imposing a fresh sentence, we are mindful of the terms of the Plea Bargain Agreement between the Prosecution and the appellant.

We therefore, impose a sentence of 15 years imprisonment agreed upon by the parties in the Plea Bargain Agreement. From that sentence, we deduct the 2 years, 11 months and 6 days that the appellant had spent on remand. The appellant shall therefore serve a sentence of 12 years and 25 days, to run from 11th January, 2018, the date of conviction.

We so order

Dated at Mbale this 6th day of Sept 2023

Cheborion Barishaki

JUSTICE OF APPEAL

Christopher Gashirabake

JUSTICE OF APPEAL

Oscar John Kihika

JUSTICE OF APPEAL