THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL AT KAMPALA

[Coram: Geoffrey Kiryabwire JA, Muzamiru M. Kibeedi JA, Oscar John Kihika JA]

**CRIMINAL APPEAL NO. 522 OF 2016**

(Arising from High Court Criminal Session Case No. 212 of 2016 at Mukono)

**BETWEEN**

1. **AFRICA WYCLIFF**
2. **MAGABALI ISMAIL ALIAS JOSE** ..............................**APPELLANTS**

**AND**

**UGANDA** ........................................................................... **RESPONDENT**

(An Appeal from the Judgments of the High Court of Uganda Hon. Lady Justice Margaret Mutonyi J and Hon Justice Batema N.D.A. of the High Court of Mukono, Criminal Session Case No. 212 of 2016, delivered on 21st December 2016 and 10th February 2022 respectively)

## JUDGMENT OF THE COURT

### Introduction

The Appellants were indicted and convicted of the offence of Aggravated Robbery contrary to **Section 285 and 286 Penal Code Act Cap 120**.

### The Facts

On the 2nd day of December 2015, the Appellants one Africa Wycliff (23 years of age), and Magabali Ismail (18 years of age) together with others still at large, at Nile Steel Company Nangwa in the Mukono District robbed Xuzai Wang of cash one hundred thirty million shillings (Shs. 130,000.000/=) and an IPhone 6 plus mobile phone valued at two million shillings and at or immediately after the said robbery, used a deadly weapon to wit a panga and an iron bar against the said Xuzai Wang.

### Decision of the Trial Court

Following a plea bargain, the Appellants were convicted by Hon Lady Justice Margret Mutonyi on their own pleas of guilty. The First Appellant on 21st December 2016 was sentenced to 18 years' imprisonment the period on remand inclusive by Justice Mutonyi. Justice Mutonyi further ordered that all the items purchased by the money robbed found in possession of the first Appellant be handed over to the complainants. However, Justice Mutonyi deferred the sentencing of the second Appellant because though the plea bargain agreement referred to recovered property or purchased property but there was only evidence of recovered property from the first Appellant. The second Appellant was subsequently on the 10th February 2022 sentenced to 20 years' imprisonment by the Hon Justice Batema N.D.A. Hon Justice Batema then deducted the time on remand served by the second Appellant and he Ordered that the second Appellant serve the balance of 14 years and 6 months at Luzira Prison.

Dissatisfied with this decision, the Appellants appealed against conviction and sentence on the one following ground: -

"That the Learned Trial judges erred in law and fact when they departed from the plea bargaining agreement..."

The Respondent opposed the Appeal.

**Representations**

At the hearing, the Appellant was represented by Ms Wakabala Suzan Sylvia and the Respondent by Mr. Joseph Kyomuhendo, Chief State Attorney.

The parties sought the leave of court to adopt their written submissions as their legal arguments in this Appeal which was granted.

**Powers of the Appellate court**

This is a first Appeal. We are alive to the legal duty of a first appellate Court which was espoused in the case of **Kifamunte Henry v Uganda SCCA No. 10 of 1997** which primarily is to reappraise all the evidence at the trial and come up with our own inferences of law and fact.

On the ground of contesting a Sentence that has been passed, we also are alive to the decision **in Ogalo s/o Owoura v R (1954) 21 EACA 270** where the Court held: -

*"... The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the court had been trying the Appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion, exercised by the trial judge unless as was said in James v R, (1950) 18 EACA 147, "it is evident that the Judge has acted upon wrong principle or overlooked some material factor". To this we would also add a third criterion, namely, that the sentence is manifestly*

*excessive in view of the circumstances of the case. An appropriate sentence should be proportionate to the offence with the gravest offences attracting the most severe penalties and lesser offences in terms of aggravation attracting less severe penalties. Courts also have added another principle of consistency in terms of equality before the law so that offences committed under similar circumstances with similar degree of gravity should attract the same range of sentences therefore precedents of the appellate courts are a relevant guiding actor…"*

Article 23 (8) of the Constitution further provides that in meting out a sentence, the Court shall: -

*"…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…"*

Applying this provision of the Constitution, the Supreme Court in the case of **Rwabugande Moses V Uganda** Crim App No 25 of 2014 (SC) held that that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision.

We shall apply the above principles to this appeal.

**Ground: That the Learned Trial judges erred in law and fact when they departed from the plea bargaining agreement.**

**Submissions of Appellants**

Counsel for the Appellant argued that the appellants were convicted and sentenced following a plea bargain agreement signed between the State and the Appellant. He

submitted that it was agreed under the plea bargain agreement that the first Appellant serves 18 years' imprisonment. However, during Allocutus, the State further prayed that the property of the Appellant be sold to compensate the victim. The court went ahead and gave an order for all the property of the Appellant to be sold and the proceeds given to the victim to recover part of his money. In this regard, Counsel in respect of the first Appellant referred Court to the plea bargain agreement at page 26 (para 4.2) which reads that: -

> " *Most of the recovered property purchased out of the stolen money was returned. That can be sold off to enable the victim recover money stolen.*"

Counsel further argued that there was no evidence that the first Appellant had consented to his property being sold. He therefore prayed that court finds that the lower court departed from the plea bargain agreement.

Counsel in respect of the second Appellant submitted that the second Appellant was sentenced the second appellant to 20 years' imprisonment which was contrary to the plea bargain agreement. He argued that the trial Judge clearly erred in so sentencing the second Appellant.

Counsel referred us to the case of **Muhwezi v Uganda (Criminal Appeal No.147 of 2009) [2014] UGCA 52 (18 December 2014)** the court of Appeal consented to the findings in **Livingstone Kakooza Vs Uganda SCCA 17 of 1993** where it held that: -

> *"...an appellate court will only alter a sentence imposed by a trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case."*

Counsel submitted that it was appropriate to interfere with the sentence meted on the second Appellant and prayed for an alternative sentence of 10 years as appropriate.

## Submissions of Respondent

Counsel for Respondent partially opposed the Appeal.

Counsel argued that, the sentence for the first Appellant of 18 years and compensation was appropriate and did not offend the Judicature Act (Plea Bargain) Rules.

However, counsel for the Respondent on the other hand conceded that the sentence of 20 years for the second Appellant did offend Rule 13 of the Judicature (Plea Bargain) Rules 2016. Counsel submitted that the 20 years was an enhanced sentence which is illegal. Counsel relied on the case of **Wangwe Robert Vs Uganda, CA No. 0572 of 20l4** where the trial Court in that matter had held that: -

> *"......having considered the sentencing guidelines and the current sentencing practice in relation, I reject the sentence of ten (10) years' proposed in the submitted plea bargain agreement entered into by the accused, counsel for the accused and the State Attorney."*

However, on appeal to this Court it was held 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 where they agreed upon a sentence of 15 years' imprisonment but the learned trial Judge enhanced it to l8 years."*

Counsel accordingly prayed that this court invokes **Section 11 of the Judicature Act and Section 132(5) of the Trial on Indictments Act** and substitute the sentence of 20 years' imprisonment for the second appellant with the sentence of l8 years imprisonment that had earlier been agreed on in the plea bargain agreement.

## Findings and Decisions of Court

We have considered the submissions of both Counsel for which we are grateful.

Under this ground, the procedure of plea bargaining is regulated by the **Judicature (plea bargain) rules 2016** which were established under **The Judicature Act section 41 (1) and (2) (e)**. In order to appreciate the importance of plea bargaining it is important to highlight the objectives of the process as enumerated under **Rule 3 (b) (c) (d) (e)(f) of the plea bargain rules (supra).** They are 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, provide quick relief from the anxiety of criminal prosecution, to encourage accused persons to own up to their criminal responsibility and to involve the victim in the adjudication process.*

The plea bargaining procedure therefore is intended to facilitate the accused, victim and the state reach an amiable agreement on an appropriate punishment.

It is therefore our finding that prima facie a plea bargain agreement should be upheld unless it is evident that the plea bargain agreement will occasion a miscarriage of justice (See Rule 13 of the Plea Bargain Rules Supra). A miscarriage of justice includes where the sentence imposed by a trial court was based on a wrong principle or it overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case.

With regard to the first Appellant, the sentencing Judge imposed a sentence of 18 years inclusive of the period on remand and compensation. Even though counsel for the Respondent found no problem with this sentence, we find after a revaluation of the evidence that the sentence did not properly apply the mandatory provision of Article 23 (8) of the Constitution. The trial Judge by lumping together the sentence agreed upon under the plea bargaining agreement and the period spent on remand in effect enhanced the said sentence to the prejudice of the first Appellant. The sentencing Judge should have first sentenced the first Appellant to 18 years as agreed to by the parties in the plea bargain agreement (page 28 Record of Proceedings) and then deducted the period on remand; which is 5 years and 6 months. We accordingly invoke

**Section 11 of the Judicature Act and Section 132(5) of the Trial on Indictments Act** and substitute the sentence of l8 years imprisonment inclusive of remand with the sentence of 18 years before taking into consideration the period spent on remand. This means that the first Appellant would serve the balance of 13 years and 6 months from the date of conviction.

We find nothing wrong with handing over the property bought from the proceeds of the robbery to the complaints as it is part of the plea bargain agreement.

The plea bargain agreement on page 36 of the court record expressly states:

> *"recovered accused property purchased out of the victim's money can compensate victim reasonably."*

This wording can be interpreted to mean that the learned judge was correct in awarding compensation through the sale of recovered property purchased by the appellant with the victim's money.

With regard to the second Appellant, it is regrettable that his sentencing was deferred for a very long time. Where a deferral of sentence is unavoidable then trial Courts should put in place times lines to be followed and not leave the deferral open ended as it was in this matter.

The above observation notwithstanding, the sentencing Judge by enhancing the second Appellant's sentence outside the plea-bargain agreement did so to the prejudice of the second Appellant.

We accordingly invoke **Section 11 of the Judicature Act and Section 132(5) of the Trial on Indictments Act** and substitute the sentence of 20 years' imprisonment with the sentence of l8 years imprisonment that had earlier been agreed on in the plea bargain agreement (see page 38 Record of Proceedings). To this we shall reduce the period spent on remand of 5 years and 6 months under Article 23 (8) of the Constitution. The second Appellant shall therefore serve the balance of 13 years and 6 months from the date of conviction. It appears that the proceeds of the robbery in respect of the

second Appellant were never recovered by the police so it serves no purpose that an Order be made that such proceeds are given to the complainants like in the case of the first Appellant.

Before taking leave of this judgment, we need to observe that the second sentencing Judge did not sign the plea bargaining agreement for completeness. This we take as an oversight and not fatal to the sentencing process since the sentencing Order was signed. However, trial Judges must take care to sign the plea bargaining agreement even if sentencing Order in the record of Proceedings is signed.

**Final Decision**

Having held as we have on the above issues Decide and Order that this Appeal succeeds for the reasons given above and that: -

1. For the first Appellant the sentence of l8 years imprisonment inclusive of remand is set aside and substituted with the sentence of 18 years before taking into consideration the period spent on remand. The period of 5 years and 6 months on remand is deducted from the sentence of 18 years. The first Appellant shall therefore serve the balance of 13 years and 6 months from the 21st of December 2016, the date of conviction.
2. The proceeds of the robbery found with the first Appellant shall also be given to the complainants.
3. For the second Appellant, the sentence of 20 years' imprisonment is set aside and substituted with the sentence of l8 years imprisonment. The period of 5 years and 6 months on remand is deducted from the sentence of 18 years. The second Appellant shall serve the balance of 13 years and 6 months from the 21st of December 2016, the date of conviction

We so order.

Dated at ......Kampala...... This Day 20th ......day...... of 2023

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**Hon. Mr. Justice Geoffrey Kiryabwire JA**

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**Hon. Mr. Justice Muzamiru M. Kibeedi JA**

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**Hon. Mr. Justice Oscar John Kihika JA**