THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

(Coram: Hellen Obura, Catherine Bamugemereire and Christopher Madrama, JJA.)

CRIMINAL APPEAL NO. 0243 OF 2015

WANJA JOHN::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mbale before Henry.I.Kawesa, J in Criminal Session Case No. 083 of 2015 delivered on 15/06/2015.)

JUDGMENT OF THE COURT

Introduction

The appellant was indicted for and he pleaded guilty to the offence of attempted murder contrary to section 204 of the Penal Code Act before the High Court (Henry.I. Kawesa,J.). The particulars of the offence were that the appellant on the 29th day of August 2014 at Bunapolo Village in Bududa District attempted to unlawfully cause the death of Harriet Nekesa.

The appellant was convicted on his own plea of guilt upon confirming that the facts as read to him were true and sentenced to 15 years. However, we note that although the learned trial Judge did not refer to a plea bargain agreement, the court had been informed by the prosecution that the appellant had signed the same and he had agreed to a sentence of 15 years. This information was given after the appellant was convicted and indeed on record there is a copy of a plea bargain agreement duly signed by the appellant and the prosecution but the learned trial Judge did not endorse the same. We shall later reproduce the relevant part of the record of proceedings to illustrate this as we resolve the appeal.

Background

The brief facts of the case which was read to the appellant and he confirmed as true were that the appellant and the victim were married. Their union was violent. On several occasions, the appellant threatened the victim with death. On the 25/08/2014, the appellant lured the victim to River Manafwa area and he used a panga and cut her severely. The appellant went into hiding and was later arrested and charged.

The appellant was later indicted and convicted on his own plea of guilty to the offence of attempted murder and sentenced as aforementioned. Being dissatisfied with the sentence, the appellant appealed to this Court on one ground on sentence, namely;

> ***"That the learned trial Judge erred in exercise of his discretion when he sentenced the appellant to 15 years' imprisonment which sentence was harsh in the circumstances"***

Representation

At the hearing, Ms. Luchivya Faith, represented the appellant on State Brief whereas Aliwali Kizito, Chief State Attorney from the Office of the Director of Public Prosecutions (ODPP) represented the respondent. The appellant was present in Court. Counsel for the appellant sought leave of this Court to appeal out of time and against sentence only under **S.132(1)(b)** of the **Trial on Indictments Act (TIA)** and the prayers were granted since counsel for the respondent did not object. Counsel for both sides filed written submissions which were adopted and have been considered in this judgment.

Appellants' Submissions

Counsel submitted that in sentencing there must be consistency and that this position was articulated by the Supreme Court in **Aharikundira vs Uganda [2018] UGSC 49 (03 December 2018.** She relied on the decision of this Court in **Okucu Joel and Anor vs Uganda [2019] UGCA 182 (12 January 2019)** to support her argument that the sentence should be

reduced since it is harsh. Counsel prayed that this Court invokes the provisions of **section 11 of the Judicature Act** to give an appropriate sentence in consideration of the fact that the appellant pleaded guilty and did not waste court's time.

Respondent's Submission

Counsel supported the sentence imposed by the learned trial Judge and contended that it was appropriate in the circumstances. Further, that it is settled law that sentence is a discretion of the trial Judge and that an appellate court will only interfere with a sentence imposed by a trial court if it is evident that it acted on a wrong principle or overlooked some material fact or if the sentence is manifestly harsh and excessive in view of the circumstances. He buttressed this position with the decision of the Supreme Court in **Kiwalabye Benard vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001** which was cited with approval in **Blasio Ssekawooya vs Uganda, Criminal Appeal No. 107 of 2009.** Counsel also alluded to the decision in **Kyalimpa Edward vs Uganda, Supreme Court Criminal Appeal No. 10 of 1995**, which was to the same effect.

Counsel contended that the record of the trial court indicates that while sentencing the appellant, the learned trial Judge considered both the aggravating and mitigating factors, particularly the fact that he had pleaded guilty and saved court's time and that there had been a long history of domestic violence as recorded in the impact statement. It was counsel's view that the learned trial Judge also subtracted the period the appellant spent on remand. He therefore argued that there was no illegality, wrong principle applied or material fact overlooked by the learned trial Judge to warrant interference by this Court.

Counsel pointed out that the maximum sentence for the offence of attempted murder under **S.204 of the Penal Code Act** is life imprisonment and that a sentence of 15 years is within the range of sentences meted out by or deemed appropriate by this Court and the Supreme

Court for the offence of attempted murder. He prayed that the conviction and sentence against the appellant be upheld and the appeal be dismissed.

Resolution by the Court

We have carefully studied the record of appeal and considered the submissions of both counsel as well as the law and authorities cited to us plus those not cited but which we find relevant to this matter. We are cognisant of the duty of this Court as a first appellate court to review the evidence on record and reconsider the materials before the trial Judge, and make up our own minds not disregarding the judgment appealed from but carefully weighing and considering it. See **Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions, S.I 13-10.**

The appeal is premised on one ground of sentence which he contends is harsh and manifestly excessive. Counsel for the appellant submitted that in sentencing, there must be consistency and that the sentence meted out against the appellant was harsh and excessive. Counsel for the respondent opposed the appeal and supported the sentence arguing that there was no illegality, wrong principle applied or material fact overlooked by the learned trial Judge to justify interference by this Court.

As we did mention in the introduction, we found on court record a duly signed plea bargain agreement by the parties under which the appellant accepted to plead guilty to the offence and agreed with the prosecution to a sentence of 15 years' imprisonment. However, this appears not to have been brought upfront at the beginning of the plea taking proceedings, so the learned trial Judge proceeded as though there was no such agreement. He even never recorded or endorsed it as required by the **Judicature (Plea Bargain) Rules, 2016** (the Rules). We found it curious that in this appeal, both counsel also did not allude to the plea bargain agreement in their respective submissions and yet it appears to have informed his

decision on the sentence of 15 years as this was the agreed sentence in the agreement. The brief record of proceedings is reproduced here below in its entirety.

"15/6/2015

***Accused**: Present*

***RSA**: Namatovu, Susan Wakabala for accused*

***Accused**: Pleads to the charge in English as follows;*

***Accused**: The charge is true.*

***RSA**: The accused and victim were married. Their union was violent. On several occasions accused threatened victim with death. On 25/August/14 accused lured victim to River Manafwa area, while there he used a panga and cut her severally. Accused went into hiding, later arrested and charged.*

***Accused**: Facts are true.*

***Court**: PG. Accused convicted on own plea of guilty.*

***RSA**: We have agreed on 15 years' imprisonment.*

***Counsel**: That's correct.*

***Accused**: I have agreed.*

***Court**: The accused has pleaded guilty. He has saved court's time. The mitigations are that there was a history of domestic violence which could have been recorded on the impact statement attached. The court will offer a sentence capable of refraining the accused. He is sentenced to a custodial period of 15 years. Period on remand be subtracted.*

Signature of the trial Judge"

It is quite evident from this record that apart from the prosecution merely stating that they had agreed on 15 years' imprisonment, there was no allusion to any plea bargain agreement having been executed or any indication that the same was conducted in consultation with the learned trial Judge pursuant to rule 8 (2) of the Rules. There is no record indicating that a report was made to the learned trial Judge about the plea bargain agreement. Similarly, there is no record of explanation made to the appellant about his constitutional rights in accordance with the elaborate procedure laid down in rule 12 (a) of the Rules. Rule 12 (5) requires the parties to sign a plea bargain confirmation before the presiding Judicial officer but there is no record to indicate that this was complied with.

We have here below reproduced Rule 12 of the Rules which provides thus;

> *"**12. Recording of plea bargain agreement by the court.***
>
> *(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 person 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 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 agreement, 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."

The purpose of explaining the constitutional rights outlined in rule 12 is to ensure that an accused person properly understands and appreciates the seriousness of the offence he is indicted with and the consequences of pleading guilty which includes the sentence he may suffer. It therefore follows that failure by a trial court to follow that procedure, like in this case, denies the accused person his or her constitutional rights and thus vitiates the plea taking proceedings. Consequently, the plea entered, the conviction and the sentence imposed, if based on the plea bargain agreement, would not stand.

Turning to this case, we note as already stated earlier that none of the above procedures was followed and the record is silent on whether or not a report was made to court about the plea bargain agreement that the parties had executed. All that was mentioned after the appellant had been convicted and was due to be sentenced was the statement by his counsel; "*We have agreed on 15 years' imprisonment*". The learned trial Judge then sentenced the appellant to 15 years' imprisonment without even referring to the plea bargain agreement in its entirety or even stating that it was the agreed sentence.

It is therefore our finding that the otherwise valid plea bargain agreement was not presented before court for the necessary steps to be taken to have it endorsed by the parties before the trial Judge as required by the Rules and it cannot be said to have been the basis of the proceedings before the trial court. In the circumstances, we cannot base our re-appraisal of the record of the lower court on the plea bargain agreement. All we need to point out is that this was wasted effort by the parties who took the trouble to execute the plea bargain agreement but were not properly guided by the court on its presentation, recording and final endorsement before the learned trial Judge.

Having so found, the next question would then be what happens to the plea of guilty that was entered, the conviction and the sentence? In our view, we would treat the proceedings that took place before court as being the usual plea taking process where a plea of guilty was voluntarily made by the appellant and it was entered by the trial court thus leading to his conviction after he confirmed the facts that were read to him as being true. In that case, we would proceed to re-evaluate the record to determine whether the proper procedure for plea taking as laid down in **Adan vs Republic, [1973] EA 446** was followed.

In **Adan vs Republic** (supra) Spry V-P at page 446 succinctly stated the procedure for plea taking 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 those 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."

Looking at the record of proceedings in this case, we find that although the learned trial Judge largely followed the procedure laid down in **Adan vs Republic (supra)**, he omitted a very important part of explaining the ingredients of the offence to the appellant. However, we are of the view that this omission by the court was cured by the fact that the appellant was taken through a plea bargain process in which his counsel explained to him the ingredients of the offence. Indeed, the copy of the agreement on record which the appellant and the prosecution signed attests to that. In the part of his plea in the form which he signed, the appellant did indicate that prior to the plea he had had a full opportunity to discuss with his advocate the facts of his case, the elements of the charge, any defences he may have had, his constitutional rights and waiver of those rights as well as the consequences of his plea. The part of the plea bargain form on the biographical information of the accused person and family indicates that the appellant was a personnel officer, which presumably means he is well versed with the English language and therefore understood the content of the document he had appended his signature to.

We must observe that we took the above course of relying on the content of the plea bargain agreement the parties had executed because in our view, our finding that it was not properly recorded in court and could not be relied on for purposes of determining the issue regarding the sentence imposed on the appellant, does not affect its validity. We believe we can still safely rely on it to find that the appellant had had the opportunity of having the ingredients of

the offence explained to him as part of that process. By so saying, we are by no means downplaying the mandatory requirement for the trial court to explain the ingredients of the offence to an accused person during plea taking. We believe each case should be treated according to its own facts and circumstances while taking into account the objective of this fundamental requirement. We think in this case the objective was achieved by the plea bargain process.

Consequently, we conclude that the plea was properly taken by the appellant and his conviction for attempted murder on his own plea of guilt was rightly done. The next question for our determination would then be whether the sentence of 15 years' imprisonment imposed on the appellant was legal or harsh in the circumstances.

On legality of the sentence, we note that the learned trial Judge in his sentencing ruling stated that the appellant is sentenced to a custodial period of 15 years. Then he added that the period on remand be subtracted. This was in compliance with article 23(8) of the Constitution which provides;

> *"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."*

This provision makes it clear that the period spent in remand shall be taken into account in imposing the term of imprisonment, which obviously means that it is the trial court that is enjoined to do it. We therefore find that the learned trial Judge erred when he said the period on remand be subtracted. The warrant of commitment which should have indicated the sentence the appellant was to serve also mere stated that the appellant was sentenced to 15 years and added that the period on remand be subtracted. We find that the period the appellant spend on remand was not actually subtracted and that makes the sentence of 15 years' imprisonment imposed on him illegal as was held in **Rwabugande vs Uganda (Criminal Appeal 25 of 2014) [2017] UGSC 8 (03 March 2017)**.

We therefore set that sentence aside and invoke the provisions of **S.11 of the Judicature Act** that grants this Court the same powers as that of the trial court to sentence the appellant afresh. We shall be guided by the range of sentences imposed by this Court and the Supreme Court in offences of a attempted murder committed in more or less similar circumstances. We shall also look at the aggravating and mitigating factors.

In **No. 19515 Sergeant Solomon Nkojo vs Uganda, Court of Appeal Criminal Appeal No.17 of 2018,** the appellant was sentenced by the trial court to 12 years' imprisonment for attempted murder. On appeal to this Court, the sentence was found to be illegal and set side due to the trial court's failure to take into account the period spent on remand. This Court then found a sentence of 15 years appropriate and upon deducting the period of 10 months spent on remand, the appellant was sentenced to 14 years and 2 months' imprisonment.

In **Okucu Joel and Anor vs Uganda (Supra),** this Court set aside the sentence of 8 years that had been imposed by the trial court on each of the appellants for attempted murder and found a sentence of 15 years' imprisonment appropriate in the circumstances. Upon subtracting the 3 years & 1 month the 1st appellant spent on remand and the 2 years & 11 months the 2nd appellant spent on remand, they were sentenced to 11 years & 1 month and 12 years & 1 month respectively. The aggravating factors in that case were that the appellants premeditated the robbery, they used a gun, a deadly weapon while committing the offence. The second complainant in that case suffered serious injuries. The mitigating factors were that the appellants were both first offenders, relatively young at the time of commission of the offence, and they were remorseful.

The aggravating factors in this case were that the offence was executed with immense brutality and that the accused used a deadly weapon to inflict the injuries on the victim. The mitigating factors on the other hand, were that the convict had been on remand for 2 months, pleaded guilty and therefore saved court's time and resources, that the convict has family

responsibilities as he had two children with the victim whom he was taking care of given that the mother is incapacitated and that he is remorseful about what he did.

Considering the aggravating and mitigating factors and being guided by the above authorities, which give the sentencing range at about 15 years for the offence of attempted murder with more or less similar circumstances, we find a sentence of 15 years' imprisonment appropriate. Pursuant to article 23 (8), we deduct the period of 2 months the appellant spent on remand and sentence him to 14 years and 10 months' imprisonment which he shall serve from the date of pronouncement, which is, 15/06/2015.

In the result, the appeal is allowed on the above stated grounds and terms.

We so order

Dated at Mbale this 15th day of March 2023

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Hellen Obura

JUSTICE OF APPEAL

.....

Catherine Bamugemereire

JUSTICE OF APPEAL

.....

Christopher Madrama

JUSTICE OF APPEAL