THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

(Coram: Elizabeth Musoke, JA, Christopher Gashirabake, JA, Eva K. Luswata, JA)

CRIMINAL APPEAL NO. 0343 OF 2017

BETWEEN

BIRIMUYE DENIS :: APPELLANT

AND

UGANDA:: RESPONDENT

(Appeal from the Judgment of the High Court sitting at Kampala in Criminal Session Case No. 368/2016 by Hon. Justice Kwesiga Wilson delivered on 25/08/2017)

JUDGMENT

Introduction

1] The Appellant was charged, indicted and convicted for the offence of aggravated robbery contrary to Sections 285 and 286(2) of the Penal Code Act. He was sentenced to 20 years' imprisonment, less four years and two months, as the period spent on remand before sentencing. It was stated in the indictment that on 10th May, 2013 at Namanve, Kira Town Council, Wakiso District, the appellant and two others robbed one Juliet Nakanwagi of a motor vehicle

registration No. UAB 912B, cash in the sum of Shs. 1,099,050, a passport and several other items. That immediately before, and immediately after the robbery, he threatened to use a deadly weapon, to wit a panga on Juliet Nakanwagi.

2] Although the matter went to trial, on 22/8/2017, before PW1 Juliet Nakanwagi could complete her evidence, the appellant through his lawyers, indicated preference to change his plea to that of guilty, and an intention to enter a plea bargain with the prosecution. The trial Judge recorded the plea of guilty on 25/8/2017, immediately upon which the prosecutor presented the facts of the case, which the appellant confirmed as correct. The facts were an abridged version of part of PW1's testimony and we shall for clarity reproduce them here as the facts admitted by the appellant:

"Brief facts of the case:
A1, Birimuye and A2 Juuko Isma, on 10/5/2013, the complainant was driving vehicle Number UAB 9128 Silver in colour. She had a laptop and other items stated in the indictment. At Nsangi, Kyengera she stopped at the supermarket. Accused set a nail in the tyre(sic). She later got a flat tyre(sic). A following vehicle stopped, the accused got out helped her to fix the tyre(sic). They grabbed her, tied her up and forcefully drove her away in her car, blindfolded her.
While driving away demanded for money she was forced to call friends who sent her money on telephone mobile system which they withdrew. They kept threatening to kill her. She was later thrown out of the vehicle at Namanve, left her for dead but recovered later.
She reported to police".

3] The prosecutor reported and the appellant agreed that as a result of the plea bargaining agreement, they had agreed a term of 20 years. The Judge proceeded to sentence the appellant to 20 years'

imprisonment from which he deducted the period spent on remand. The appellant being aggrieved with the decision of the High Court lodged an appeal to this court against sentence only on the following ground:

> That the learned trial Judge erred in law and fact when he passed a harsh and excessive sentence against the appellant, thereby occasioning a miscarriage of justice.

Representation

4] The appellant followed his appeal by zoom link from the Luzira Upper Prison. He was represented by Counsel Lydia Namuli and counsel Nsubuga Samuel, the latter who held the brief of Mr. Henry Kunya. The respondent was represented by counsel Semalemba Simon, an Assistant Director of Public Prosecutions. Although represented, on 26/7/2022 the appellant addressed the Court to state that he filed the appeal because, although he agreed to, and signed an agreement for a sentence of 15 years, his lawyer informed him that the Court had added five years. In addition to that submission, both parties had previously filed written submissions before the hearing of the appeal as directed by the Registrar of the Court. Counsel for both parties applied and we agreed to adopt their written arguments as submissions in the appeal.

Submissions for the Appellant

5] According to the appellant's counsel the settled position of the law is that an appellate Court is not to interfere with sentence imposed by

the trial court which has exercised its discretion, save where exercise of discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice. In that regard, he referred to the case of **Kiwalabye Benard vs Uganda, SC Criminal Appeal No. 143 of 2001** cited in **Kimera Zaverio, vs Uganda CA Criminal Appeal No. 427 of 2014.**

6] Counsel continued that in imposing discretionary custodial sentences, the trial court must ensure that a sentence is commensurate to the seriousness of the offence. That in this case, although the offence was serious, several mitigating factors were put before the trial Judge, but he ignored them. Those included, the fact that the appellant was a young first time offender, aged below 28 years, who pleaded guilty, and had been on remand for 4 years and 2 months. In addition, that most of the stolen items were recovered. Counsel contended then that in view of those mitigating factors, the sentence of 20 years' imprisonment though legal, was excessive. Counsel argued that sentencing should punish wrong doers but not impair them, especially for this offender who was remorseful, and at 26 years, could leave prison into a productive life.

7] To buttress his arguments, counsel cited the case of **Kalibobbo Jackson vs Uganda, CA Criminal Appeal No. 54 of 2001** where a sentence of 17 years' imprisonment was considered manifestly harsh and excessive, and thus reduced to seven years. He also referred to **Bikanga Daniel vs Uganda, Criminal Appeal No. 28 of 2000** where a sentence of 21 years was reduced to 12 years because the trial court failed to exercise its discretion with regard to mitigating

factors, and the resulting sentence was considered as harsh and excessive.

8] In conclusion, counsel prayed that this Honourable Court be pleased to allow the appeal and the sentence be substituted with an appropriate one to meet the ends of justice.

Submissions for the Respondent

9] Respondent's counsel agreed with his colleague's submissions with regard to the powers of an appellate to interfere with a sentence imposed by the trial court. He then submitted that on the face of the plea bargain agreement, both aggravating and mitigating factors were considered before the appellant and his counsel appended his signature to the agreement. Counsel continued that arriving at the sentence, it is abundantly clear that the trial Judge was alive to the mitigating and aggravating factors which were contained in the plea bargain agreement before him.

10] Counsel argued in conclusion that the Judge by not explicitly stating the mitigating and aggravating factors before passing sentence, did not in itself occasion a miscarriage of justice. He referred to the case of **Guloba Rogers vs Uganda, Criminal Appeal No. 57 of 2021 (2021 UGCA 16)** where the appellant was convicted on two counts of murder and aggravated robbery and was sentenced to 47 years' imprisonment on each count, but on appeal reduced to 35 years' imprisonment on each count.

Decision of Court

11] We have carefully studied the court record, considered the submissions for either side, the law and authorities cited therein. A first appeal from a decision of the High Court requires this Court to review the evidence and make its own inferences of law and fact. **See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.113- 10.** We do agree with, and follow the decision of the Supreme Court in **Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997,** where it was held that on a first appeal, this 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."

12] We agree with the legal position espoused by both counsel. Sentencing is a matter for the discretion of the trial Court. Thus, an appellate Court can only interfere with the exercise of discretion if the sentence imposed is manifestly excessive, or is so low as to occasion a miscarriage of justice. Court may also interfere where the trial court ignores to consider an important matter or circumstance it ought to have considered before imposing the sentence, or where the sentence imposed is wrong in principle. See for example, **Kiwalabye Bernard vs Uganda (supra).**

13] It is not in contention that during the trial, the appellant changed his plea from one of not guilty to one of guilty. Before doing so, he entered into a plea bargain agreement with the prosecution as indicated on pages 67 to 76 of the record of appeal. It is that

agreement that the trial Judge relied upon to sentence the appellant. That being so, the applicable law for us to consider would be the Judicature (Plea Bargain) Rules 2016, in particular Rule 12 that provides in part as follows:

(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. Emphasis applied.

14] We deduce from the above provisions that a plea bargain is made by a well-informed accused who signs it voluntarily. In this case, the appellant was represented at the trial. When the matter was called to hearing on 25/8/2017, the Judge inquired about the progress of the plea bargain. The appellant responded as follows:

"I hereby freely and voluntarily plead guilty to the charge above and agree to be sentenced to 20 years.....we have agreed that I serve 20 years' imprisonment. I have signed the agreement.

And immediately before the Judge pronounced sentence he stated that:

"I signed this agreement. I accepted 20 years' imprisonment. I was not forced"

It is clear on pages 73 and 74 of the record that the appellant and his counsel signed the agreement on 25/8/2017.

15] We consider the above as the correct version of the proceedings with respect to the appellant's plea and sentencing. Therefore, his contest during hearing of the appeal that he had agreed to 15 years but sentenced to 20 years, is negated by the record. It is not shown in the record that he contested the negotiated sentence and therefore, he readily submitted to the jurisdiction of the court in that regard. In any case, his appeal against the sentence was restricted only to the fact that it was harsh, but not that it was forced upon him by his counsel or the trial Judge.

16] We are prepared to agree with respondent's counsel that a bargain when made and endorsed by all the participating parties, is binding on the convict, and as authority has shown, can only be set aside on justifiable grounds. The rationale is that the agreement follows a plea of guilty which ordinarily in the absence of exceptional circumstances, is not appealable. It was for example held in **Abiti Moses vs Uganda, Criminal Appeal No.286 of 2015** that:

".....in cases of plea of guilty, ..., no appeal lies there from; except where the legality of the plea or sentence is in issue. Plea bargain serves to benefit both the accused person and the prosecution".

We note that there was no complaint that the appellant did not understand the terms and import of the agreement, or that he was coerced or misled to sign it. The only complaint here is that the Judge failed to appreciate and mention the mitigating factors and as a result, imposed a sentence that was harsh and excessive.

17] By its nature, the plea bargaining agreement majorly follows negotiations between the prosecution and the defense. Such negotiations ordinarily take into account the interests and expectations of both the victim and the accused, the gravity of the offence, and other matters. Similar to sentencing imposed after a full trial, both sides are allowed to raise mitigating and aggravating factors, which must be fully recorded in the agreement, and therefore form part of the record. Although at page 19 of the record, the prosecutor appeared to have referred only to the aggravating factors, the mitigating factors were clearly recorded in the agreement at page 71 of the record. Therefore, the Appellant cannot argue that the same were never considered. It is assumed that when negotiating a sentence, both factors were in equal measure considered before the prosecution agreed to the appellant's request to halt the trial and change his plea.

18] The above notwithstanding, we consider the ground of appeal was drawn under the misconception that it is the trial Judge that decided and then imposed the sentence. This is not possible because under Rule 3 of the Rules, one of the main objectives of plea bargaining is to encourage accused persons to own up to their criminal responsibility and then with the prosecution and in consultation with the victim, reach an amicable agreement on an appropriate sentence. The participation of the judicial officer in the process, is quite limited. Under Rule 8, the judicial officer may participate and give some guidance in the negotiations on the sentence and other matters. However, ultimately, it is for the accused and prosecution to agree on the sentence, and when they

do, the Court is bound to endorse it. The judicial officer can only reject it where in their consideration it is illegal or against public policy.

19] Where the court rejects a sentence, then under Rule 12, they must consider it a failed process, record the reasons for rejecting it and remit the case for trial before a new judicial officer. Owing to the limited participation of judicial officers in the plea bargaining process, appellate courts have been reluctant to interfere with such sentences. A case in point is the decision of this Court in **Lwere Bosco versus Uganda, Criminal Appeal No. 531 of 2016** where it was held:

"Severity of a sentence as a ground of appeal cannot arise out of plea bargain proceedings because the parties negotiate and agree voluntarily. A convict cannot later change his mind on appeal faulting the trial Judge whose discretion in the plea bargain proceedings is limited to confirming a sentence voluntarily initiated and agreed to by the parties to the agreement. The applicant cannot turn around and argue that the sentence so approved was harsh and excessive for not consideration of mitigating factors because these factors are part of the negotiation".

20] In this case, the Judge accepted the agreed sentence. His duty was to endorse and then pronounce it, which he did. Failing to mention the mitigating factors already on record in the plea bargaining agreement was neither fatal to the proceedings and did not occasion a miscarriage of justice. We therefore find that permitting the appellant to appeal against a sentence he himself or his counsel negotiated at the trial without justifiable reasons, will defeat the purpose and rationale of plea bargaining in our criminal justice system. It may also send out a negative signal to the public,

especially the victims who will lose motivation to participate in plea bargain which is an innovation that has had tangible positive results in reducing delayed trials, prison congestion and case backlog. Those who opt to enter the plea bargain procedure should be properly prepared and fully appraised of all necessary information with regard to their rights and the fact that their decision, save for very limited cases, is irreversible. The appellant is bound by the sentence he agreed to, and in our view, has raised no valid grounds for us to reverse it.

21] For the above reasons, the sentence of twenty years (less the four years and two months spent on remand) is upheld. Consequently, this appeal fails.

Dated at Kampala this ..... day of 2023

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HON. ELIZABETH MUSOKE

JUSTICE OF APPEAL

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HON. CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

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HON. EVA K. LUSWATA

JUSTICE OF APPEAL