

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBALE
CRIMINAL APPEAL No.148 of 2016
(CORAM: H. Obura, C. Bamugemereire & C. Madrama, JJA)

5 EMWODU AMOS APPELLANT
VERSUS

UGANDA.....RESPONDENT

10 *(Appeal from the decision of Henrietta Wolayo J, dated 27th April 2016 in Criminal
Session No. 157 of 2015 holden at Soroti High Court)*

JUDGMENT OF THE COURT

15 The appellant, Amos Emwodu was indicted for the offence of Murder contrary
to sections 188 and 189 of the Penal Code Act. It was alleged that on the 23rd
day of September 2015 at Opiyai 'A' village in the Soroti district, Amos Emwodu,
Agnes Adwongo and Samuel Odongo, with malice aforethought unlawfully
caused the death of Christine Akunyo.

Background

20 The brief background to this appeal is that on the 23rd of September 2015 Amos
Emwodu, the appellant and 2 others violently attacked the Akunyo and with the
use of sticks, assaulted and fatally injured her. She succumbed to the injuries
attributed to the violent assault. Subsequently, the appellant was indicted with
the offence of Murder c/s 188 and a89 of the PCA. He pleaded guilty under a plea
25 bargain agreement and was sentenced to imprisonment for a period of 20 years.

Dissatisfied, the Appellant appealed against sentence only. The sole ground of
appeal as set out in the Memorandum of Appeal is as follows;

That the learned trial Judge erred in law and fact when she imposed a
sentence of 20 years' imprisonment on the appellant through the plea
30 bargain proceedings against his will which occasioned a miscarriage of
justice.

Representation

At the hearing of the appeal the appellant was represented by Ms Agnes Wazemwa, on State Brief while Mr. Frank Aine a State Attorney in the Office of the Director of Public Prosecutions represented the Respondent. Counsel for the
5 appellant sought leave of this court to appeal against sentence only and to validate the Memorandum of appeal which was filed out of time. Counsel for the respondent had no objections to the prayers sought by counsel for the appellant.

There being no objection from the respondents, this court granted leave to the appellant to file the memorandum of appeal out of time and granted leave to the
10 appellant to appeal against sentence only. Both counsel for the respective parties filed written submissions, which have been relied upon by this court in arriving at its decision.

The Appellant's Submissions

Counsel for the appellant submitted that upon committal to the High Court, the
15 appellant requested to participate in a plea bargain session and on 19th April 2016. He signed a plea bargain agreement to serve a period of 15 years' imprisonment. It was counsel's contention that upon being produced in court for confirmation of sentence, the court rejected the sentence of 15 years and imposed upon the appellant a sentence of 20 years' imprisonment against his will.

Counsel submitted that it is trite that the appellate court is not to interfere with the sentence imposed by the trial court unless the sentence imposed is manifestly excessive or so low as to amount to a miscarriage of justice or where the trial court ignores to consider an important matter or circumstances which ought to be considered while passing sentence or where the sentence imposed is wrong
20 in principle as was held in **Kiwalabye Bernard v Uganda SCCA No. 143 of 2001**.

Counsel cited rule 4 of the Judicature (Plea Bargain) Rules, 2016, which provides that the plea bargaining process is between an accused person and the

prosecution. Further that rule 8 warrants the court's participation in plea bargaining discussions. 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 sentences before the agreement is brought to court for approval and recording. He cited Luwaga Suleman aka Katongole v Uganda CACA No. 858 of 2014, where court found that failure of the Resident State Attorney to consult the court through the process of plea-bargaining prior to bringing the agreement to court for approval and recording was in contravention of the law. And that court had a right to reject the sentence as it had occasioned a miscarriage of justice."

Counsel submitted that in the present case, the record did not indicate whether there was participation of court in the process before the agreement was signed. He stated that what was clear was that there was an initial recorded sentence of 15 years which was altered to 20 years by the trial Judge.

It was counsel's averment that under **rule 13 of the Judicature (Plea Bargain) Rules**, where court rejects a plea bargain agreement, it is required to record the reasons for the rejection and then refer the matter for trial. Counsel argued that in this case, the trial Judge rejected the appellant's negotiated sentence of 15 years and went ahead to impose a sentence of 20 years, which was contrary to the law and occasioned a miscarriage of justice. Counsel submitted that the trial Judge could have referred the matter for trial in the stead.

Counsel further contended that the appellant was remorseful and had pleaded guilty at the earliest opportunity without waiting for a protracted trial. Counsel added that the appellant was 22 years old at the time of commission of the offence, a first time offender and an HIV/AIDS victim who suffers from asthma and epilepsy. It was counsel's submission that the trial Judge did not consider these mitigating factors while imposing the sentence against the appellant thus occasioning a miscarriage of justice. Counsel further contended that State did

not submit on any aggravating factors yet the trial Judge formulated her own which she based to sentence the appellant to 20 years.

Counsel prayed that the sentence of 20 years be set aside and a lenient and reasonable sentence be handed to the appellant.

5 The Respondent's Submissions

In reply, counsel for the respondent contended that the appellant agreed to a sentence of 20 years' imprisonment in the plea bargain agreement. His submitted that the allegation of agreeing to 15 years is a clear afterthought. Counsel made reference to *Aria Angelo v Uganda CACA No. 439 of 2015* where court stated
10 that for an agreement to plead guilty to be valid, the accused must;

- i. Accept the plea bargain in full awareness of the facts of the case.
- ii. Accept the plea bargain with full awareness of the legal consequences.
- iii. Accept the plea bargain in a genuinely voluntarily manner.

Counsel added that rule 8 provides for court's participation, however, this
15 participation is not embedded anywhere in form of particularization and style in the rules. Reference was made to *Lwanga Suleiman alias Katongole v Uganda SCCA No. 858 of 2014* where court noted that; "from the review of the rules, the same do not provide for a particular form of consultation with the court.

It was counsel's averment that this matter was conducted under the plea bargain
20 agreement and in accordance with the Judicature (Plea Bargain) Rules 2016 and further that court considered the mitigating factors and aggravating factors.

Counsel contended that what appeared on the record as the initial 15 years is a mere typographical error which was being corrected by the trial Judge inserting 20 years as agreed by the parties. He added that the 20 years' sentence was not
25 an imposition by the trial Judge as alleged by counsel for the appellant. Counsel averred that the appellant agreed to the 20 years' imprisonment and signed the agreement after consultation with the court.

It was counsel's submission that the sentence of 20's imprisonment is not in any way as harsh as the maximum sentence in murder cases. The maximum sentence for the offence of murder is death. Counsel submitted that this court should find that the plea bargain agreement was entered into legally and what appears on the record are mere corrections of court which cannot be a ground to invalidate the agreement between the parties. Counsel prayed that court be pleased to dismiss this appeal and uphold both conviction and sentence accordingly.

Consideration of Court

Concerning the only ground of appeal, the appellant faults the trial judge for diverting from the terms of imprisonment agreed upon in the plea bargain agreement. Counsel for the respondent submitted that the trial Judge sentenced the appellant according to the terms agreed upon in the plea bargain agreement. We have carefully considered the submissions of counsel, the record and authorities availed to us. We are alive to the duty of this court as a first appellate court to reappraise all the material that was made available at trial and come up with our own inferences of law and fact. (See *Kifamunte Henry v Uganda SCCA No. 10 of 1997*).

The principles upon which an appellate court may interfere with sentence imposed by the trial court were considered in *Kamya Johnson Wavamuno v Uganda SCCA No. 16 of 2000*, where the Supreme Court laid down guidelines as follows;

"...It is well settled that the court of Appeal will not interfere with the exercise of discretion unless there has been a failure to take into account a material consideration, or an error in principle was made. It was not sufficient that the members of the court would have exercised their discretion differently."

In the instant appeal, counsel for the appellant contended that the sentence of imprisonment to 20 years was illegal considering that the trial Judge sentenced the appellant outside the plea bargain agreement.

The practice of plea bargain is regulated by the *Judicature (Plea Bargain) Rules, 2016*. Plea-bargain is defined under rule 4 to mean the process of negotiation

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 charges, reduce a charge to a less serious offence, or recommend a particular sentence subject to approval by Court.

5 Where a bargain is reached but one of the parties, is not agreeable, (the court inclusive), rule 13 of the **Judicature (Plea Bargain) Rules, 2016** provides for rejection of such plea bargain agreement. The said rule states that;

1. The Court may reject a plea bargain agreement where it is satisfied that the agreement may occasion a miscarriage of justice.

10 2. Where the court rejects a plea bargain agreement-

a. It shall record the reasons for the rejection and inform the parties.

b. The agreement shall become void and shall be inadmissible in subsequent trial proceedings or in any trial relating to the same facts, and

15 c. The matter shall be referred for trial subject to sub rule 8 (3).

The implication of the above rules is that the trial Judge is not to alter the sentence agreed upon by the parties but may reject it under **rule 15(3) of the Judicature (Plea Bargain) Rules, 2016** if he or she is of opinion that the particular circumstances of a case deserve a more severe sentence, in which case
20 the matter would either go on full trial or the parties would enter a new bargain.

In the instant case, we carefully perused the plea bargain agreement on the record and observed that under the provision of sentence, there was an alteration where whitewash was applied to what would appear to have been the figure 15 years but was whitewashed and indicated as 20 years. The trial Judge did not
25 countersign on that alteration. Further still, in the final sentence, the trial Judge cancelled the sentence of 15 years using a pen and indicated twenty, above the 15 and further cancelled fourteen years and indicated nineteen above the fourteen.

No countersigning was made on the alterations either. For clarity, we shall quote it verbatim below;

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The violent attack on the deceased that left her dead attracts a custodial sentence. The right to life must be protected.

Appropriate sentence is fifteen years (*sic altered to twenty*). As accused has been on remand since September 2015, he is sentenced to fourteen (*sic altered to nineteen*) years and six months' imprisonment.

Dated at Soroti this 27th day of April 2016.

Signed, Judge.

The above alterations are indicative of a process that was not complete. We respectfully find fault with the manner in which the trial Judge allowed the alterations to appear on the record. Under these circumstances, we are persuaded to give the appellant the benefit of doubt regarding his allegation that the sentence earlier agreed to was 15 years' imprisonment.

In *Wangwe Robert v Uganda CACA No. 0572 of 2014*, this court held that;

"With due respect we find that the 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 a plea bargain agreement whereby they agreed upon a sentence of 15 years but the trial Judge enhanced the sentence to 18 years and 10 months. Having done so, we find that the learned trial judge imposed an illegal sentence on the appellant. The sentence is therefore hereby set aside."

In *Rev. Father Santos Wapokra V Uganda, CACA No.204 of 2012*, where this court explained the purpose of a retrial thus;

“The overriding purpose of a retrial is to ensure that the cause of justice is done in a case before Court...however that must ensure that the accused person is not subjected to double jeopardy, by way of expense, delay and inconvenience by reason of the retrial. Other considerations are; where the original trial was illegal or defective...the expense of the new trial to the accused, the fact that any criminal trial is an ordeal for the accused who should not suffer a second trial, unless the interests of justice so require and the length of time between the commission of the offence and the new trial, and whether the evidence will be available at the new trial.”

In this appeal the, Emwodu, the appellant protests the enhancement of his sentence from imprisonment of 15 years to imprisonment for 20 years. Clearly, the Plea Bargain Argument indicates that there was an alteration and a change of mind. The sentence typed into the record was imprisonment for 15 years. The sentence altered in pen was 20 years. This change of mind was not communicated through the right channels. Sometimes trial Judges rescind the agreement. If this is the situation, the communication has to be made to the prosecution and the accused. A fresh bargain must be entered. A trial court cannot unilaterally alter the sentence earlier agreed upon. What seems to have happened in this case is that the trial Judge reneged on the agreement reached but did not inform the parties. In the circumstances we are inclined to believe the appellant, as shown on the record, he accepted a Plea Bargain resulting into a sentence of imprisonment for 15 years.

We therefore allow this appeal and set aside the sentence of imprisonment for 20 years imposed by the trial Judge since this was not what the appellant bargained. We now invoke the powers of this Court under section 11 of the Judicature Act to sentence the appellant afresh based on the plea bargain agreement that was duly signed by both parties. The parties had agreed on a sentence of 15 years. We accordingly sentence the appellant to 15 years, less the

time he had spent on remand. We recognize that the appellant was remanded on the 1st October 2015. His total time spent on remand before conviction was 7 months and 26 days.

When the time spent on remand, the 7 months and 26 days, is subtracted from the sentence of imprisonment for 15 years, the appellant shall serve a sentence of imprisonment for 14 years, 5 months and 4 days effective from 27th April 2015.

This appeal succeeds and the appellant shall serve sentence on the above terms.

We so order

Dated at Kampala this 15th Day of March 2023



Hon. Lady Justice Hellen Obura
Justice of Appeal



Hon. Lady Justice Catherine Bamugemereire
Justice of Appeal



Hon. Mr Justice Christopher Madrama
Justice of Appeal