THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL No.130 of 2018
(Coram: Obura, Bamugemereire & Madrama JJA)

KEEM PAUL :::APPELLANT

VERSUS

UGANDA ::: RESPONDENT

(An Appeal from the decision of H. Wolayo J dated 18th July 2016 the High Court of Uganda holden at Mbale)

Criminal Law – plea bargain – whether the appellant can appeal against sentence after a plea bargain – Rule 8(2) The Judicature (Plea Bargain) Rules 2016.

JUDGMENT OF THE COURT

Introduction

The appellant, **Paul Keem** on his own volition, entered a plea bargain agreement arrangement. As a result of the plea bargain, he agreed to serve 18 years' imprisonment for the offence of Murder contrary to section 188 and 189 of the Penal Code Act. He was sentenced to 15 years' imprisonment after deducting the three years he had spent on remand.

Background

Briefly, Keem Paul was a Local Defence Unit (LDU) Officer identified as No.AX000354. On 12th December 2011 he had a misunderstanding with his wife whom he suspected of cheating on him. She run away from him and disappeared. Armed with an AK 47 Keem went about looking for his missing wife. He met the deceased Lothurin Etukan and shot him dead. He was arrested and charged with murder. When he appeared in court, the appellant pleaded guilty for the offence of Murder c/s 183 and 184 of the PCA and voluntarily entered a plea bargain agreement of 18 years in prison. The Learned Trial Judge then sentenced the appellant to 18 years and deducted a period of 3 years

that the appellant had spent on remand. His final sentence was 15years' imprisonment. Dissatisfied, the he appealed to this court on 2 grounds;

1. The Learned Trial Judge erred in law and fact when she ignored some of the mitigating factors in favour of the prosecution hence occasioning miscarriage of justice to the appellant.
2. Without prejudice to the former the sentence of 18 years was deemed harsh and excessive in the circumstances given the remorsefulness of the appellant.

At the hearing of this appeal, the appellant abandoned his 1st ground of appeal. His appeal is based only on Ground No.2, the sentence.

The appellant was represented by learned counsel Agnes Wazemwa while learned Senior State Attorney Josephine Aryang represented the Respondents. The Prison Authority was unable to physically produce the appellant from Gulu Main Prison. He appeared by a video link on Zoom. Counsel for the appellant applied for leave to appeal against sentence only. Leave was granted by this court. Both counsel relied on written submissions which this court has considered in its decision.

The Appellant's Submissions

Counsel for the appellant was critical of the Learned Trial Judge's approach to sentencing for reason that she disregarded the mitigating factors in this case and imposed a harsh sentence of 18 years. Counsel also challenged the Learned Trial Judge for not corresponding with the parties prior to the approval and recording of the plea-bargaining agreement. Counsel relied on Rule 4 of the Judicature (Plea Bargain) Rules of 2016 and the authority of **Luwaga Suleman aka Katongole v Uganda CACA No.858 OF 2014** where this court set aside a 16-year

sentence because there was no consultation between the court and Resident State Attorney.

Counsel prayed to this court to set aside the sentence and a lenient and reasonable sentence be handed to the appellant.

The Respondent's Submissions

The respondent contended that the sentence of 18 years passed by the learned trial Judge was neither harsh nor excessive. He argued that the Learned Trial Judge considered all mitigating and aggravating factors. One of the aggravating matters brought to the attention of the Learned Trial Judge was the fact that the appellant was an LDU Army officer who had a pre-meditated intention of killing the deceased. In mitigation, the Learned Trial Judge considered the fact that the appellant was on remand for 3 years and a young man with a family of four dependants and that he was remorseful. Counsel further submitted that the Learned Trial Judge considered the 3 years that the appellant spent on remand and reduced the sentence from 18 years to 15 years. Counsel for the respondent agreed with the finding of Learned Trial Judge and concluded that a sentence of 18 years' imprisonment in the circumstances was legal, counsel prayed that this court upholds the trial courts sentence and dismisses the appeal.

Consideration by Court

As a 1st appellate court we are alive to our duty to re-appraise and re-evaluate the whole record and that we are at liberty to arrive at our own conclusions and make our own inferences about issues of law and fact. **See rule 30(1) of the Judicature (Court of Appeal Rules) Directions, S.113-10, Kifamunte v Uganda SCCA No. 10 of 1997.** The appellant having withdrawn his 1st ground of appeal, counsel for the appellant applied for leave to appeal against sentence only. Leave

was granted. This appeal is therefore against sentence only. In **Kyalimpa Edward v Uganda SCCA No. 10 of 1995** while referring to **R v Haviland (1983) 5 Cr. App. R(s) 109** the Supreme Court laid down the principles upon which an appellate court may interfere with a sentence passed by the trial court,

> "An appropriate sentence is a matter for the discretion of the sentencing Judge. Each case presents its own facts upon which a Judge exercises his discretion. It is the practice that as an appellate court, this Court will not normally interfere with the discretion of the sentencing Judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial Judge was manifestly so excessive as to amount to an injustice". **See also; Kamya Johnson Wavamuno v Uganda SCCA No.16 of 2000, Kiwalabye Bernard v Uganda SCCA No. 143 of 2001, Livingstone Kakooza v Uganda SCCA No. 17 of 1993 [unreported]** and **Jackson Zita v Uganda SCCA No. 19 of1995.**

We now delve into the fundamentals of this appeal with the above principles in mind. It is the appellant's contention that the plea bargain procedure was defective for reason that the trial court was neither informed nor consulted about plea bargain negotiations nor was its recommendation with regard to the possible sentence sought. We have perused the record of the trial court and it is evident that the appellant voluntarily entered a plea bargain agreement the consequence that he would serve a sentence of imprisonment of 18 years.

"ACCUSSED PERSONS PLEA

I hereby freely and voluntarily plead GUILTY to the charges(s) above and agree to be sentenced to 18 years' imprisonment ..."

Rule 4 of the Judicature (Plea Bargain) Rules 2016 defines a "plea bargain" 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 offense, or recommend a particular sentence subject to approval by the court. The same rule defines a plea bargain agreement to mean an agreement entered into between the prosecution and an accused person regarding a charge or sentence against an accused person.

The appellant's contention is that the court was not consulted before approval of the plea bargain agreement.

Rule 8 of the Judicature (Plea Bargain) Rules 2016 provides for court's participation in plea bargain agreements, precisely that,

"8. Court participation in plea bargain

(1) The court may participate in plea bargain discussions.

(2) The 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 and recording."

The reasoning of this court in Lwere Bosco v Uganda CACA No.531 of 2016 is quite compelling:

"Severity of sentence as a ground of appeal cannot arise out of plea bargain proceedings because 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 appellant cannot turn around and argue that a sentence so approved was harsh and excessive for non-consideration of mitigating factor because these factors are part of the negotiation. **The accused person or his counsel must labour to inform court about the ongoing plea bargain negotiations and also consult court** on its recommendations especially on the possible sentence before the agreement is brought to court for approval and recording..."

In line with the above decision in Lwere we can safely conclude that it is the duty of the accused person or his counsel to inform the court about the ongoing plea bargain negotiations and to consult the court on its recommendations. The Learned Trial Judge cannot be faulted for executing an agreement as agreed by the parties. The failure to be consulted during the plea bargain negotiations cannot be visited on the trial Judge since there is no obligation placed on the court to initiate the consultation.

In this matter, the appellant pleaded guilty and voluntarily acceded to imprisonment for 18 years. The Learned Trial Judge confirmed and approved this sentence. The appellant now appeals on the grounds that the sentence was a harsh and excessive sentence. The appellant relied on the authority of **Luwaga Suleman aka Katongole v Uganda CACA No.858 of 2014** where:

"The court found that the trial Magistrate erred in law and in fact when she failed to follow the Judicature (Plea Bargain)

Rules 2016 which came into force on 1/4/2016. She ought to have assigned an advocate to the Appellant and encouraged the state Attorney to consult the victim with a view of settling the matter under plea bargain."

To distinguish *Luwaga* from this matter it should be noted that in this matter before us, the appellant, Paul Keem, had proper representation by an advocate of the High Court. This was unlike the circumstances in ***Luwaga*** where the appellant was not assigned an advocate due to the fact that he did not have the right, under the law, to representation. In ***Luwaga*** there was a fundamental defect in the plea bargain proceedings. The appellant did not have representation. However, in this case, the appellant was ably represented by counsel, who explained to him his constitutional rights. He was duly informed that by entering into a plea bargain he was waving some of his rights.

Comparably, when this court in **Lwere Bosco (supra)** , set aside a plea bargain agreement for being defective the court found out that during the process of entering the plea bargain, the appellant was not properly appraised of the waiver of his constitutional rights to a fair trial.

Both ***Luwaga*** and ***Lwere*** were found not to comply with the consultation requirement in Rule 8(2), and more importantly, both had defects that fundamentally compromised the appellant's constitutional rights to a fair hearing. The above two citations are clearly distinguishable from the matter before us.

It is our considered view, therefore, that once an appellant freely and voluntarily agrees to enter a plea bargain, s/he cannot without good reason abrogate that agreement. Allowing this appeal would undermine the relevance and the objectives of plea bargaining in the criminal justice system.

We have already found as above that this plea bargain was in conformity with rules 9 and 3 of the **Judicature (Plea Bargain) Rules 2016**. As a result, we see no reason to disturb the proceedings, conviction, sentence and orders of the trial Judge. This appeal has no basis. It is herewith dismissed.

Dated at **Kampala** this ....14th.... **day** of .....March..... 2023

HON.LADY JUSTICE HELLEN OBURA
JUSTICE OF APPEAL

HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL

HON. JUSTICE CHRISTOPHER MADRAMA
JUSTICE OF APPEAL