

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. 0101 OF 2020

WESAMBA ADAM:.....APPELLANT

VERSUS

UGANDA:.....RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mbale before His Lordship Hon. Justice Henry Kawesa, J delivered on the 07/07/2017 in Criminal Session Case No. 0270 of 2016.)

JUDGMENT OF THE COURT

Introduction

The appellant pleaded guilty following a plea bargain agreement in which the parties agreed on a sentence of 13 years and he was convicted of the offence of kidnapping with intent to murder contrary to sections 243(1) (a) of the Penal Code Act by the High Court (Kawesa, J.) on the 07/07/2017. He was however sentenced to 123 years' imprisonment according to the sentencing ruling, although the Warrant of Commitment signed by the learned trial Judge on 7th July 2017 states 13 years.

Background

The facts of this case as ascertained from the court record are that on the 4th day of March, 2016, the appellant called the complainant on telephone No. 0781176739 claiming that he had been hired to kill him. He told the complainant to give him 15,000,000/= (Fifteen million Uganda shillings) as a condition to spare his life and that of his family members. When the complainant assured the appellant that he had no money, the appellant threatened to kill the complainant or kidnap one of his family members.

Consequently, the appellant went to St. Jude Primary School where the complainant's son was studying and tricked the teachers to handover the victim to him on the pretext that he was sent by the appellant. When the boy was handed over to the appellant, he gave him a dark blue cap to put on so as to camouflage his appearance. The appellant led the victim to an incomplete building and told him to wait for him as he goes to bring ice cream. When the appellant left, the victim sensed danger and fled to the shop of his mother. He narrated the ordeal to his mother who reported the matter to Busia Police. The police tracked the owner of telephone No. 0781176739 and it was found to belong to the appellant.

The appellant was arrested and while at Police, the teachers of the victim correctly identified him as the person who picked the little boy from school on the pretext that he was sent by the parents. He was consequently indicted, pleaded guilty following a plea bargain agreement and he was convicted and sentenced as aforementioned.

Being dissatisfied with the decision of the trial court, the appellant appealed to this Court on the following two grounds;

1. *That the learned trial Judge erred in law and fact when he convicted the appellant based on a plea bargain agreement without following due process.*
2. *That the learned trial Judge erred in law and in fact when he sentenced the appellant to a long term/illegal sentence contrary to the plea bargain agreement and without considering the period spent on remand.*

Representation

At the hearing, Mr. Nappa Geoffrey, represented the appellant on State Brief while Mr. Ssemalemba Simon Peter, Assistant Director of Public Prosecutions appeared for the respondent. The appellant was present in Court. Both parties filed written submissions which we have considered in this judgment.

Submission for the Appellant

Counsel informed Court that when he filed the appellant's submission based on the two grounds of appeal, he had not yet interacted with him. But when he interacted with the appellant thereafter, he informed him that much as the plea bargain agreement had issues, he was only interested in challenging the aspect on sentence for the failure by the learned trial judge to take into account the period spent on remand. Counsel therefore prayed to abandon ground 1 of the appeal and only pursue ground 2 on sentence.

On ground 2, it was counsel's contention that the sentence of 123 years' imprisonment was imposed by the learned trial Judge in disregard of the agreed sentence of 13 years stated in the plea bargain agreement and reported in court. According to counsel, that meant the learned trial Judge had rejected the agreed sentence of 13 years without giving any reason as required by rule 13 of the **Judicature (Plea Bargain) Rules, 2016** (the Rules) which rendered the sentence illegal as it occasioned a miscarriage of justice.

Submission for the Respondent

Counsel for the respondent submitted that the appellant was not properly convicted as the procedure laid down in **Adan vs Republic EACA Criminal Appeal No. 53 of 1973** was not followed. He pointed out that the charges were never read to the appellant and the brief facts were not read back to him. He submitted that the proceedings were a nullity and prayed for a retrial.

Without prejudice to the above submissions, counsel argued that the sentence of 123 years that appears on the record was a mere typographical error since the Warrant of Commitment signed by the learned trial Judge indicates that he was sentenced to 13 years. He also referred to the plea bargain agreement that indicates a sentence of 13 years. Counsel never addressed the main complaint of the appellant that the period spent on remand was not taken into account but concluded that since the appellant's conviction was not proper, it follows that the sentence passed against him was illegal.

Rejoinder

In rejoinder, counsel submitted that the appellant was only concerned about the non-consideration of the period spent on remand and had no problem with the plea taking process. He argued that ordering a retrial will cause more injustice to the appellant because he will have to go back and wait for a session and yet he is comfortable with what happened and only wants a reduction of the period spent on remand.

Resolution by the Court

We have considered the arguments for both parties. While counsel for the appellant acknowledges that there is a problem with the plea taking process, he insists that his client is not interested in pursuing the same and all he wants is reduction of the period spent on remand. In his written submission, on ground 1 which was abandoned, counsel for the appellant had argued that the trial court never followed the due process outlined under rule 12 of the Rules which caused a miscarriage of justice to the appellant as was held in **Lwere Bosco v Uganda Court of Appeal Criminal Appeal No.531 of 2016**. He submitted the proceedings was a nullity and prayed that this Court sets aside the conviction and the sentence.

Counsel for the respondent on the other hand argued that the proceedings before the lower court were vitiated by the fact that neither the charges nor the facts of the case read to the appellant during the plea taking process which rendered the entire proceedings a nullity. Counsel strongly urged this Court to find the proceedings before the trial court a nullity and order a retrial.

In the persuasive decision in **Makula International Ltd vs. His Eminence Cardinal Nsubuga & Anor. (1982) HCB 11**, it was held that; *"a court cannot sanction what is illegal and an illegality once brought to the attention of court overrides all questions of pleadings including admissions made therein."*

We therefore feel inclined to first analyse the proceedings before the lower court with a view of establishing whether or not there was any illegality.

The record of proceedings before the lower court indicates as follows;

"RSA Khauka for the state: Present

5 *Suzan for the accused: Present*

Accused pleads in Samia as follows: its true

RSA: On the 4th March 2016 accused kidnapped victim aged 9 years from school. He made phone calls to the father demanding a ransom of 15 million. Victim escaped when the accused went to buy ice cream. Accused was tracked and charged and charged.

10 *Accused: Facts are true*

Court: Plea of guilty, Convicted on own plea of guilty

RSA: Signed Plea Bargain agree for 13 years.

Accused: Its true

15 *Court: Plea Bargain agreement noted. The aggravating and mitigating factors noted. Accused is a first offender. He is sentenced to 123 years in Prison from date of first remand."*

Although it is evident from the record that the learned trial Judge did not record the fact that the charges were read to the appellant, we note that the appellant's response was recorded as; "it is true", which implies that he was responding to the charges that were read to him. This was followed by facts of the case that appears on the record and this, contrary to what
20 counsel for the respondent's contended, shows that the facts were indeed read to the appellant and he confirmed them to be true. We therefore find that the only valid issue raised by counsel for the respondent is the failure of the trial court to record that the charges were read to the appellant.

In **Adan vs R 1973 (Supra)**, the procedure for recording a plea of guilty was laid down as follows;

"The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded. The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and a change of plea entered and the trial should proceed. If there is no change of plea, a conviction should be recorded and a statement of fact relevant to sentence together with the accused's reply should be recorded."

In this appeal, the record is silent on whether or not the charges were read to the appellant and the essential ingredients explained to him. However, we note from the plea bargain agreement on record that the appellant was represented by Ms. Suzan Slyvia Wakabala who endorsed the part of the agreement that says she explained the ingredients of the offence to the appellant as his counsel. She even appears on the record during the plea taking process. We believe that if indeed the charges were not read and the ingredients of the offence explained to the appellant by the trial court, she would have raised an objection in court. Since no objection was raised, we can safely conclude that the charges were read and the ingredients of the offence were explained to the appellant but the learned trial Judge only omitted to put it on record

We have also found guidance from **S. 139 of the Trial on Indictments Act** which provides that;

"(1) Subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error,

omission, irregularity or misdirection in the summons, warrant, indictment, order, judgment or other proceedings before or during the trial unless the error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice.

5 *(2) In determining whether any error, omission, irregularity or misdirection has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."*

In this appeal, we are of the view that the failure of the learned trial Judge to record that the charges had been read to the appellant did not occasion a miscarriage of justice.

10 Be that as it may, we have noted some more serious irregularity that relate to the recording of the plea bargain agreement. It is clear from the record that the learned trial Judge did not follow the proper procedure for recording a plea bargain agreement as outlined in rule 12 of the Rules.

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

12. Recording of the plea bargain agreement by the court.

15 *(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 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;

20 *(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 bargain 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 bargain, 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."

When an accused person opts to plead guilty under a plea bargain agreement, it is the mandatory duty of the trial court to inform the accused of his or her rights, and to satisfy itself that the accused understands the important matters set out under Rule 12 (1) (a) of the Rules. Under rule 12 (4) of the Rules, the trial court is also required to confirm that an accused person freely and voluntarily, without threat or use of force, executes the agreement with full understanding of all matters. These requirements are intended to preserve the accused's non-derogable constitutional right to a fair hearing.

In this appeal, the record does not indicate that the trial court complied with the procedure set out in the Rules. In the circumstances, we find that the failure to follow the mandatory procedure for recording a plea bargain agreement by the trial court occasioned a miscarriage of justice and it rendered the proceedings a nullity. We are therefore inclined to quash the appellant's conviction and set aside the sentence that was imposed by the learned trial Judge.

We need to observe, just in passing, that had we not made the above findings and upheld the conviction, we would have still been inclined to set aside the sentence on the ground of illegality for two reasons. Firstly, the learned trial Judge did not take into account the period the appellant had spent on remand, and secondly, he stated that the sentence was to be served from the date of admission on remand yet section 106 (2) of the Trial on Indictment Act provides that every sentence shall be deemed to commence from and include the whole day of the date on which it was pronounced.

For the reason of failure to comply with rule 12 of the Rules, this appeal succeeds. The appellant's conviction is quashed and the sentence imposed on him is set aside. However, we find that the plea bargain agreement the appellant and the state had executed remains valid. We therefore order that this file be placed before another trial Judge in the circuit for purposes of recording the plea bargain agreement between the parties. We regret that the appellant who had opted to shorten his trial by embracing the plea bargain procedure has to be subjected to the inconvenience of being referred back to the trial court.

We direct the Registrar of this Court to treat this matter as urgent and bring it to the immediate attention of the trial court to be placed before a trial Judge for purposes of complying with our above stated order, in any event, not later than two months from the date of this judgment.

We so order.


Dated at Mbale this 16th day of May 2023



Hellen Obura
JUSTICE OF APPEAL



Catherine Bamugemereire
JUSTICE OF APPEAL



Christopher Madrama
JUSTICE OF APPEAL