THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

(Coram: Cheborion Barishaki, Hellen Obura, Eva K. Luswata, JJA)

CRIMINAL APPEAL NO. 313 OF 2019

BETWEEN

TURINAWE ALEX aka KAKIGA:::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA:: RESPONDENT

(Appeal from the Judgment of Hon. Mr. Justice Emmanuel Baguma, sitting at Mpigi High Court in Criminal Session Case No. 057 of 2018, delivered on the 2nd day of November 2018)

JUDGMENT OF THE COURT

Introduction

1] This appeal is arising from the judgment of the High Court in which the appellant was sentenced to 16 years, 8 months and 4 days' imprisonment on his own plea of guilty for the offence of murder contrary to Section 188 and 189 of the Penal Code Act. It was stated in the indictment that on the 8th day of June, 2017 at Nkokonjeru 'A' Zone, Kyengera in Wakiso District, the appellant with malice aforethought, unlawfully killed Akankwasa Generous alias Musimenta.

2] Before his trial could commence on 11/2010, the appellant negotiated his sentence and entered into a plea bargain agreement where he agreed to a prison term of 18 years. We note that following the recording of his plea, the prosecutor did not submit the facts of the case. All she stated was that the brief facts are on page 10 of the plea bargain agreement. However, in paragraph 3 of page 10 of the plea bargain agreement, the summary of the case/agreed facts are said to be *". . . as per the indictment"*. Our only fallback position from which we were able to gather the following brief facts, is the summary of the case filed by the prosecution in 2018.

3] It was stated that the appellant and his wife Akankwasa Generous alias Musimenta (now the deceased), resided together in Nkokonjeru 'A' Zone, Kyengera in Wakiso District. That during May 2017, the appellant stole Matooke from an abattoir and the deceased blamed him for it, and as a result, the appellant begun to threaten to kill her. On 8/6/2017 both the appellant and deceased returned to their home. During the same night, the deceased made a phone call to her sister and informed her that she wanted to report the appellant to police for beating her. That night the appellant's neighbour heard the deceased groaning in their house like she was being strangled, although he feared to get out of his own house. The next day on 9/6/2017, the appellant's neighbours saw his house locked from inside with a padlock and

they knew the occupants had gone to work. The deceased did not report to work that day and later the same evening, one of her workmates came to her home. Upon learning from the deceased's workmate that she had not reported for work that day, the neighbours got concerned. When they peeped through the window of the appellant's house, they saw the deceased's lifeless body lying on the floor in a pool of blood but the appellant was nowhere to be seen. The matter was reported to police and the appellant was arrested. He executed a plea bargain agreement as aforementioned, and was accordingly sentenced.

Representation

4] During hearing of the appeal on 17/8/2022, the appellant was represented by Mr. Henry Kunya on State brief, while Ms. Fatina Nakafeero a Chief State Attorney, appeared for the respondent. The appellant followed proceedings by video link from Kigo Government Prison. During the trial, Mr. Kunya indicated that he had on 15/8/2022 filed a memorandum of appeal on behalf of the appellant with one ground only, which stated as follows:

> ***THAT the learned trial Judge erred in law and fact when he imposed a manifestly harsh and excessive sentence against the appellant.***

Mr. Kunya accordingly successfully moved the Court under Rule 43 of the Rules of the Court, and Section 132(1)(b) of the Trial on Indictments Act (TIA), for leave to proceed on the one ground challenging the sentence. Both counsel filed written submissions which we have considered when deciding the appeal.

Submissions for the Appellant

5] In his submissions, Mr. Kunya drew our attention to the fact that he had filed a fresh memorandum of appeal for his client to replace one that the appellant had earlier filed on 29/10/2019. He then submitted the well settled position of the law that, an appellate court is not to interfere with the sentence imposed by the trial court which has exercised its discretion on sentence, unless the sentence imposed is manifestly excessive or so low as to amount to a miscarriage of justice. Counsel made reference to the case of **Kiwalabye versus Uganda, SC Criminal Appeal No. 143 of 2001** as cited in **Kimera Zaverio versus Uganda, CA Criminal Appeal No. 427 of 2014.**

6] Mr. Kunya then specifically addressed the mitigating factors presented for the appellant. He submitted that he was a first time offender, of a youthful age of 35 years at the time he was sentenced, and thus capable of reforming and being re-integrated into society. He also mentioned the fact that the appellant had family responsibilities of two children, was remorseful, and had saved court's time and resources when he pleaded guilty. In comparison to the given sentence, Mr. Kunya cited the decision of **Mulumba Kaggwa & Anor versus Uganda, CA Criminal Appeal No. 331 of 2009,** that cited **Kimera Zaverio versus Uganda (supra),** in the latter, where a sentence of life imprisonment for murder was reduced by this honorable court to 17 years' imprisonment. He argued then that the appellant who had pleaded guilty, deserved a more lenient sentence.

7] In conclusion, Mr. Kunya prayed that this honorable 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

8] As a precursor to her submissions, Ms. Nakafeero raised a preliminary objection that the one ground of appeal offended Section 132(1)(b) of the Trial on Indictments Act (TIA) and prayed that it should be struck out. She nonetheless, addressed the merits of the appeal.

9] Ms. Nakafeero agreed with her learned friend on his submissions on the law with regard to powers of the appellate court when making a decision to interfere with a sentence. She in that regard cited the decisions of **Wamutabaniwe Jamiru versus Uganda, SC Criminal Appeal No. 74 of 2007** which was in agreement with **Kamya Johnson Wavamunno versus Uganda, CA Criminal Appeal No. 16 of 2000.** However, she did not consider the sentence imposed as harsh or excessive, because the offence attracts the maximum sentence of death and when the sentencing range provided in Schedule 3 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013, (hereinafter Sentencing Guidelines), mentions a starting point of 30 years to death. Ms. Nakafeero in addition considered as baseless, the argument that the trial Judge omitted to consider other mitigating factors presented for the appellant. She argued strongly that since the appeal emanates from plea bargain proceedings, the plea bargain when confirmed, formed part of the

record and the appellant was as such, estopped by the provisions of Rule 12 (1) (g) Judicature (Plea Bargain) Rules 2016 (hereafter Plea Bargain Rules), to file an appeal contesting sentence.

10] Ms. Nakafeero argued further that in arriving at the sentence, the trial Judge made a comprehensive consideration of both the mitigating and aggravating factors. She concluded then that the sentence that was meted out to the appellant was not harsh and the Court rightly directed itself on the law and the Plea Bargain Rules. She prayed that this honorable court upholds the sentence and dismisses the appeal.

Analysis and Decision of Court

11] We have carefully studied the court record, considered the submissions for both counsel, and the law and authorities cited therein. The single issue for court's determination is whether the sentence of 16 years 8 months and 4 days' imprisonment imposed upon the appellant, was harsh and manifestly excessive in the circumstances of the case.

12] The powers of this Court on first appeal from a decision of the High Court, is well settled. It is provided under **Rule 30 (1) (a) Rules of this Court that:**

> *"On any appeal from the decision of the High Court acting in the exercise of its original jurisdiction, the court may-*
>
> *a. Reappraise the evidence and draw inferences of fact..."*

When reviewing the mandate of this Court, the Supreme Court decided in **Kifamunte Henry versus Uganda, Criminal Appeal No. 10 of 1997,** that 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 judgment appealed from but carefully weighing and considering it."*

Also see: Kyalimpa Edward versus Uganda, SC Criminal Appeal No. 10 of 1995.

13] The general principle of the law is that, the powers of this Court to interfere with a sentence imposed by the High Court are quite limited. In **Wamutabaniwe Jamiru versus (supra)** the Supreme Court was in agreement with their earlier decision of **Kamya Johnson Wavamunno versus Uganda, (supra)** that the appellate court can only interfere:

> *If the sentence that was imposed was manifestly excessive or so low as to amount to a miscarriage of justice, or where a trial court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."*

Similarly, under Rule 12 (1) (g) of the Plea Bargain Rules, appeals against negotiated sentences are limited only to legality or severity of sentence, or where a Judge pronounces a sentence outside the agreement.

ELK

14] At pages 11 to 17 of the record, we found a plea bargain agreement duly signed by the prosecution and the appellant under which the appellant pleaded guilty to the offence of murder and agreed with the prosecution to a sentence of 18 years' imprisonment. We have put the plea taking process to fresh scrutiny. Having done so, we have found serious irregularities which although not raised in the appeal, could vitiate the recording of the plea bargain agreement. For clarity, we shall reproduce part of the proceedings during which the agreement was entered on the record:

Prosecution:

The accused person is in court for plea taking on plea bargain.

Defense Counsel:

The accused's rights were explained to him under rule 12 and we are ready to proceed.

Court:

The indictment read and explained to the accused person in Luganda.

Accused:

I have heard and understood the indictment. It's true.

Court: *Plea of guilty is recorded against the accused person.*

State:

The brief facts and aggravating factors and mitigating factors are on page 10 of the agreement. We have agreed for 18 years. (sic)

Sentence

Defense Counsel:

The accused person has been on remand since 6/7/201(sic). The period spent on remand is 1 year, 3 months and 26 days. I pray that time spent on remanded be considered.

Court:

I have considered the bargain between the state and accused person for 18 years sentence for murder. I will subtract the period spent on remand of 1 year, 3 months and 26 days from years. I will sentence the convict to serve a period of 16 years, 8months and 4 days in prison.

Signed

Judge

2/11/17.

15] It is evident from the record that during the pre-trial proceedings on 2/11/2010, Mr. Kumbuga the appellant's counsel informed Court that he had explained to his client his rights under Rule 12 of the Plea Bargain Rules. Beyond that, the procedure for proper plea taking and sentencing by the Court was never followed. We note three serious omissions by the Court:

a. The brief facts were not read and explained to the appellant as required by law
b. Due to number (a) above, the appellant was never asked to confirm if the facts were true to ensure that his plea of guilty was unequivocal.
c. The learned trial Judge proceeded to sentence the appellant without first convicting him.

16] This Court has in the earlier cases of **Oketch Simon versus Uganda, CA Criminal Appeal No. 007 of 2018** and **Oroni Basil versus Uganda, CA Criminal Appeal No. 142 of 2018,** found that failure to follow the correct procedure for recording a plea bargain agreement results into a miscarriage of justice. Although this Court did not interfere with what was agreed in the agreement, in both cases, the proceedings for recording the agreement were set aside with an order that the cases be placed before a new Judge of the High Court to record the proceedings afresh. We agree with both decisions and the following are our reasons:

17] A plea bargain precedes plea taking. Thereafter, the Court is mandated to take the plea and follow the procedure provided under sections 50 - 63 of the Trial on Indictments Act (TIA). Section 60 of the TIA provides as follows:

Pleading to indictment.

The accused person to be tried before the High Court shall be placed at the bar unfettered, unless the court shall cause otherwise to order, and the indictment shall, be read over to him or her by the Chief registrar or other officer of the court, and explained if need be by that officer or interpreted by the interpreter of the court; and the accused person shall, be required to plead instantly to the indictment……"

18] Once the charges have been read and explained, the accused shall be asked to take a plea instantly to what has been read. It is expected in terms of the plea bargain agreement that the accused

pleads guilty and a plea of guilty is entered whereupon the facts are read back as such, the court will be able to establish from the answers given by the accused whether the plea is equivocal or unequivocal. Under Section 63 of the TIA, where the accused pleads guilty, a plea of guilty shall be entered and subsequently the presiding Judge shall establish the veracity of the plea before conviction on entering a plea of guilty.

19] The procedure for recording a plea of guilty was set out in the now well followed decision of the East African Court of Appeal. It was held in **Adan Inshair Hassan** versus **The Republic [1973] I EA 445. Spry V - P at pages 446 447** stated 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 understands. 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. The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It does not infrequently happen that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction".

20] We observe that sections 60 - 63 of the TIA were not followed. The result is that the sentence of the appellant was unlawful. We find so because the proper procedure was not followed and there was even no conviction before a sentence was imposed. We therefore allow the appeal and set aside the sentence of the appellant. There was no objection to the plea bargain agreement itself and we equally have no reason to interfere with it. In the premises, we order that the file be sent back to the High Court, and placed before a new Judge who shall take the appellant's plea afresh, on the basis of the plea bargain agreement on record. The new Judge should follow the correct procedure of plea taking, conviction and sentencing as stipulated under the TIA and decided cases. In particular, the facts of the case should be confirmed and read out to the appellant to confirm, dispute or vary, as the case may be.

21] Accordingly, we have found merit in the appeal and it is allowed in the terms above.

Dated at **Kampala** this ..... day of..... **2024.**

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HON. CHEBORION BARISHAKI
JUSTICE OF APPEAL

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HON. HELLEN OBURA
JUSTICE OF APPEAL

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HON. EVA K. LUSWATA
JUSTICE OF APPEAL