THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT ARUA

(Coram: Kiryabwire, Mulyagonja, & Luswata, JJA)

CRIMINAL APPEAL NO. 0486 OF 2015

BETWEEN

OTTO RICHARD:: APPELLANT

AND

UGANDA:: RESPONDENT

(Appeal from the Judgment of the High Court sitting at Arua in Criminal Session Case No. 434 of 2013 delivered by Justice Margaret Mutonyi on 8th day of April, 2015)

JUDGMENT OF THE COURT

Introduction

1] This appeal arose from the decision of the High Court of Uganda in which the learned trial Judge convicted the appellant of the offence of aggravated defilement, contrary to Sections 129 (3) and (4) (a), (b) and (c) of the Penal Code Act. It was stated in the indictment that on the 26th day of October, 2013, at Luny Pali Village in Agago District, the appellant performed a sexual act with AM a girl aged 12 years old when he is a paternal uncle to the victim and a person infected with HIV (Human Immune Virus).

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Brief Facts

2] At the hearing of 8/4/205, counsel for the State submitted that the parties had consulted with the relatives and agreed on a term of 20 years' imprisonment. Counsel then filed a plea bargain agreement dated 8/4/2015 which shows that the appellant had agreed to a term of *"30 years' imprisonment inclusive of period on remand"*. The brief facts of the case were recorded in paragraph 3.0 of the agreement. It was stated briefly that on 26/10/2013, at Luny Pali village in Agago District, Otto Richard had sexual intercourse with AM a girl aged 12 years. He was HIV positive. The Judge admitted the agreement onto the record and endorsed it. She subsequently signed a commitment warrant indicating that the appellant was to serve a term of 30 years' imprisonment.

3] The appellant being dissatisfied with the decision of the learned trial Judge, lodged an appeal to this Honorable Court on the following grounds;

i) That the learned trial Judge erred in law and fact when she convicted and sentenced the appellant to 30 years' imprisonment without the accused pleading guilty to the charge of aggravated defilement.

ii) The learned trial Judge erred in law and fact when she relied on the plea bargain agreement signed by the appellant who is illiterate in a language that he did not understand.

Representation

4] At the hearing of the appeal, the appellant was represented by Ms. Daisy Patience Bandaru on State brief, while the respondent was represented by Ms. Fatinah Nakafeero, a Chief State Attorney. The parties filed written submissions before the hearing of the appeal as directed by this Court. Counsel for both parties applied and the Court adopted their written arguments as their submissions in the appeal. In addition, during the proceedings on 20/11/2023, Ms. Fatinah Nakafero after conceding that there were illegalities in the procedure followed in recording the agreement, prayed for a retrial. After being questioned on the feasibility of a retrial eight years after the appellant was convicted, she insisted that the prosecution is in a position to trace the victim and witnesses or to revisit the plea bargain. We now turn to counsels' submissions which we shall relate briefly.

Ground One

Submissions for the appellant

5] Ms. Bandaru first referred to the guarantees under Article 28 of the 1995 Constitution of the Republic of Uganda as amended. She submitted in particular that in a criminal trial, a person is presumed innocent until proven guilty and must be afforded a fair hearing. She then pointed out that when the matter first came up before the trial court, the appellant never pleaded guilty to the offence of aggravated defilement and the matter was set down for hearing. It was never heard and instead, the prosecution introduced a plea bargain agreement (hereinafter PBA) already

signed by the appellant, his counsel and prosecution. That agreement was admitted in Court and endorsed by the Judge although the appellant never took a plea.

6] Ms. Bandaru submitted further that the inference of those proceedings is that by opting for a PBA, the appellant had the intention to change his plea from not guilty to a plea of guilty. That however, the Judge did not give him an opportunity to do so, and instead convicted and then sentenced him to 30 years' imprisonment. Ms. Bandaru opined that the proceedings were irregular in contravention of Section 60 and 63 of the Trial on Indictment Act (TIA).

7] Ms. Bandaru continued to submit that in this case, there is no indication on the record that the appellant changed his plea from not guilty to guilty, and therefore it was wrong for the trial Judge to assume that her endorsement of the agreement served as an alternative to plea taking, which is mandatory. She cited the decision of this Court in **Ndidde Khalid & Another versus Uganda, Criminal Appeal No. 0237 of 2017 and 518 of 2016** and **Adan Inshair Hassan V Republic [1973] EA 445**, in that regard.

Ms. Bandaru concluded that the omission to conduct plea taking was fatal and fundamentally affected the rights of the appellant who was in essence convicted and sentenced to a prison term without pleading guilty to the offence of aggravated defilement. Thus, Counsel invited this Court to find so and hold that this ground of appeal succeeds.

Ground Two

8] Ms. Bandaru submitted that in the agreement, the appellant's recorded education history is that he is an illiterate man, stated to be a primary one leaver. That the assumption then is that he could neither read nor understand English, the language in which the agreement was recorded. She continued that no certificate of translation was attached to the agreement and save for his lawyer stating that he had explained the contents of the agreement to the appellant in Luo language, there's nothing on record to show that the appellant signed the agreement after it had been translated to him. In addition, she contended that Mr. Walter Okidi who acted as translator, made no oath to confirm that he was sworn before making the translation which would make the agreement defective.

9] In conclusion, Ms. Bandaru prayed that this Court makes a finding that the proceedings in the trial court were irregular which occasioned a miscarriage of justice to the appellant. She suggested a speedy re-trial by the High Court as the most justiciable remedy since the appellant was serving his term since 2015.

Respondent's submissions

10] In response, Ms. Nakafeero invited us to consider that plea bargain agreement proceedings are governed by the Judicature (Plea Bargain) Rules 2016, which in Regulation Rule 12(1) (g) restrict the right of appeal only to legality or severity of sentence, or where the Judge imposes a sentence more severe than what is provided in the law or, where a sentence is imposed outside what

was agreed in the agreement. She agreed with Ms. Bandaru that the parties and the court were all bound by the agreement which upon the confirmation by the court became part of the court record. Ms. Nakafeero then conceded that it was a fatal error for the judge not to take and record the plea, and then proceed to pass a sentence of 30 years' imprisonment which was quite different from the 20 years that the parties had agreed to in agreement.

11] Citing numerous authorities Ms. Nakafeero in addition drew our attention to the settled position that an appellate court will not normally interfere with a sentence which is a matter of discretion of the trial judge. That it will only do so where it is shown that the sentence is manifestly excessive or so low as to amount to a miscarriage of justice, or where the court fails to take into account an important matter or imposes a sentence that is wrong in principle. She referred to the decisions in **Wamutabaniwe Jamiru versus Uganda, SC Criminal Appeal No. 74 of 2007,** and **Kyalimpa Edward versus Uganda, SC Criminal Appeal No. 10 of 1995;** that followed **R V De Haviland (1993) 5 Cr. App. R 109.**

12] In conclusion, Ms. Nakafeero conceded as had been raised by Ms. Bandaru, that there are elements of illegality in the procedure that the Judge adopted to admit the agreement. She then prayed that Court considers the provisions of the Plea Bargain Rules and S.11 of the Judicature Act, to quash the conviction and sentence given by the learned trial Judge and order for a retrial. To support that

submission, Ms. Nakafeero relied on the case of **Mugisha Wilson versus Uganda, CA Criminal Appeal No. 309 of 2010** where this Court following **Tuuni Stephen & Anor versus Uganda, CA Criminal Appeal No. 190/2011,** set aside a conviction and sentence and ordered a retrial in respect of an appellant who had served 10 years of imprisonment.

Analysis and Decision of the Court

13] We have carefully studied the court record, and considered the submissions filed by both Counsel. We have in addition considered the law and authorities counsel cited as well as those sourced by the Court. We are mindful that this is a first appeal to this Court and governed by the provisions of Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions SI 13-10 of (Rules of Court). We are in accordance with the law required to carefully and critically review the record from the court below and in doing so, reappraise the evidence and make inferences of fact, but taking caution that we did not see the witnesses testify and also, without disregarding the decision of the High Court. In **Kifamunte Henry versus Uganda, SC Criminal Appeal No. 10 of 1997,** it was held that this Court has a duty to:

> *"...review the evidence of the case and 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."*

Also see: Kyalimpa Edward versus Uganda, SC Criminal Appeal No. 10 of 1995. Alive to the above-stated duty, we shall proceed to resolve the two grounds of appeal as below;

Ground One

14] Under this ground of appeal, the appellant contested the manner in which his plea was taken and asserted that he was convicted and sentenced for 30 years' imprisonment without pleading guilty to the offence of aggravated defilement. His counsel prayed that we set aside the sentence and consider ordering a re-trial.

15] The principles guiding an appellate court when considering an appeal against a sentence are well settled. Sentencing is a matter of discretion, and we may interfere in the decisions of the lower court, only in cases where it is shown that:

a. The sentence is illegal.
b. The sentence is manifestly harsh or excessive or too low as to amount to an injustice.
c. There has been failure to exercise discretion.
d. There was failure to take into account a material factor.
e. An error in principle was made.

See for example, ***Ogalo S/O Owoura versus R (1954) 21 E.A.C.A. 270,*** **Kyalimpa Edward versus Uganda, (supra), Kamya Johnson Wavamuno versus Uganda, SC Criminal Appeal No. 16 of 2000 and Kiwalabye versus Uganda, SC Criminal Appeal No. 143 of 2001.**

16] We have confirmed from the record that when the case was first called up for mention on 16/3/2015, the appellant took plea. He denied the charge and the matter was adjourned a few times until 8/4/2015 the date was fixed for hearing. On that day, the matter did not go to trial. Instead, the prosecutor informed the court that the parties had entered into a plea bargain by which the appellant had agreed to serve a term of 20 years' imprisonment. The Judge engaged the victim and then endorsed the agreement. For clarity we have reproduced part of the proceedings during which the agreement was entered on the record.

16th March 2015

State: *It is for plea taking.*

Court: *Charge read and explained to the accused in Luo.*

Accused: *I understand the charge I don't know anything concerning that allegation.*

Court: *Plea of not guilty entered.*

State: *I intend to call four witnesses.*

Court: *Case fixed for hearing on 19 l 3l 2O15 at 8am. Accused further remanded.*

19th March, 2015

Accused in Court

Representatives are still the same.

State: *The case is for hearing. There is no proof of service. We pray for adjournment.*

Court: *The Prosecution is also given last adjournment to*

7/14/2015 at 9am.

7th April, 2015

State: *The case is for hearing. I have an expert witness in Court but we have agreed on the medical evidence.....*

State: *I pray that the matter be stood over until afternoon since the witnesses are given Ruling. (Sic!)*

Defence: *No objection. The village is not Patongo but Lamit.*

Court: *Matter stood over upto 2:30pm.*

8th April 2015

State: *The case was fixed for hearing today but both the State and Defense have agreed to enter a Plea Bargain Agreement after consulting with relatives, we agreed on the term of 20 years' imprisonment. We tender the said agreement for confirmation.*

Victim: *I propose 30 years.*

Court: *The Plea Bargain Agreement is explained to the convict and after accepting to the terms, it is endorsed.*

.....

Margaret Mutonyi

Judge

8th April, 2015."

17] We have put both the plea bargaining agreement and the plea taking process to fresh scrutiny. Having done so, we found serious irregularities some of which were raised by both counsel. In particular, we noted the following:

a) There is no indication that counsel for the appellant explained to him his rights as an accused person who had opted to plead guilty.

b) On 16/3/2015, the appellant denied the charge of aggravated defilement. Subsequently, on 8/4/2015, the Judge did not administer a fresh plea before endorsing the agreement. Therefore, the plea of not guilty previously entered on the record was maintained on the record. A plea bargaining agreement cannot be enforced before the one offering it has pleaded guilty to the charge.

c) There is no indication that a summary of facts was read out by the prosecutor or that the appellant was invited to confirm or reject any facts.

d) The mitigating and aggravating factors informing the agreement were not recorded or mentioned by the Judge

e) The Judge proceeded to sentence the appellant without first convicting him.

f) Although the parties plainly indicated that they had agreed on a prison term of 20 years, after engaging the victim who was present in Court, the Judge instead sentenced the appellant to 30 years' imprisonment

18] It is evident from the record that after administering the plea on 16/3/2015, the Judge omitted to repeat that procedure on the date she endorsed the agreement. She may have erroneously considered that the agreement was enough to indicate that the appellant had changed his plea. A plea bargain precedes plea

taking but does not replace that very important step of the trial. The decision of this Court provided by the appellant's counsel is instructive. It was held in **Ndidde Khalid & Another versus Uganda, (supra)** as follows:

> *"...this was one of the cases taken under the plea bargaining procedure .....We wish to observe that this procedure did not replace the law with regard to the taking of plea from accused persons. It is a pre-trial procedure that may lead to the taking of plea from accused persons. It is a pretrial procedure that may lead to the conclusion of criminal case by way of plea of guilty. Nevertheless, it does not replace the obligation on the court to plea taking in accordance with the law as laid down in both statute and established case law..."*

19] The process of plea taking is provided for under sections 50-63 TIA. Section 60 TIA provides as follows:

Pleading to indictment.

> *"The accused person to be tried before the High Court shall be placed at the bar unfetterd, 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..."*

The East African Court of Appeal in the now well followed decision of **Adan Inshair Hassan versus The Republic (supra)** explained the process in detail. It was held that:

> *"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 a language which he can speak and understand. The Court should explain to him the essential ingredients of the charge and should be asked if he admits them. If he does admit, his answer should be recorded as nearly as possible in his own words and then a plea of guilty formally entered. The prosecutor should then be asked to state the facts of the case and the accused be given an opportunity to dispute or explain the facts or to add any relevant facts he may wish the court to know. If the accused does not agree with the facts as stated by the prosecutor or introduces new facts which, if true might raise a question as to his guilt, a change of plea to a one of not guilty should be recorded and the trial should proceed. If the accused does not dispute the alleged facts in any material respect, a conviction should be recorded and further facts relating to the question of sentence should be given before sentence"

20] In this case, no plea was administered and the appellant was sentenced without a conviction. It was also wrong for the Judge not to have given due consideration of the agreed sentence of 20 years' imprisonment. The plea bargaining agreement is an agreement like any other, and at its core, is a contract between the State and the accused. It must be respected by the Court more so because it involves one party who has relinquished a host of his /her constitutional guarantees in return for a speedy trial and a certain sentence. This Court when dealing with similar facts has previously advised as follows:

"plea bargaining creates an agreement between the prosecutor and the accused with all the features of an agreement in the law of contract. The court plays the role of a regulator of the agreement to ensure that the agreement conforms to the needs of the justice of the

> *case. But the court* is *not privy to the agreement and cannot redefine it. What the court may do* is *to reject a plea bargain agreement where it is satisfied that the agreement may occasion a miscarriage of justice. . ..*
>
> *It* is *because of the seriousness accorded to a plea bargain that the rules prohibit the substitution of a judge imposed sentence in the context of plea bargain context." (sic)*

See **Tamuzadde Hamidu versus Uganda, CA Criminal Appeal No.456 of 2014** followed in **Agaba Emmanuel & 2 Others, CA Criminal Appeal No. 139 of 2017**.

21] We appreciate that at the time this sentence was given, there was no legislation in place to specifically guide the Court in that respect. However, by then, the plea bargaining process was taking root in our criminal justice system. The only role the Judge could play was to advise the accused whether the Court would follow or reject the bargain that was presented. It was judicious for the Judge to have sought the views of the victim, but it was wrong for her to have then regarded those views as overriding to what was agreed between the two parties as the appropriate sentence. Earlier on in the proceedings, the prosecution had submitted that the victim's relatives had been consulted before the sentence was agreed upon. The victim could not change that position in Court.

22] A close scrutiny of the agreement shows that the agreed sentence of 20 years' imprisonment was changed to 30 years' imprisonment, probably after the victim's submission in Court. It is a surprise that the appellant's counsel did not raise any

objection to this turn of events in the proceedings, when his client was clearly being subjected to a gross injustice. Much of what happened here is now prohibited by Rule 15(b) of the Plea Bargaining Rules that were passed in May 2016 as the formal guide to how trials involving plea bargains should be conducted.

23] This Court has in the earlier cases of **Oketcho Simon versus Uganda, CA Criminal Appeal No. 007 of 2018** and in **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.

24] In conclusion, we find that the trial Judge made serious errors with respect to many aspects of the plea bargain and trial of the appellant. She then gave an unlawful sentence, one imposed without convicting the appellant and after ignoring the sentence that was agreed upon between him and the State prosecutor. It is a sentence that we are prepared to interfere with, and do set it aside.

25] Accordingly ground one succeeds.

Ground Two

26] In ground two, it is stated that the Judge relied on a plea bargain agreement signed by the appellant an illiterate who did not understand the language in which it was written. The record indicates that after the agreement was presented to court, the Judge consulted the victim and then recorded that she had explained the contents of the agreement to the appellant in a language that he understood, and that he accepted its contents. After which he signed the agreement. It is not indicated on the record that the Judge recorded the appellant's response to her explanation. None the less, it is evident in the agreement itself that Mr. Walter Okidi Ladwar, the defence counsel, indicated by appending his signature to the agreement, that he had explained the contents of the agreement to his client the appellant, before he signed. No contest was raised at the trial that the appellant did not understand what he signed. However, as we have found, the Judge completely ignored the agreed sentence which was the fundamental item of the agreement and upon which the appellant was prepared to plead guilty to the offence.

27] Accordingly, we find no merit in ground two and it fails.

28] We conclude that irrespective of our findings with regard to the second ground, this appeal has substantially succeeded. The trial Judge imposed an illegal sentence that we have set aside. Since the appellant offered a sentence of 20 years that the State prosecutor agreed with, it must be allowed to stand.

29] In the premises, we order that the file be sent back to the High Court, and placed before another Judge who shall take the appellant's plea afresh, on the basis of the plea bargain agreement on record. The Judge should follow the correct procedure of plea taking, conviction and sentencing as stipulated under the TIA and decided cases. This being an old case, our decision must be expeditiously executed in order to meet the ends of justice.

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

Dated this ..... **day of** ..... **2024.**

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HON. GEOFFREY KIRYABWIRE
JUSTICE OF APPEAL

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HON. IRENE MULYAGONJA
JUSTICE OF APPEAL

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HON. EVA K. LUSWATA
JUSTICE OF APPEAL