THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
HOLDEN AT FORT PORTAL
CRIMINAL APPEAL NO. 27 OF 2021

{Coram: Egonda-Ntende, Bamugemereire, Mugenyi, JJA}

TAYEBWA MATIYA :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(An appeal against the decision of Vincent Emmy Mugabo J in the High Court of Uganda at Fort Portal dated 27th October 2020, in Criminal Session No. 259 of 2015).

JUDGMENT OF THE COURT

Introduction

The appellant was indicted for the offence of Aggravated Defilement contrary to **Section 129 (3), (4) (a) & (c) of the Penal Code Act, Cap 120**. It was alleged that on the 10th day of May 2015 at Kyakikokwa Village, Kitongole Parish, Kisojo Sub-County in Kyenjojo District, the appellant performed a sexual act on KD, a minor aged 4 years. He entered a plea bargain and was sentenced to 17 years' imprisonment on his own plea of guilty.

Background

The appellant was cohabiting with Beth Katusabe, KD's mother and was a stepfather to the said victim. The facts as can be ascertained from the lower court record were that on the 10th of May 2015 the appellant was at home with the children while his partner went to wash clothes at the well. He sent the other children off and

was left alone with KD. KD's mother returned home to find the appellant in the very act of performing a sexual act on KD.

She immediately reported the matter to the Local Council Chairperson and Police. He was arrested and medically examined and found to possess normal mental faculties and was HIV negative. The victim was also examined and found to be 4 years old. She had inflammation and lacerations around her private parts.

At the trial, the appellant readily pleaded guilty and was convicted, on his own plea of guilty and sentenced to 22 years and five months' imprisonment. The trial deducted the period of 5 years and 5 months the appellant had spent on remand. He was to serve a sentence of 17 years' imprisonment. The appellant being dissatisfied with the sentence sought and was granted leave to appeal against sentence only on the following ground:

Ground of Appeal

That the trial Judge erred in law and fact when he passed a manifestly harsh and excessive sentence of 22 years and 5 months' imprisonment against the appellant thereby occasioning gross miscarriage of justice.

Representation

At the hearing of the appeal, the appellant was represented by Ms. Angela Bahenzire on State brief while the respondent was represented by Ms. Sherifah Nalwanga a Chief State Attorney of the Office of the Director of Public Prosecutions. The appellant was in court.

Submissions for the Appellant

Counsel for the appellant submitted on the principles under which this court may interfere with the sentence passed by a lower court. She cited **Kyalimpa Edward v Uganda SCCA No. 10 of 1995** for the proposition that an appropriate sentence is a matter for the discretion of the sentencing Judge and this court will not normally interfere with the discretion of the sentencing Judge unless the sentence is illegal or is manifestly excessive as to amount to an injustice.

Counsel relied on **Anguipi Isaac alias Zako v Uganda CACA No. 281 of 2016** where this court reduced a sentence of 26 years to 18 years' imprisonment in a murder trial. In that case, the court considered the mitigating factors which included that the appellant being a young man aged 35 years, was capable of reforming. He was a first offender, a bread winner and was remorseful.

Counsel submitted that in the instant case which was a plea-bargain agreement the appellant was a young man with children to look after, was a first offender and that the 5 years and 5 months he had spent on remand had reformed him.

Counsel contended that even though the appellant was sentenced in accordance with the plea bargain agreement, he appeals to this court against sentence only; on grounds that the sentence handed down to him is harsh and manifestly excessive. Counsel prayed that the said sentence be set aside and substituted with a lesser sentence as this court deems fit.

Submissions for the Respondent

Counsel submitted that the appellant has no right of appeal since he entered into a plea bargain agreement willingly and voluntarily and agreed to the sentence. It was counsel's submission that when the prosecution informed the court of the plea bargain process, the appellant, through his lawyer, confirmed having understood the plea bargain process. It was counsel's contention that the trial Judge did not act on any wrong principle of the law. He sentenced the appellant in accordance with the plea bargain agreement. Counsel invited this court to find that the sentence was neither harsh nor excessive.

Counsel cited **Kobusheshe Karaveri v Uganda CACA No. 110 of 2008** for the proposition that sentencing is discretionary and is left to the sentencing Judge. This court can only interfere where the trial Judge acted on a wrong principle or where the sentence is manifestly harsh and excessive.

Counsel relied on **Lwere Bosco v Uganda CACA No. 531 of 2016**, to submit that 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 by the parties to the agreement.

Counsel urged this court to uphold the sentence and dismiss the appeal for lack of merit.

The Decision of Court

This appeal is against sentence only. The appellant in this case faulted the trial Judge for sentencing him to a term of imprisonment of 17 years, which he considered manifestly harsh and excessive.

As an appellate Court, we are constrained on how much we can intervene on the discretionary power of a sentencing Judge. It is trite that we are not to interfere with a sentence imposed by a trial court merely because we would have imposed a different sentence had we been the trial court.

We can only interfere with a sentence where it is either illegal, or founded upon a wrong principle of the law, or as a result of the trial Court's failure to consider a material factor, or that the sentence is harsh or manifestly excessive. (**See Kizito Senkula v Uganda SCCA No.24 of 2001 and Bashir Ssali v Uganda -SCCA No.40 of 2003).**

We have had the opportunity to reappraise the plea bargain process carried out in the trial court. For ease of reference, we wish to set out below the proceedings in relation to the taking of the plea:

"**State:** We proceeded on plea bargain in the case.

Defence: The indictment is true and I pray the plea bargain be presented before court.

State: The convict entered into a plea bargain in which he agreed to wave all his constitutional rights. We explained to him the facts. The aggravating and mitigating circumstances. He agreed to them, and we agreed to a sentence of 22 years and 5 months, which includes the period spent on remand of 5 years and 5 months. After it is deducted, he will serve 17 years of imprisonment. He signed the plea bargain in the presence of the advocate who also counter signed and so did the prosecution. We pray the plea bargain is admitted reinforced as agreed.

Defence: No objection. We have held a successful plea bargain and agree to the above.

Court: Did you understand the plea bargain process?

Accused: I did with my lawyer who is in the court.

Court: The court has examined the circumstances under which the offence was committed and the aggravating and mitigating circumstances, the sentence of 22 years and 5 months imprisonment is found and just. The 5 years imprisonment already spent on pre-trial remand is removed and find the sentence of 17 years imprisonment is left for the convict to be served. I so order."

The plea bargain procedure is defined under **rule 4 of the Plea Bargain Rules** in the following terms:

"The process 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 of approval by court."

This is therefore a settlement between an accused person and the prosecution where he/she accepts the offending upon a promise of a lesser sentence. **Rule 10 of the Judicature (Plea Bargain) Rules** provides that a plea bargain agreement shall, before being signed by the accused, be explained to the accused person by his or her advocate or a justice of the peace in a language that the accused understands. Where the offender has negotiated with the prosecution through an interpreter, the interpreter has a duty to attest to the fact that interpretation of the contents of the agreement was accurately conducted from the process of the negotiations through execution.

It is trite that once the parties conclude the plea-bargain process, the gist of their agreement is reduced into an agreement which binds upon both the accused and the prosecution.

We have carefully reviewed the set of documents which make the plea bargain and the process undertaken by both parties. We can safely conclude that it meets all the requisite conditions and was properly executed.

In **Lwere Bosco v Uganda (Supra)** this court observed that severity of sentence, as a ground of appeal, cannot arise out of a plea bargain. This is largely because in a plea bargain, the parties would have negotiated and agreed voluntarily. A person convicted as a result of a plea bargain may not successfully fault the trial Judge

for severity of sentence. A Judge's discretion in a plea bargain is limited to confirming a sentence which is voluntarily initiated and agreed upon. However, a ground for appeal arises where a trial Judge passes a stiffer sentence than was agreed in the plea bargain or where in the process of executing the agreement, important steps such as explaining the rights of the appellant and **Adan v R (1973) EA 445** process in entering a plea of guilty, are omitted.

In this particular set of facts, the appellant who was accused of defiling his 4year old stepdaughter agreed to enter a plea bargain with the prosecution. Both parties settled for a sentence of 22 years and 5 months' imprisonment with the obligation to deduct the five years and five months the appellant had been in pre-trial custody.

The agreement was played out in the prosecution statements:

> **"State: The convict entered into a plea bargain in which he agreed to wave all his constitutional rights. We explained to him the facts. The aggravating and mitigating circumstances. He agreed to them, and we agreed to a sentence of 22 years and 5 months which includes the period spent on remand of 5 years and 5 months. After it is deducted, he will serve 17 years of imprisonment. He signed the plea bargain in the presence of the advocate who also counter signed and so did the prosecution. We pray the plea bargain is admitted reinforced as agreed."**

In sentencing, the learned trial Judge remarked as follows:

> **"Court: The court has examined the circumstances under which the offence was committed and the aggravating and mitigating circumstances, the sentence of 22 years and 5 imprisonment is found and just. The 5 years imprisonment already months spent on pre-trial remand is removed and find the sentence of 17 years imprisonment is left for the convict to be served. I so order"**

In view of the above findings, our conclusion is that the learned trial Judge in a step-by-step process, adhered to procedure for plea bargain. The sentence of 22 years was neither harsh nor excessive.

We find, however, that the learned trial Judge omitted to deduct the extra five months the appellant spent on remand and only credited five years. It is our view that another six months can be deducted from his sentence due to the above error.

Having ascertained that the bargain agreement was properly conducted, we find no merit in this part of the appeal. The appellant will serve a sentence of 16 years and seven months' imprisonment with effect from 27th of October 2020 which was the date of conviction. The appeal succeeds in part.

We so order.

Dated at Kampala this.....10th.....day of.....November..... 2023.

Fredrick Egonda-Ntende
JUSTICE OF APPEAL

Catherine Bamugemereire
JUSTICE OF APPEAL

Monica K. Mugenyi
JUSTICE OF APPEAL