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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBALE
CRIMINAL APPEAL NO. 0142 OF 2018

(Coram: Obura, Bamugemereire & Madrama, JJA)

ORONI BASIL} APPELLANT

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VERSUS

UGANDA} RESPONDENT

*(Appeal from the decision of the High Court of Uganda at Mbale in
Criminal Session Case No 0177 of 2014 before Batema J delivered on 13th
December, 2016)*

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JUDGMENT OF COURT

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The appellant was charged with three counts of the offence of aggravated defilements of 3 girls of minority age contrary to section 129 (3) and (4) of the Penal Code Act. The appellant was charged on three counts of aggravated defilement the particulars of which were that the appellant on 17th July 2014 at Agolotom Village in Kumi district performed a sexual act on AJ, a girl aged five years when he was HIV-positive. On the second count, the appellant was charged with aggravated defilement and the particulars were that on 17th July 2014 at Agolotom Village in Kumi district the appellant performed a sexual act on one AV, a girl aged four years when he was HIV positive. On the third count, the appellant was charged with aggravated defilement the particulars of which were that on the 17th of July 2014 at Agolotom Village in Kumi district the appellant performed a sexual act on ALS, a girl aged seven years when he was HIV positive.

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The prosecution and the appellant executed a plea bargain agreement whereupon the appellant pleaded guilty and was sentenced to 21 years' imprisonment on each count.

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The appellant was aggrieved by the sentences impose on him and he appealed to this court, with the leave of court under section 132 (1) (b) of the Trial of Indictment Act, cap 23 against sentence only on the grounds that:

- 5 1. The learned trial judge erred in law and fact when he convicted and sentenced the appellant based on a plea bargain agreement without following the due process.
2. The learned trial judge erred in law and in fact when he passed a sentence without considering the period spent on remand.

10 At the hearing of the appeal, the learned Senior Assistant DPP Mr. Oola Sam appeared for the respondent and learned Counsel Mr. Geoffrey Nappa appeared for the appellant. The court was addressed in written submissions. However, when the appellants counsel interacted with the court, he stated that his brief was only to challenge sentence on the

15 ground that the period on remand was not considered. The appellant was arrested on 13th August 2014 and was convicted and sentenced on 13th December 2016, a period of two years and 4 months. The Senior Assistant DPP conceded that the period the appellant had spent on remand had not been considered by the time of imposing the sentence.

20 The court was also addressed in written submissions which we have considered.

 On the first ground, the appellant's counsel submitted that the appellant voluntarily pleaded guilty to the three counts of the offence. He submitted that the plea bargain agreement executed is governed by the **Judicature**

25 **(Plea Bargain) Rules of 2016** and rule 4 thereof defines plea bargain as a process between an accused person and the prosecution in which the accused person agrees to plead guilty in exchange for pleading to a less serious offence or for recommendation of a particular sentence subject to approval by the court. Further the appellant's counsel relied on rule 12

30 of the Plea Bargain Rules and submitted that it requires that the presiding judge informs the accused person about his rights during the process and should satisfy itself that the accused person understands.

 He contended that the appellant never took a plea and nobody ever read back to him facts. What is on record simply shows that the charge was

35 read back to the appellant in a court with no jurisdiction (Magistrates Court) and for purposes of the accused knowing the charges brought against him. The appellant's counsel relied on **Lwere Bosco Vs Uganda; Criminal Appeal No 531 of 2016** for the right procedure in proceeding on

5 the basis of a plea bargain and entering plea thereunder. In that case, the court found that the failure to follow the procedure for recording a plea bargain agreement occasioned a miscarriage of justice and set it aside. The appellant's counsel contended that there was no evidence to show that the plea bargain agreement was ever interpreted to the appellant
10 and no evidence to show that the appellant understood the contents therein. He contended that the plea bargain agreement offended the dictates of the law and the court should use its discretion to set it aside and consequentially quash the conviction of the appellant and set the sentence aside.

15 On ground 2 as to whether the learned trial judge erred in law and fact when he passed a sentence without considering the period the appellant spent on remand, the appellant's counsel submitted that the offence was committed in July 2014 and the appellant was convicted by the trial court on 13th December 2016 which means that he had spent close to 2 years
20 and six months on remand before his conviction and sentence. He relied on article 28 (8) of the Constitution and submitted that the sentence was an illegal sentence for failure to take into account the period the appellant had spent in pre-trial detention prior to his conviction and sentence.

25 In reply, the respondent's counsel conceded that the procedure for plea taking under section 60, 63 and 82 of the Trial on Indictment Act was not followed and therefore the procedure for the plea taking was defective. He cited **Adan Vs Republic (1973) 1 EA 443** where the East African Court of Appeal set out the procedure to be followed in plea taking.

30 With regard to grounds 2, the respondent's counsel submitted that ground 2 is dependent on the resolution of ground 1. He submitted that since no plea was taken, no proper conviction was entered and ground 2 of the appeal is redundant and does not merit consideration by this court. The respondent's counsel prayed that the conviction and sentence of the
35 appellant to be set aside and a retrial ordered.

Consideration of the appeal.

We have carefully considered the appellant's appeal, the submissions of counsel as well as the authorities cited and the record.

5 On 13th December 2016, the matter proceeded before the learned trial judge whereupon the appellant's counsel Mr Henry Kunya appearing on state brief stated that they were unable to split the file due to the bureaucratic type procedures with the regional police commander. That the state renegotiated and the accused was willing to serve 21 years on
10 each count whether the file is split or not. Thereafter the accused stated as follows:

I voluntarily plead guilty. I defiled J aged 5 years and another victim A aged 4 years. I did bad. I am HIV positive. I am on treatment. The other girl is S aged 6 years.

15 Thereafter the learned trial judge ruled as follows.

Court:

The plea bargain agreement is accepted. Accused shall serve the sentence of 21 years on each count.

Obviously no plea was taken and the procedure for plea taking was not
20 followed.

Plea bargaining is governed by the **Judicature (Plea Bargain) Rules, 2016**. Rule 12 of the **Judicature (Plea Bargain) Rules** provides that 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. The
25 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. Further, the accused person shall freely and voluntarily without threat or use of force execute the agreement with full understanding of all matters. Under Rule 12 (5) of the **Judicature (Plea Bargain) Rules**, a plea bargain agreement is executed before the Judicial
30 Officer who has been satisfied as stated above. It provides that:

(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
35 accused.

The plea bargain precedes plea taking. Thereafter the court shall take the plea and follow the procedure under Trial on Indictments Act, Cap 23 and specifically these are set out under sections 60 – 63 of the Trial on Indictments Act. Section 60 of the Trial on Indictments Act provides that:

5 60. 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, unless, where the accused person is entitled to service of a copy of the indictment, he or she shall object to the want of such service, and the court shall find that he or she has not been duly served with a copy.

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Where 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 shall plead guilty and a plea of guilty entered whereupon the facts are read back and with the assistance of court, the court will establish from the answers of the accused whether the plea is equivocal or unequivocal.

Under Section 63 of the Trial on indictment Act, 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. Section 63 of the TIA provides that:

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63. Plea of guilty.

If the accused pleads guilty, the plea shall be recorded and he or she may be convicted on it.

30 The procedure for recording a plea of guilty was set out in **Adan v Republic [1973] 1 EA 445 by Spry V – P** who read the judgment of the East African Court of Appeal stated at pages 446 – 447:

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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 understand. 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

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5 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
10 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
15 to assess sentence. It not infrequently happens 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 Because sections 60 – 63 of the Trial on Indictments Act, were not
followed, the conviction of the appellant was unlawful. We therefore
allow the appeal and set aside the conviction and sentence of the
appellant.

We note that the appellant appealed against sentence only and accepted
25 the plea bargain agreement. In the premises, the file shall be sent back
to the High Court to take the plea of the appellant again on the basis of
the plea bargain agreement on record which shall be explained in the
manner stipulated in the rules and the procedure for plea taking under
the Trial on Indictment Act, followed. Thereafter, if the appellant
30 maintains his plea of guilty, the trial court shall follow the procedure in
conviction and sentence.

We accordingly allow the appeal and order that the file be sent back to
the trial court to expeditiously take the plea of the appellant and deal with
the matter as stipulated by the law.

35 Dated at Mbale the 18th day of July 2022 2023


Hellen Obura

Justice of Appeal



Catherine Bamugemereire

Justice of Appeal



Christopher Madrama

Justice of Appeal