THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

[Coram: Geoffrey Kiryabwire, Muzamiru M. Kibeedi & Margaret Tibulya, JJA]

CRIMINAL APPEAL NO. 199 OF 2016

(Arising from the High Court Criminal Session Case No.423 of 2014 at Fort Portal)

BETWEEN

KUWANGE EMMANUEL ..... APPELLANT

AND

UGANDA ..... RESPONDENT

(An appeal from the Judgment of the High Court of Uganda Hon. Mr. Justice Batema N.D.A J delivered on 5th May 2016)

JUDGMENT OF THE COURT

Introduction

The Appellant was indicted and convicted of the offence of Murder Contrary to Sections 188 and 189 of the Penal Code Act Cap 120.

The Facts

The evidence presented at the trial showed that the Appellant is the biological father of Agaba Angella, a three-month-old child. The child's mother, Katusabe Edina, had left the marital home after a disagreement with the Appellant on 11th June, 2014. On 12th June 2014, the Appellant went and picked the deceased from the mother and that was the last time that the child was ever seen again. The matter was reported to the police and the Appellant arrested and charged with Aggravated Trafficking in Children Contrary to sections 3 (1) (a) and 5 of the Trafficking in Persons Act, 2009.

The case first came up for trial on 5th May 2016, the charge was amended to Murder Contrary to Sections 188 and 189 of the Penal Code Act. The Appellant pleaded guilty and entered a plea bargain agreement (PBA) to serve 20 years in prison.

Decision of the Trial Court

The Trial Judge sentenced the Appellant to 20 years' imprisonment. Dissatisfied, the Appellant appealed against sentence on the following grounds: -

That the sentence is illegal and manifestly harsh and that the Trial Judge did not put into consideration the mitigating factors.

The Respondent opposed the Appeal.

Representation

At the hearing, the Appellant was represented by Counsel Bahenzire Angella and the Respondent by Counsel Harriet Adubango, Resident Chief State Attorney ODPP. The Appellant was present.

The parties sought the leave of Court to adopt their written submissions as their legal arguments in this Appeal which leave was granted.

Powers of the Appellate Court

The case **of Oryem Richard v Uganda** Criminal Appeal No. 22 of 2014(SC) provides for the duty of the Court as thus: -

> *"We should point out at this stage that rule 30(1) of the court of Appeal Rules, places a duty on the court of Appeal, as the first appellate court to re-appraise evidence on record and draw its own inference and conclusion on the case as a whole by making allowance for the fact that it has neither seen nor heard a witness. This gives the appellate court the duty to rehear the case."*

We are alive to the duty of this court as a first appellate court as decided in the case of **Kifamunte Henry v Uganda** SCCA No. 10 of 1997 to reappraise all the evidence at trial and come up with our own inferences of law and fact. This is a first appeal and it is the duty of this court to re-evaluate the evidence, weigh conflicting evidence and reach its own conclusion on the evidence bearing in mind

that it did not see the witnesses testify **(See Pandya v** R [1957] EA p 336 and **Kifamunte Henry v Uganda** [1998] UGSC 20**).**

In **Kiwalabye vs Uganda** Supreme Court Criminal Appeal No143 of 2001 it was held that:

> *"It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing Judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial Judge was manifestly so excessive to amount to an injustice."*

Submissions of the Appellant

Counsel for the Appellant submitted that the Trial Judge sentenced the Appellant to an illegal and manifestly harsh sentence of 20 years and did not put into consideration the remand period and the mitigating factors. The sentence was illegal and they wanted it set aside. The mitigating factors showed the Appellant pleaded guilty, was a first time offender, had no previous criminal record and disclosed facts that were not in the knowledge of the prosecution.

Submissions of the Respondent

Counsel for the Respondent submitted that the Appellant's Appeal is without merit because he voluntarily agreed to the 20-year sentence as part of a plea bargain. Counsel emphasized that the trial Judge has limited discretion in plea bargain cases and cannot unilaterally alter the agreed-upon sentence.

Counsel for the Respondent contended that the 20-year sentence is not manifestly harsh, considering the maximum penalty for murder is death. Counsel argued that the PBA clearly reflects a consideration of all the mitigating factors. The Respondent also points out that the trial Judge did deduct the time spent in remand from the final sentence.

Counsel for the Respondent submitted that the Appellant's Appeal is based on a misunderstanding of the plea bargain process and the limited role of the trial Judge in such cases. Counsel prayed that the court therefore upholds the 20-year sentence and dismiss the appeal.

Findings and decision of Court

This is an appeal against sentencing arising from a Plea Bargain Agreement (PBA). The scope of investigation of this Court, as a first appellate court, in appeals arising from a PBA is limited to **Rule 12(1)(g)** of **the Judicature (Plea Bargaining) Rules S.I. 43 of 2016** to the legality and severity of the sentence or if the Judge sentences the accused outside the PBA.

Section 132(1) of the Trial on Indictment Act provides for appeals to the Court of Appeal from the High Court that:

Subject to this section;

(a) An accused person may appeal to the Court of Appeal from a conviction and sentence by the High Court in the exercise of its original jurisdiction, as of right on a matter of law, fact or mixed law and fact;

(b) An accused person may, with leave of the Court of Appeal, appeal to the Court of Appeal against the sentence alone imposed by the high Court, other than a sentence fixed by law;

(c) Where the High Court has, in the exercise of its original jurisdiction, acquitted an accused person, the Director of Public Prosecutions may appeal to the Court of Appeal as of right on a matter of law, fact or mixed law and fact.

And the Court of Appeal may-

(d) Confirm, vary or reverse the conviction and sentence;

(e) In the case of an appeal against the sentence alone, confirm or vary the sentence; or

(f) Confirm or reverse the acquittal of the accused person."

Non-consideration of mitigating factors

In the record of proceedings of Court, while sentencing the Appellant, the Trial Judge stated:

"Accused is sentenced to 20 years of imprisonment to be served at Luzira Upper Prison."

Counsel for the Appellant submitted that, the sentence has no mention of mitigating factors put into consideration by the Trial Judge. Where a Sentence is imposed without having regard to mitigating factors, such sentence is considered illegal and an appellate court may set aside the sentence and substitute the same with a lawful sentence, **Wamutabanemwe Jamiru v Uganda, SCCA No. 14 of 2001**.

Section 60 of **Constitution (Sentencing Guidelines for Court of Judicature) (Practice Directions) 2013**, empowers the defense counsel to bring to the attention of the court the mitigating factors which are open to the accused.

We agree with Counsel for the Appellant when he cited the case of **Musana Richard v Uganda,** Criminal Appeal No. 571 of 2014, for the proposition that: -

> *"... An accused person who opts to enter into a plea bargain does so with the hope of getting a more lenient sentence than what court would impose after a full trial. In our view that is the incentive which makes the plea bargain attractive to accused persons... In practice this may not be the case and we believe that the Rules Committee had this in mind when it made appeals against severity of sentence one of the exceptions under rule 12(1)(g) of the plea bargain rules."*

From the PBA on Court Record (Para 4.2 thereof), it is clear that the mitigating factors in this offence were listed and therefore must have been taken into account. These factors were: -

- "Accused has pleaded guilty thus saving court's time,
- He is a first offender
- Appears remorseful
- He disclosed facts that were not in the knowledge of the prosecution..."

From the above, we find that the Appellant has not demonstrated how and why he claims that mitigating factors in this Appeal were not taken into account. Furthermore, it is clear that the Appellant voluntarily participated in the arriving at the 20-year prison sentence in the presence of his advocate and the prosecution.

The plea bargain process was voluntary with minimal participation of the trial Judge and he should therefore not be faulted for the sentence in this case since his discretion in a plea bargain is minimal as opposed to an ordinary trial.

Under **Rule 13 of the Judicature (Plea Bargain rules) 2016,** the Trial Judge does not have the power to alter or amend the terms of the Plea Bargain Agreement. Rule 4 of the Judicature (Plea Bargain Rules) 2016 defines plea bargaining as: -

> *"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 offence or recommend a particular sentence subject to approval by court. It further defines a plea bargain agreement to mean an agreement between the prosecution and an accused regarding a charge or sentence against an accused".*

In **Agaba Emmanuel and 2 others V Uganda,** Criminal Appeal No. 139 of 2017, Court held: -

> *"...that plea bargaining creates an agreement between the prosecutor and the accused with all features of an agreement in the law of contract. However, the Court is not privy to the agreement and cannot redefine it..."*

The Appellant should not be allowed to back track on his agreement with the prosecution for no valid reason since this will occasion miscarriage of justice to the victims of this crime and undermine the relevancy of plea bargain in the criminal justice system. In **Okori Isaac versus Uganda** Court of Appeal Criminal Appeal No. 333 of 2017 it was held that: -

> *"allowing convicts to appeal against sentences they freely and voluntarily agreed to in the first place without good reason would in our view*

undermine the relevancy and the objectives of plea bargaining in our criminal justice system"

We accordingly find that the mitigating factors were properly identified and taken into account during sentencing and that the Appellant is bound by his agreement.

Illegality of sentence

The Appellant further faults the Judge for sentencing him to twenty years in prison without putting into consideration the remand period and mitigating factors.

At page 7 of the Record of Appeal, the trial Judge sentenced the Appellant to 20 years in prison and deducted the 1 year and 10 months he had spent on remand there by leaving him with 18 years and 2 months. It is therefore clear to us that the trial Judge did take into account the time on remand of the Appellant when reaching the final sentence.

We resolve this ground in the negative.

Final Decision

Having held as we have on the above issues we hereby Decide and Order that:

The Appeal is dismissed.

WE SO ORDER

Dated at ..... this day of ..... 2024.

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Hon. Mr. Justice Geoffrey Kiryabwire JA

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Hon. Mr. Justice Muzamiru M. Kibeedi JA

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Hon. Lady Justice Margaret Tibulya JA