UGANDA / JUDGMENT

# Achile v Uganda (Criminal Appeal No. 0012 of 2017) [2017] UGHCCRD 103 (15 June 2017)

[2017] UGHCCRD 103

COURT
HC: Criminal Division (Uganda)

BEFORE
Stephen Mubiru, J

CASE / FILE NUMBER
Criminal Appeal No. 0012 of 2017

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**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**

**CRIMINAL APPEAL No. 0012 OF 2017**

**(Arising from Yumbe Grade One Magistrate's Court Criminal Case No. 0179 of 2017)**

**HAJI ACHILE TWAIBU ..... APPELLANT**

**VERSUS**

**UGANDA ..... RESPONDENT**

**Before: Hon Justice Stephen Mubiru.**

## JUDGMENT

The appellant was on 30th March 2017, before the Grade One Magistrate's Court at Yumbe, charged with one count of Libel C/s 179 of *The Penal Code Act*. It was alleged that on 20th January 2017 in Yumbe District, the appellant unlawfully published libellous statements in a transmittable affixed form through his Facebook Page, a social media capable of widespread dissemination to right thinking members of society with the intention thereof to damage the reputation or character of the L. C. 5 Chairman Mr. Taban Yassin, a Public Officer of Yumbe Local Government. The words were that;

Mr. Taban further gave his Government car to Police to rob the people of Aringa of their valuables bought from the refugees and Chairman was given money (Car was hired) so if you as Chairman instead of protecting your people, you participate in robbing them.

The appellant was unrepresented when he appeared in court on 30th March 2017. Upon the charge being read and explained to the appellant, he responded; “I understood particulars, facts is true (sic). I had even a lot but they picked just that content.” The prosecution then proceeded to narrate the facts of the case as follows;

On 20th January 2017, on his Facebook page a social media accessibly (sic) by many persons, wrote that LCV Chairperson gave out his government car to police to rob indigenous people of Yumbe. He stated car was hired by police which were widespread and damaged reputation of a person of LCV (sic) a public officer. When others came to know. Copies of defamatory statement were got (sic) reported matter to police and he was charged and detained.

When those facts were put to the accused, he responded; “facts are true.” The court then stated; “PG is entered. Accused is convicted.” The prosecution then submitted in aggravation of sentence following which the appellant responded; “it is true I wrote them. I think that is all.” The court then adjourned the case to 6th April 2017 for sentencing.

When the case came up for sentencing on 6th April 2017, the appellant this time was represented by Mr. Mohammed Buga Nasur who informed court that he had just been given instructions by the convict to represent him. His instructions as narrated to court were that when the appellant was charged, he had not understood the nature of the charge. Counsel had been instructed to ask court to read the charge to the appellant again. The prosecution objected to the prayer, submitting that the procedure of recording a plea of guilty had been complied with and therefore what was left was to sentence the appellant. He prayed that the court should proceed to pronounce the sentence. In rejoinder, counsel for the appellant submitted that an accused is free to change plea at any stage of the proceedings before sentence. The court ruled that the procedure for recording a plea of guilty had been complied with and therefore the prayer made by counsel fails. The court then allowed counsel to make a submission in mitigation of sentence after which it sentenced the appellant to twelve months’ imprisonment.

Being dissatisfied with the decision, the appellant appealed on the following grounds, namely;

1. The learned trial magistrate erred in law in denying the convict an opportunity to change his plea before sentencing thus occasioning grave miscarriage of justice.
2. The learned trial magistrate erred in law and fact when he passed a harsh sentence on grounds that the aggravating factors are more hence occasioning grave miscarriage of justice.

At the hearing of the appeal counsel for the appellant Mr. Mohammed Buga Nasur, submitted that the trial magistrate made three fundamental mistakes; failure to explain all the essential ingredients of the offence. He referred to page 8 of the record of proceedings where the trial court noted; “Charge read and explained to the accused” and submitted that this does not mean that particulars were explained. There is a duty imposed on the judicial officer to explain to the accused person the essential ingredients of the offence before the prosecution narrates the facts. The court should indicate the ingredients of the offence. He submitted further that the law

imposes a duty to record the reply of the accused to each and every ingredient. “I understand the particulars of the offence” does not mean that the particulars were explained to him. Every ingredient must be explained and a reply to it recorded. He should have responded to each essential ingredient. He cited *Evaristo Turyahabwe v. Uganda*, a criminal appeal and *Mathias Kawuma v. Uganda [1997] HCB 12* in support of his submission that there is need to explain the essential elements of the offence. Without it, the appellant gave a vague response.

In the alternative, he argued that the appellant expressed an intention to change plea but the prayer was denied and therefore the conviction cannot be sustained. The appellant made an application to change plea on the day he was coming for sentencing. He submitted that the statement by counsel in reply at page nine of the record was in effect a request for the charge to be read back to the accused. Counsel stated that a plea of guilty can be changed at any time before sentence. The court erroneously overruled the application. He prayed that the appeal be allowed and a re-trial ordered. He further prayed that since the case involves a lot of political undertones in Yumbe, the trial should be transferred to Arua Chief Magistrate’s court.

Submitting in opposition to the appeal, the learned State Attorney Mr. Emmanuel Pirimba argued that a prayer for change of plea is discretional to the court. The accused may apply but the court retains the discretion as to whether to grant the prayer or not. The accused must give reasons for the prayer and in this case the court was not satisfied with the reason since the plea was unequivocal. He prayed that the appeal be dismissed. In the alternative, if the appeal is allowed, he submitted that he had no objection to the prayer for transfer of the case to a court of competent jurisdiction at the Chief Magistrate’s Court of Arua.

Having perused the record of the court below, considered the grounds of appeal, listened to the submissions of both counsel and addressed my mind to the law, I did not find merit in the argument that the plea was equivocal. However, the argument that it was erroneous not to permit the appellant to change his plea had merit and the first ground of appeal therefore succeeded. Consequently the appeal was allowed. The conviction of the appellant on his own plea of guilty was quashed and the sentence set aside. A re-trial was ordered. In accordance with the provisions of section 41 of *The Magistrates Courts Act*, it was ordered that the trial of the appellant be transferred to a court of competent jurisdiction at the Chief Magistrates Court of Arua. In the meantime the appellant was to remain on remand pending the re-trial or until further orders of the trial court to which the case was transferred. I undertook to give detailed reasons for this order in this judgment, which I now proceed to do.

This being a first appellate court, it is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see *Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997* and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997*, where it was held that: “the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it”.

According to section 204 (3) of *The Magistrates Courts Act*, no appeal is allowed in the case of any person who has pleaded guilty and has been convicted on that plea by a magistrate's court except as to the legality of the plea or to the extent or legality of the sentence. Having been convicted on his own plea of guilty, the appellant is by virtue of that section barred from challenging the conviction and the only way this Court could address itself to the first ground of appeal was to determine whether the plea recorded by the court below was equivocal which would make the conviction unlawful thus allow this Court to address itself on that issue of conviction.

The correct manner of recording a plea of guilty and the steps to be followed by the court was laid down in the celebrated case of *Adan v. Republic, [1973] EA 446* where Spry V. P. at page 446 stated it in the following terms:

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 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.

It is incumbent upon a trial Court at plea stage to be meticulous in recording the language an accused clearly understands or is familiar with to enable him or her plead to the same properly and in unequivocal manner. In cases where an accused pleads guilty, to record the answer the accused gives as clearly as possible in the exact words used by the accused. Reading the facts of the case is meant to ensure that an accused's plea is taken in unequivocal manner and there should be no doubt as whether the accused has understood the charges facing him in addition to the substance and every element of the charge. The importance of statement of facts is that it enables the trial court to satisfy itself that the plea of guilty was really unequivocal and that the accused understood the facts to which he was pleading guilty and has no defence. The facts as read to the accused must disclose the offence. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty and thereafter, the facts are narrated to the accused person and he or she is once more asked to respond to the facts. It is important that both the statement of offence as contained in the charge sheet as well the facts as narrated by the prosecution must each disclose an offence, otherwise the plea is not unequivocal.

The distinction between a criminal and civil libel came in an obiter dictum of Lord Denning M. R. in *Goldsmith v. Sperrings Ltd. [1977] 1 W. L. R. 478 at 485* where he said:

Now there is a distinction between a criminal libel and a civil libel. A criminal libel is so serious that the offender should be punished for it by the state itself. He should either be sent to prison or made to pay a fine to the state itself. Whereas a civil libel does not come up to that degree of enormity. The wrongdoer has to pay full compensation in money to the person who is libelled and pay his costs - and he can be ordered not to do it again. But he is not sent to prison for it or made to pay a fine to the State. When a man is charged with criminal libel, it is for the jury to say on which side the line falls. That is to say, whether or not it is so serious as to be a crime. They are entitled to, and should, give a general verdict of "guilty" or "not guilty.

This passage was cited with approval in *R. v. Wells Street Stipendiary Magistrate, Ex parte Deakin [19781 1 W. L. R. 1008 at 1011* by Lord Widgery C. J. who described it as “perhaps the most convenient, comprehensive and modern definition of criminal libel.” The Lord Chief Justice said that one of the requirements of criminal libel was that the wrong was so serious that it required the intervention of the State. As the injury done by a libel arises from the effect it produces on its readers, publication is an essential ingredient of the offence.

The following passage from Lord Coleridge C. J's direction to the jury in *R. v. Deverell (1889) 86 L. T. Jo. 300* is instructive:

... there ought to be something of a public nature about [a libel] to justify the interfering of the Crown as representing the public by proceeding by indictment. The Crown was the prosecutor in a case of indictment, and, therefore, an indictment for libel ought to be something which interested the Crown, which concerned the general interests of the public .... If a libel was repeated, and was infamous, ... no man could be expected to submit to it, and the libeller should be indicted, by all means; but ... when it was clearly an individual squabble between two people ... it was well-settled law that it ought not to be, and was not, in point of law, a proper subject of indictment.

For a charge under section 179 of *The Penal Code Act,* it is necessary that the particulars of the offence should specify; - an intention vilify the complainant and expose him or her to hatred, contempt and ridicule; the sort of imputation which is calculated to vilify the complainant, and bring him or her into hatred, contempt and ridicule which concerned the general interests of the public beyond an individual squabble between two people; publication of a grave, not trivial, libel; it must have bee published in writing, or in some other form that is permanent in the sense that it is not merely transient; and that it is the accused who did it. If the charge or the facts as narrated omitted any allegation as to these essential ingredients of the case, then the plea will be equivocal.

The charge in the instant case, although it does not specifically lay out the sort of imputation which is calculated to vilify the complainant and bring him into hatred, contempt and ridicule which concerns the general interests of the public beyond an individual squabble between him and the appellant, it states in general terms that the words complained of were published “with

the intention thereof to damage the reputation or character of the L. C. 5 Chairman," hence in his official capacity. To the extent that it imputes participation in robbery, it presents on the face of it, publication of a grave and not trivial libel. To the extent that it was allegedly published on Facebook, it was done in some form that is permanent in the sense that it is not merely transient and it finally attributes the publication to the appellant. The charge did not therefore omit any of the essential ingredients.

The record of the trial court discloses that interpretation from English to Aringa, the mother tongue of the appellant, was provided although it is not necessary that the language be in the accused person's mother tongue but in a language he or she understands. The appellant understood both English and Aringa. I was therefore satisfied that the charge was read and explained to him in a language he understood and that he understood the charge. He admitted the charge and a plea of guilty should have been entered at that point. The trial court did not do so. It did not enter any formal plea after the charge and the essential ingredients thereof were read and explained to the appellant but instead entered the plea after the prosecution had narrated the facts. With due respect to the learned magistrate, this obviously was a wrong approach which, though I did not find to have occasioned miscarriage of justice against the appellant.

After entering the plea of guilty but before convicting the accused, the court is required to ask the prosecution to outline the facts of the case. In *Adan* (supra), this court emphasised the importance of the statement of facts in the following terms:

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 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.

In the instant case, the facts as narrated by the prosecution omitted the intention to vilify the complainant and expose him to hatred, contempt and ridicule, and did not disclose the sort of imputation which was calculated to vilify the complainant, and bring him into such hatred, contempt and ridicule which concerned the general interests of the public beyond an individual squabble between two people. Had the response of the appellant to the particulars of the offence been separate and distinct from that made to the facts as narrated by the prosecution as it ought to have been had the proper procedure been followed, I would have come to an entirely different conclusion.

I however considered the fact that both the plea and conviction came after the particulars of the offence had been explained and the facts narrated. The Appellant therefore admitted both the particulars and those facts together rather than in sequence as would have been the case had the court below followed the proper procedure. He was convicted after being given the opportunity to refute or explain the facts or add any relevant facts. His response left no doubt that he had

understood both the particulars and the facts of the case and despite the flaw in the procedure of recording the plea, I was of the opinion that his plea was unequivocal and the flawed procedure had not occasioned a miscarriage of justice and it is for that reason that I rejected the argument that the appellant's plea was equivocal.

However, if an accused wishes to change his or her plea thereafter or in mitigation says anything that negates any of the ingredients of the offence he or she has already admitted and been convicted for, the court must enter a plea of not guilty. That is to say that, an accused person can change his or her plea at any time before sentence (see *Joseph Mugola v. R. (1953) 20 E. A. C. A. 171*; *Derek Lawrence Searle v. R. (1955), 22 E. A. C. A. 443* and *R. v. Mutford and Lothingland Justices [1971] 1 All E. R. 81*). It is only once sentence has been passed upon a person who has unequivocally pleaded guilty, that he or she cannot afterwards be allowed to retract that plea unless he or she pleaded guilty to a charge which in fact disclosed no offence (see *R. v F. J. Patel (13) EACA 179* and *Korir v. Republic [2006] 1 EA 124*).

In *R. v. Plummer, [1902] 2 K. B. 339* the accused pleaded guilty and sought to change his plea before he was sentenced. At p. 347, Wright, J. said: "another point is raised in this case, namely, whether the court had power to allow the appellant to withdraw his plea of guilty. There cannot be any doubt that the Court had such power at any time before, though not after, judgment. . . ." Similarly in *R. v. McNally, [1954] 2 All E. R. 372*, Lord Goddard, C. J. said: ". . . Once sentence has been pronounced there is no power in the court to allow the plea to be withdrawn....a plea cannot be changed after judgment."

In the instant case, the appellant and his counsel made a mess of the prayer for change of plea. The main thrust of the argument made by counsel for the appellant before the trial court was that the appellant had not fully understood the charge. Counsel presented the argument for change of plea obliquely in reply to the submissions of the prosecution opposing his prayer for the charge to be read to the appellant afresh. That of course would not be necessary without a prayer for change of plea. While rejecting the appellant's application, the learned magistrate gave the reason that the appellant had already pleaded guilty to the charge against him as the justification for the refusal. It is apparent that the magistrate misapprehended the law in this regard as a plea of guilty and indeed a conviction cannot be a bar to change of plea. The learned magistrate had the discretion to allow the appellant change his plea, but the reason he put forth for refusal is contrary to the position of the law as propounded in a case whose facts bear close resemblance to those of the case at hand.

In *Kamundi v. Republic [1973] 1 EA 540*, the appellant had been convicted of robbery with violence and other offences following purported pleas of guilty. The trial magistrate recorded pleas of guilty and entered convictions without following the usual procedure of allowing the prosecution to state the facts and allowing the accused to answer to these facts before entering convictions. After convicting, the magistrate adjourned to enable the prosecution to produce the criminal records of the accused persons. On the resumption of the trial the appellant was represented by an advocate who submitted that the pleas of guilty were ambiguous. The magistrate held that the plea was unequivocal and that the court had no power to quash its own

conviction and refused to allow the appellant to change his plea.

On second appeal it was argued that a magistrate should be able to alter a plea of guilty at any time before pronouncing sentence. It was held that the proper procedure before entering a conviction had not been followed and that a magistrate has a judicial discretion to allow a change of plea before passing sentence or making some order finally disposing of the case and in this case his discretion had not been judicially exercised.

When there is an indication of the desire to change plea, even at the stage of mitigation of sentence, it is for the court to decide whether justice requires that it should be permitted for example if it is made for reasons which the court deems valid and which perhaps it had previously had no opportunity of considering. In the case of *S. (an infant) v. Manchester City Recorder, [1969] 3 All E. R. 1230*, while justifying the power of court to accept a change of plea after conviction but before sentence, Lord Morris, stated at p. 1242:

The court might feel that having regard to the reasons advanced it would be wholly wrong to hold a person to some previous acknowledgment of guilt. The desire of any court must be to ensure, so far as possible, that only those are punished who are in fact guilty. The duty of a court to clear the innocent must be equal or superior in importance to its duty to convict and punish the guilty. Guilt may be proved by evidence. But also it may be confessed. The court will, however, have great concern if any doubt exists as to whether a confession was intended or as to whether it ought really ever to have been made. . . . It would be a grave defect in our law and system if there is some rule which thwarts the course which the interests of justice prompts.

On the evidence before me, the court below did not consider the reasons advanced by the appellant judiciously. The court ought to have been cognisant of the fact that its duty to clear the innocent is of equal or superior in importance to its duty to convict and punish the guilty and in a proper case such as this, when the opportunity is availed, a conviction after hearing evidence ought to be preferred. In all the circumstances, the trial was unsatisfactory. Accordingly the conviction and sentence could not be allowed to stand. Where an appellant has not had a satisfactory trial, the fairest and proper order to make is one for a retrial. It is for those reasons that the appeal was allowed and a re-trial was ordered.

Dated at Arua this 15th day of June 2017. .....

Stephen Mubiru

Judge

15th June 2015.

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