

UGANDA / JUDGMENT

Eryeny Bonny v Uganda

(Criminal Appeal No. 654 of 2022)

[2023] UGCA 368 (5 May 2023)

[2023] UGCA 368

COURT

Court of Appeal of Uganda

BEFORE

Cheborion-Barishaki, JA, Monica K. Mugenyi, JA,
Gashirabake, JA

CASE / FILE NUMBER

Criminal Appeal No. 654 of 2022

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THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA AT ARUA

(Coram. Cheborion, Mugenyi & Gashirabake, JJA)

CRIMINAL APPEAL NO. 654 OF 2022

ERYENY BONNY

VERSUS

<table>

UGANDA RESPONDENT

(Appeal from the High Court of Uganda holden at Lira (Nabisinde, J) in Criminal Case-No. 89 of 2012)

JUDGf/tENT qf THE COURT

A Introduction

- 1 Mr Bonny Gryeny (the Appellant) was arraigned for the offence of aggravated defilement contrary to sections 129(3) and (4)(a) of the Penal Code Act. Cap T20 on 17th June 2014 he pleaded *Not Guilty* to the indictment and his Inal commenced However, following the close of the prosecution case, the Appellant did on 3 : October opt to change his plea to an admission of guilt It v/as on that basis that he was subsequently handed a 17-year custodial sentence?
- 2 The Appellant has since lodged the present Appeal challenging the procedure adopted by the trial court at his plea taking, as well as the resultant sentence on the following grounds:
- *i* Ths *teamed trial Judge conducted the trial with procedural material rffecu.tirc/ areas tnq to* a *nvstnal and erred in law and tact when she failed to record the appellant* \ \$ *plea wren he elected* to *change plea, as requited bylaw, thereby occasioning a miscarriage ofjustice to the Appellant which defect* is *incurable*
- *i: The trial Judge wtnngiy p'cceedeci io mitigate sentence niter...:us u::a>n^ \ ins Apn^ant without entering a conviction n* :av. *pgtitns-' tec Appelant or.* a *cnarge ot* aggra/a.'sc *defilement contrary to section 129(3) and (4i(a) of the Pcvi? Code Act. Cap :2G as reoinrpd by law*
- *III The trial Judge passed an illegal and excessive sentence of • •* years *against the Appellant tn* law *>n the circumstances to (he prejudice of the Appellant*
- 3 At the hearing of the Appeal, Mr. Jimmy Madira represented the Appellants while the Respondent was represented by Ms Immaculate Angtoko Chief State Attorney.

B Determination

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4 appeal from conviction and sentence, as is on indictment Act Cap The powers of an appellate court in an the case presently, are outlined in Section 132 of the Trial 23 (TIA). Section 132(1)(a) and (d) provide as follows.

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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

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- And the Court of Appeal may -

- d. Confirm reverse or vary the conviction and sentence

- 5 An appeal against a conviction on a plea of quilty is specifically governed by section 132(3) of the same Act, which does permit such an appeal in respect of the legality of the plea or to the extent or legality of the sentence

- 6 It is the duty of a first appellate court to reconsider all material evidence that was before the trial court and, giving allowance for the fact that it neither saw nor heard the witnesses, come to its own conclusion on that evidence. In so doing, the first appellate court should consider the evidence on any issue in its totality and not any piece thereof in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the Irial court See Baguma Fred vs. Uganda. Criminal Appeal No. 7 of 2004 (Supreme Court) In the earlier case of Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 that duty had been spelt out as follows:

The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its DAY mind not disregard the judgment appealed from out carefully weighting and considering it

- 7 On the question of evidence Bogere Moses & Another vs. Uganda. Criminal Appeal No. 1 of 1997 (Supreme Court) further proposes that a first appellate court should where available on record, be guided by the impression of the trial judge on the manner and demeanor of the witnesses.
- 8. It is on the foregoing basis that the present Appeal shall be determined. We propose to address all the grounds of appeal together

9 It is the Appellant's ^c onienhon that the trial judge did not record his change of plea to a plea of guilty or indeed enter a conviction against him poor to embarking on *nllocutis* proceedings which procedure flouted sections 63 and and of the TIA. as well as Ad«<:lo 28(3?oj of the Constitution The frai judge >s pari culml/ faulted for omitting to mad and explain the indictment to the Appellant m contravention ol the procedure for the recording of a plea of *guilty* as succinctly la/J down in Adan vs Republic (1973) EA 445 Learned Counsel for the Appellant argues that the requirement under section 63 of the TIA to record a plea of gun! is

mandatory as is the conviction arising therefrom within (he confines of section 86(3) of the same Act ' The failure by the Inal judge to adhere to either requirement as weB as the process fnr plea taking articulated in Adan vs Republic (supra;. are opined to amount to major procedural defects that render the trial process incurably defective and thus occasioned a mistrial.

10. The cited statutory provisions are reproduced below for ease of reference'

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

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- (3) In the case of ^a conviction, the judgment shall specify the offence of which, and the section of the written lav; under which, the accused person is convicted.
- (4) The judgment in the case of a conviction shall be followed by a note of the steps taken by the court prior to sentence and by a note of the sentence passed together with the reasons for the sentence when there are special reasons for passing ^a particular sentence.

¹¹ Reference is further made to the case of Davis Kamundi vs Republic (1973) EA 540 where the East African Court of Appeal observed that 'justice cannot be effected if ^a plea of guilty is entered as the result of ignorance or

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misunderstanding |i W1S furtbm clawed in that ^r ase tb.r a ourt the discretion to allow a change of pica at any time before >t has finally disposed of ^a case, including changing ^a pl*-a ^o^f |⁰ one *r^f* the circumstances sowan. M

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- 12. In the mallei before us piesenlly. >t is argued that the omission to read me facts m support of the indictment to the Appellant left him unable to confirm them or dispute such of them that he disagreed with He was thus deprived of the opportunity to revert to his original plea of nor *guilty* m the event that he disputed some of the alleged facts Hus Court is thus urged to exercise its remit under Rule 32 of ti= Judicature (Court of Appeal Rules) Directions to quash the Appellant s conviction and sentence, and acquit him of the offence of defilement as charged
- 13. Conversely, while acknowledging the failure by the trial judge to abide the procedure outlined in Adan vs Republic (supra), the Respondent nonetheless contends that the Appellant did confirm to the trial court, his desire to change his plea, the facts of the case against him were read to him by the prosecution and he was duly sentenced on that basis. It is argued that the indictment having been previously read to the Appellant in Langi (when he pleaded *not guilty*),* he understood the nature of the offence for which he had been indicted and in respect of which he sought to change his plea
- 14. Reference in that regard is made to the case of Uganda vs Guster Nsubuga & Another, Criminal Appeal No. 92 of 2018 (unreported), v/here the Supreme Court held that substantive justice required that the anomaly in plea taking be overlooked in favour of -the cause of justice rather than nullify the entice trial It is op»ned. in the present case, that the cited omission does not go to the root of the Appellant s case, did not occasion a miscarriage of justice and is curable under Article 126(2)(e) of the Constitution
- 15. In any event, learned State Counsel invites the Court to invoke section H of the Judicature Act. Cap 13 to acknowledge that the Pioseculton had tendered in .ts evidence with the Appellant's participation It is thus proposed mat should the Court be so inclined; rather than order a retrial, the matter should be .emitted to the High Court for the accused to lie put on his defence.

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- 16. With regard lo (he contested sentence, it is argued on the authority *of* Kiwafabyc vs Uganda, Criminal Appeal No.143 of 2001 (Supreme Court) that sentencing ^s al the discretion of a trial judge and an appellate court should only interfere with -*» sentence so imposed if it is evident that the trial court acted on a wrong principle or overlooked some material fact, or if the sentence is manifestly harsh ard excessive Reference in that regard was additionally made to Kyalimpa Edv/ard vs Uganda, Criminal Appeal No.10 of 1995 (Supreme Court)

- 17. In support of the sentence handed down in this case, it is opined that the trial judge duly considered all mitigating and aggravating factors before passing a sentence of 17 years' imprisonment, which is well within the acceptable range of sentences for the offence of aggravated defilement. For illustration purposes, reference is made to the cases of Ntare Augustine vs Uganda, Criminal Appeal No. 53 of 2011 (unreported). Maqoro Hussein vs Uganda, Criminal Appeal No. 261 & 305 of 2016 (unreported) and Seruyange Yuda Tadeo vs Uganda. Criminal Appeal No. 80 of 2010 (unreported), where this Court upheld custodial sentences of 25. 20 and 33 years respectively were imposed for the same offence.

18 As quite correctly proposed by Counsel for the Appellants (with which Slate • Counsel is in agreement), the correct procedure for plea taking was elaborately articulated by the East African Court of Appeal in Adan vs Republic (supra) as follows

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When 3 person is charged with an offence the charge and particulars thereof should be read out to him so far as possible in his own language. but if that is not possible in the language which he can speak and understand Thereafter the Court should explain to him the essential ingredients of the charge and he should be asked if he admits them ¹¹ he dees admit his answer should be recorded as nearly as possible in his own words and 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 chang^e . of plea to one of not guilty should be recorded and the trial should proceed.

the accused does not dispute the alleged facts in any material respect a conviction is

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19 We have read and considered the record of the trial court's proceedings. In re/case that on 17th June 2014, the indictment, and particulars of the offence of aggravated defilement were read and explained to the Appellant in English. He was asked whether he understood the indictment and particulars for which he responded in the affirmative. He was then asked if he had his plea and responded that he did not. He then entered a plea of not guilty. The trial commenced.

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20 On 3rd October 2014, before a ruling on a trial which had been rendered, Counsel for the Appellant informed the trial court that his client wished to change his plea and upon inquiry of him by the court, the Appellant confirmed. "Yes, I want to change plea." The record bears a statement by the trial judge that the indictment and particulars were read and explained to the Appellant again. When the prosecution read the facts of the case to him, immediately after the facts had been read, the parties embarked on the allocution proceedings following which on 3rd October 2014 the trial judge handed down the sentence.

21 It is not readily apparent from the record what language was used for the change of plea on 3rd October 2014, neither is it indicated that he understood the indictment that had been read to him. In any case, reading and explaining the particulars of an indictment is not the same thing as explaining the ingredients of an offence which is what *Adan vs Republic* (supra) espouses so as to ensure that the accused person understands the nature of the offence s/he seeks to concede to. That is the same spirit that underlies the prosecution reading the facts of the case to an accused person that has professed an understanding of the indictment. The accused seeks to plead guilty to it. It is intended to secure confirmation from the accused person of the facts as alleged by the prosecution but should not be used to substantiate or alter the alleged facts, a plea of not guilty should be recorded.

22 In the matter before us the indictment was silent on the ingredients of the offence therefore reading and explaining it to the Appellant does not guarantee that he understood the offence in respect of which he sought to change his plea. The indictment was as follows.

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23. There is no indication on record that the essential ingredients of the offence were read to the Appellant after the reading of the indictment let alone that he was as^ed whether he understood them or on his own volition professed an understanding thereof The facts of (he case were read to him but he was not given an opportunity to either affirm, dispute or substantiate them so as to engender an understanding as io whether he was in fact maintaining his changed plea This would have been a vital affirmation of his changed plea, the absence of which raises questions as to its authenticity.
24. We therefore find that the procedure adopted at the change of the Appellant s plea was not such as engendered his understanding of the indictment ;n respect cf ■which the change had been made, as proposed in Kamundi vs Republic (supra) Wd cannot rule out the possibility of him disputing any of the facts had he been given the opportunity, which would have necessitated the revers.on of his plea from an admission of guilt to a plea of not guilty. Accordingly, ms conviction on a plea that was not judiciously recorded is in our view, substantically prejudicial to the Appellant's right to a fair trial

25 We are alive to the exception in section 34(1) of the Criminal Procedure Code Act Cap 11G (CPC), which provision mandates an appellate court in an appeal against conviction to dismiss the appeal notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, if it considers that no substantial miscarriage of justice has actually occurred.' *(ouremphasis)*

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26 In Abdu Ngobi vs Uganda, Criminal Appeal No. 10 of 1991 (Unreported), tra-Supreme Court advanced the following approach for the evaluation of evidence \$\\theta^\\star\$ criminal trials.

> (The) evidence of the procedution should be examined and weighed against the evidence of the defence so that a final decision is not taken until all the evidence that been considered. The proper hoproach is to consider the strength and weaknesses of each side, weigh the evidence as a whole, apply the burden of pittal as a ways testing upon the prosecution, and decide whether the defence has raised a reasonable policit. If the defence has successfully done so, the accused/must be acquirted, but if the defence has not raised a doubt that the prosecution case is true and accurate, then the witnesses can be found to have correctly identified the appellant as the person who was at the scene of the incidents as charged.

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27. Undoubtedly, such a judicious evaluation of the evidence would only be possible where the defence has presented its evidence as well. This is not forthcoming in the present Appeal, where the Appellant was not put on his defence before his conviction and sentence. That being so, we are satisfied that the omissions of the trial court in recording the changed plea did occasion a substantial miscarriage of justice that cannot be cured by the exception in section 34(1) of the CPC. We would therefore allow Grounds 1 and 2 of this Appeal, and do accordingly quash the Appellant's conviction.
28. We do agree with learned State Counsel that an appellate court may only interfere with a sentence meted out by a trial court in the case of an illegal or manifestly excessive sentence or where the trial court has overlooked important matters or principles that ought to be considered. See *Kyalimpa Edward vs Uganda* (supra) and *Kiwalabye vs Uganda* (supra). Nonetheless, Rule 32(1) of the Court of Appeal Rules of Procedure does mandate this Court to confirm, reverse or vary the decision of the High Court, or remit the proceedings to the High Court with such directions as may be appropriate, or order a new trial, and make any necessary, incidental or consequential orders. Needless to state such reversal of a high Court decision would include the quashing of its sentence

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- 29 In the present Appeal having quashed the Appellant's conviction it follows that any sentence in respect thereof would be rendered redundant. Ground 3 of the Appeal would succeed on that point.

- *C* Disposition

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- 30 In the result, this Appeal is hereby allowed with the following orders
- I. The Appellant's conviction and sentence are quashed.
- II. Criminal Case No. 89 of 2012 of the High Court holden at Lira is remitted to the High Court for the hearing of the defence case and conclusion of the Appellant's trial, the Prosecution case having been concluded.

It is so ordered,

2023. Dated and delivered at Kampala this *L> day of*

Barishaki Cheborion Justice of Appeal

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Monica K. Mugenyi Justice of Appeal

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•s.r t,

Christopher Gashirabake

Justice of Appeal

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