

Mugisha David Luke v Uganda
(Criminal Appeal No. O350 of 2017)
[2025] UGCA 208 (27 June 2025)
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The Appeal

2. The Appellant appealed against both conviction and sentence on the following grounds:
 - 1. That the learned trial Judge erred in law and fact when he convicted the Appellant for the offence of murder basing on a plea of guilty recorded without following the legal established procedure of recording a plea of guilty hence occasioning a miscarriage of justice;
 - 2. That the learned trial Judge erred in law and fact when he convicted the Appellant for the offence of Rape basing on a plea of guilty recorded without following the legal established procedure of recording a plea of guilty hence occasioning a miscarriage of justice;
 - 3. That the learned trial Judge erred in law and fact when he followed the wrong procedure for convicting and sentencing the Appellant under a plea bargain agreement hence occasioning a miscarriage of justice; and
 - 4. That the learned trial Judge erred in law and fact when he failed to deduct the time the Appellant had spent in lawful custody from the sentence he meted out thereby occasioning a miscarriage of Justice.

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3. At the hearing of the appeal, Counsel Chan Masereka appeared for the Appellant on state brief. The Respondent was represented by Happiness Ainebyona, Chief State Attorney from the Office of Director of Public Prosecutions holding brief for Counsel Kulu Idambi, Assistant Director of Public Prosecutions.
4. The appellant's counsel sought leave to have the appeal validated. The Respondent's counsel did not object. The court validated the appeal. Both parties filed their respective written submissions which were adopted by this court and considered in the determination of the appeal. However, we note that the Respondent's counsel did not submit on the 4th ground of the appeal.

Duty of the first appellate court

5. The duty of this court as a first appellate court is stated in rule 30 (1) of the Judicature (Court of Appeal Rules) Directions, S.I. 13-10. It is to re-appraise the whole of the evidence before the trial court and draw from it inferences of fact. The court then comes to its own decision on the facts and the law but must be cautious of the fact that it did not observe the witnesses testify. (Refer to *Bogere Moses & Anor v. Uganda*, Supreme Court Criminal Appeal No. 1 of '971)
6. We shall keep in mind the above duty as we resolve the grounds of this appeal. We shall consider the 1st and 2nd grounds jointly and the last two grounds separately as per the parties' submissions.

Grounds

1. That the learned trial Judge erred in law and fact when he convicted

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the Appellant for the offence of murder basing on a plea of guilty recorded without following the legally established procedure of recording a plea of guilty hence occasioning a miscarriage of justice;

2. That the learned trial Judge erred in law and fact when he convicted the Appellant for the offence of Rape basing on a plea of guilty recorded without following the legally established procedure of recording a plea of guilty hence occasioning a miscarriage of justice

The Appellant's Submissions

7. The Appellant's counsel argued that it is trite law that the need for elaborate process of plea taking is in furtherance of the imperative need to protect and promote the right of an accused person to a fair trial, which is a safeguard enshrined in the Constitution.
8. That in the instant case, the procedure for recording the plea was improper at plea taking and that the Appellant's plea was never recorded in the exact words as he put it. That the record does not explain if all ingredients of both counts were explained to him before he could take plea. That the court unanimously convicted the Appellant of each of the counts in total disregard of the right procedure which requires each offence and ingredients to be explained to the accused person and then he is invited to take plea to each ingredient and then court goes ahead to convict on each count separately before taking plea on the subsequent count.
9. It was further submitted for the Appellant that the record does not show

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that the Appellant admitted each and every allegation of the offences charged. That the record also indicates that the accused person pleaded guilty but not specifically to each of the ingredients of the offences. The Appellant's counsel cited the cases of Muhereza Wilbroad v. Uganda, Court of Appeal Criminal Appeal No.470 of 20'16 and Adan v. R [1973] EA 445.

10. The Appellant's counsel submitted that the procedure of plea taking as laid out in the authorities cited was either not followed or was out rightly flawed in the instant case. Counsel implored this honourable court as an appellate court, to rely on what is on the record to come up with its own findings and make its own conclusions.
11. The Appellant's counsel submitted that it is clear from the record that the procedure for plea taking was flawed, tainted with irregularities and improper which require this honourable court's attention. Counsel stated that it is trite that the appellate court may, depending on its findings, quash, or uphold the decision of the lower court, come up with its own decision,

address legal issues of unfairness or irregularity that are not contained in the memorandum but are glaring on the record which resulted into a miscarriage of justice and order for a retrial in the interest of justice, bearing in mind that litigation whether in civil or criminal cases must come to an end. The Appellant's counsel contended that it is trite that even where court has erred, the appellate court interferes with the decision of the lower court only where there has been a miscarriage of justice to any of the parties in the proceedings guided by the presumption of innocence of an accused person.

12. The Appellant's counsel submitted that the learned trial Judge's decision

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was founded on an equivocal and irregular plea. Counsel argued that the trial Judge erred both in law and fact when he recorded the Appellant's equivocal plea of guilty as he never admitted each and every ingredient of the offences of murder and rape. Counsel prayed that the 1st and 2nd grounds of the appeal succeed.

^The Respondent's submissions

13. In opposition, the Respondent's counsel submitted that for all intents and purposes, there was no miscarriage of justice occasioned to the Appellant as learned counsel for the Appellant wants court to believe. That as required by law, the procedure for plea taking was followed by the learned trial Judge at page 6 of the record of appeal. That the facts were read to the Accused or Appellant and explained before he pleaded guilty and the Judge convicted him on his own plea of guilt. That the ingredients of the offence were explained thoroughly one by one, the interpreter of the court interpreted to the accused in his own language and the Accused pleaded instantly to the indictment.
14. The Respondent's counsel submitted that the legally established procedure of recording a plea of guilty was followed, hence there was no miscarriage of justice occasioned to the Appellant. That the Appellant should not hide behind the technicalities since the Constitution of the Republic of Uganda, '1995 clearly talks about substantive justice and not promoting technicalities. Counsel also referred to the case of Adan v. Republic and submitted that the learned trial court followed exactly the procedure laid out in the above cited case.
15. The Respondent's counsel submitted that at page 10 of the record of

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appeal, the learned trial Judge convicted the Appellant on his own plea of guilty and that page 9 of the record of appeal speaks for itself. That the explanation of the full details of the ingredients of the offences is at a later stage during trial where the prosecutor will present to court all the ingredients of murder and rape but not at plea taking.

16. The Respondent's counsel added that the Accused's counsel never raised the irregular procedure, if any, at the trial. That the learned trial Judge clearly applied the law to the facts of the case. Counsel stated that this honourable court interferes with a decision of the learned trial Judge only if there is a miscarriage of justice, which is not the case in this case. That the learned trial Judge complied with the provisions of the Trial on Indictments Act. The Respondent's counsel prayed that this honourable court be pleased not to interfere with the conviction and sentence. That the 1st and 2nd grounds of this appeal are devoid of merits, frivolous and vexatious and of no legal force.

The Court's analysis

17. The Appellant's counsel faults the trial judge for convicting the Appellant on both counts of murder and rape without following the legally established procedure of recording a plea of guilt. Section 61 of the Trial on Indictments Act, Cap. 25, requires the accused person to appear in person before court to take plea. It provides thus:

"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

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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."

18. Furthermore, section 64 of the Trial on Indictments provides that if the accused pleads guilty, the plea shall be recorded and he or she may be convicted on it.
19. To enable us properly analyze and appreciate the 1st and 2nd grounds of this appeal, it is imperative to quote the lower court proceedings verbatim. It states as follows:

"On 23/5/17 Accused present Mr. Muhereza for State Mr. Barekensi for Accused. Accused:- I signed that agreement. Court:- Indictment read to Accused. Accused:- Count I: I am guilty - PG. Count II: I am guilty - PG. Brief Facts:- As per paragraph 3.0. Accused:- Facts admitted as correct, Court:- You are convicted on your own PG as charged on each one of the two Counts.

Aggravating factors paragraph 4. 1.

and

Mitigation paragraph 4.2.

Remand: 1 year and 23 days.

Convict: I pray for a deduction for my sentence. We had agreed to have sex and I paid little money then she held my tentacles' and we fought. I pray for forgiveness.

Sentence-

Aggravating and mitigating factors considered. A sentence of 25 years on each Count could be suitable. Considering the period spent on remand, I shall impose a sentence of Twenty-Four (24) years' imprisonment on each Count which will run concurrently starting from today.

Right of Appeal explained.

Duncan Gaswaga

Judge

23/5/17"

Since there was sexual intercourse taking place between the accused and the deceased, the word "tentacles" should have been "testicles".

20. In *Adan v. Republic* (1973) E. A. 443 the procedure for taking pleas was stated at page 446 thus:

> "When a person is charged, the charge and 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

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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 the facts and the accused's reply must, of course, be recorded."

²¹. Section 123 of the Penal Code, Cap '120 provides thus:

"Any person who has carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, commits the felony termed rape."

Section 124 of the Penal Code Act, Cap 120 provides that a person convicted of rape is liable to suffer death.

22. In *Upar v. Uganda* (1971) E. A. 98 the East African Court of Appeal held that lack of consent always remains an essential element of the crime of rape. In *Nakholi v. Republic* (1967) E. A. 337 it was held that lack of consent is an

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essential ingredient in the proof of rape, and although a girl may be of such tender years that mere proof of her age is sufficient to establish lack of consent, this must be proved before convicting. At pages 337 to 338 the court held thus:

"The two essential/s are therefore carnal knowledge of a woman or girl and lack of consent and both these essential/s must be established by the prosecution and accepted by the court before a conviction for rape can be arrived at. It is a fact that the age of the girl is material and that in some cases the girl may be of such tender years that mere proof of her age may be sufficient to establish the lack of consent on her part, as the girl would on account of her age be unable to understand what was happening and would not be able to consent as she would not know what she was consenting to. In such case then the age of the child would be evidence from which the court could arrive at the conclusion that the act was done without her consent, but the court would still have to find this as a fact before convicting of rape."

23. The record of appeal reveals what the accused said in mitigation of sentence. He said "I pray for a deduction for my sentence. We had agreed to have sex and I paid little money then she held my tentacles' and we fought, I pray for forgiveness." The word "tentacles" must have meant testicles. This quotation takes this court back to the plea taking process. After recording the plea of guilty, the trial court record indicates brief facts as "As per paragraph 3.0." According to paragraph 3.0 of the plea bargain agreement, the facts were "Mugisha David Luke on the 21st day of April 2016 at Kibengo cell Isingiro District had unlawful carnal knowledge of Bairomumaisho Peforoza without her consent and after unlawfully kidnapped her."

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24. In this court's view, the summary of the case attached to the indictment is the one the prosecution should have read to the accused after the court entered the plea of guilty instead of an abridged version in the plea bargain agreement. The summary of the case attached to the indictment has details of the accused and the deceased drinking alcohol together at the bar of Nuwabine in Ibinja Trading Centre Isingiro District. At page 4 of the record of appeal, it is detailed thus:

"On interrogation he told police that on the fateful night, he was with the deceased taking alcohol at the bar of Nuwabine where he told her that he wanted to play sex with her and she accepted on condition that he pays her 10,000/-. The accused started buying her alcohol. That at around 23.00 hrs the bar was closed and they left. As agreed they placed sex from the bush and after the

deceased demanded for the money and the accused did not give it to her, a fight ensued and the accused pulled her neck and struggled her to death. Thereafter he pulled the deceased's body and dumped in the bush. Accused's charge and caution statement was recorded."

25. In *Kato v. Republic* (1971) E. A. 542 at pages 543 to 544, the East African Court of Appeal held thus:

"..... if it can be clearly shown that the accused person has admitted all the ingredients which constitute the offence charged, it is then proper to enter a plea of guilty. The words 'it is true' when used by the accused person may not amount to a plea of guilty, for example, in a case where there may be a defence of self defence or provocation."

26. In *Rv. Yonasani Egalu* (1942) 9 E. A. C. A. 65 at page 67, the court said

that

"In any case in which a conviction is likely to proceed on a plea of guilty (in other words, when an admission by the accused is to be allowed to take the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution) it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every constituent and that what he says should be recorded in a form which will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally."

27. The above crucial procedural requirements were not followed in the instant case. The facts read to the accused "as per paragraph 3.0' do not support the charge of rape and murder as there was consent to have sex at a consideration. Sexual intercourse took place according to the admitted medical evidence and summary of facts. When the accused failed to pay what was agreed to, the deceased squeezed the accused's testicles and a fight ensued and the accused strangled the deceased to death. The circumstances of the strangulation were not read back to the accused in order for the court to enter a conviction for murder. Ordinarily, it should have been manslaughter and not murder.

28. The summary of the facts attached to the indictment contained the circumstances under which the alleged offences were committed but the summary was not read to the accused / appellant during the plea taking process. Therefore, the plea taking process was flawed as the proper procedure was not followed by the trial court. There was miscarriage of justice to the Appellant. So, the 1st and 2nd grounds of this appeal have merits and they are

well

allowed

29. The principles upon which court should order retrial were restated in *Fatehali Manji v. The Republic* (1966) E. A. 343 at page 344 thus:

"..... in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."

30. Having allowed the 1st and 2nd grounds of appeal, this court finds it unnecessary to tackle grounds 3 and 4 which are premised on the 1st and 2nd grounds of appeal. Once the plea taking process is flawed, the plea bargain agreement and the sentence cannot stand. Therefore, in the interest of justice, the appeal is allowed and we quash the conviction and set aside the sentence and order for release of the accused / appellant forthwith.

/>- Signed, dated and delivered at Kampala this day of June, 2025

Moses Kazibwe Kawumi JUSTICE OF APPEAL.

@ CrW

Florence akachwa JUSTICE OF APPEAL.

Cornelia Kakooza Sabiiti JUSTICE OF APPEAL.

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