



# PLEA BARGAINING

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## OUTLINE

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- Introduction to the Judicature (Plea Bargain) Rules, S.I 43-2016
- Scope of Plea Bargain
- Pre-trial Disclosure
- Sentencing Guidelines
- Key pointers
- Procedure for plea bargain
- Practical Challenges



## Introduction

The presumption of innocence enshrined in Article 28 (3) (a) of Uganda's Constitution provides that a person charged before the courts with a criminal offense is presumed innocent until proven guilty by the prosecution or pleads guilty

S. 63 of the Trial on Indictments Act - If accused admits the truth of the charge (pleads guilty), the court records it and he or she may be convicted upon it

Plea bargain introduces a new scope to the plea of guilty, the aspect of a negotiated settlement of the criminal charge. It is a form of Alternative Dispute Resolution in Criminal matters.

## Plea Bargaining (PB)

Introduced in Uganda by the Plea Bargain Rules of May 2016. It changes the criminal justice landscape by allowing the parties to work out a mutually satisfactory disposition of the case subject to court approval.

R 4 defines PB 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 offense, or recommend a particular sentence subject to approval by the court.

## Objectives of Plea Bargaining - R3

- Enhance efficiency, improve access to criminal justice by timely resolution of cases, reduce case backlog and prison congestion, circumvent long wait for trial, encourage accused to take responsibility for the crime and involve the victim in the adjudication process.
- Prosecutor may drop some charges, reduce charges to lesser offense/ minor and cognate offense;
- Court sanctions and confirms the agreement subject to safeguards contained in the Rules.
- It may reject the agreement. The duty to oversee the propriety of the process lies on the Court

## Cont'd

Agaba Emmanuel and 2 others versus Uganda, Criminal Appeal No 139/2017, the Court of Appeal quoted Santobello vs New York 404 US 257, in which Chief Justice Burger captured the essence of plea bargaining when he stated:

*The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called plea bargaining is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal Charge were subjected to a full-scale trial, the States and Federal Government would need to multiply by many times the number of Judges and court facilities.*

## Cont'd

*Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; and by shortening the time between the charge and the disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned*"

Articles 126 and 127 of the Constitution: Participation of the people in the administration of Justice, justice not being delayed, adequate compensation being awarded to victims of crime; reconciliation between parties being promoted; justice being done to all

PB is a move towards restorative justice rather than retributive: focus on reconciliation rather than punishment of the offender for the crime committed



## Initiation of PB

### Rule 5:

Initiated by prosecutor / accused orally or in writing

Initiated at any stage of proceedings before sentence is passed. It may be raised by either party in court before or even during trial

This requires the accused to know that this option is open to him in addition to the ordinary guilty plea. Inform/ educate the accused on this option (ACD Case Management Rules, 2021 require this)

R 16: Accused to be informed after disclosure: another judicial officer may be appointed to facilitate PB : Negotiations do not have to stay a trial necessarily, but parties may on application be given up to 30 days to do so



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It should be noted however that the initiation of PB may come as late as after conviction. The duty of the court at this stage has been discussed in *Inensiko Adams versus Uganda*

(Mukono Criminal Appeal No 263/2017)

The Judge dealt with a ground of appeal emanating from the trial magistrate's failure to follow procedure when the accused stated that he wanted to enter a plea bargain and instead proceeded to handle the matter as a plea of guilty. The accused was misled into thinking he was in a plea bargain. The case was at defense hearing when the accused stated, "*I am for plea bargaining*"

## Cont'd

The State replied *“The case came for trial the accused was put on the list for Plea Bargain but it failed”* The accused said: *“I am willing to compensate the complainants. I admit I committed the offense. I will pay two million shillings on 20<sup>th</sup> March 2017”*: The State said *“Let him pay the two million shillings from prison”*

The trial magistrate read the charges afresh and the accused pleaded guilty. Previously accused had said his lawyer was coming and they would sign the agreement.

Held: the court is obliged to give the initiating party a chance to discuss the case with the contending party. Even though the temptation of the court rejecting the plea bargain at the latter stage in the proceedings is high, a judicial officer must not be seen to flout the rules of procedure.

Lwere Bosco versus Uganda ; CA 531/2016

*The court is obliged under the Rules to embrace plea bargain any time before sentence when either party before it expresses interest in the process, unless it is intended to pervert the cause of justice.*

## Rule 7: Disclosure

Legal Requirement to enable the accused to have all relevant information to make an informed decision on Plea Bargain

Court to ensure this is done. Excellent where there is legal representation; NB Some trials in the High Court do not require mandatory legal representation

Good where the accused is literate

Help/innovation required where the accused is illiterate/does not understand the language of the court: justice of the peace in prisons, legal aid service providers, interpreters

## Cont'd

Soon Yeon Kong Kim Versus Attorney General

(Constitutional Reference No 6/2007)

Outlawed criminal trials by ambush: Prosecutor required to disclose statements, and documentary evidence to be relied on: exceptions exist for minor cases and with leave of court

See Sub-rule 2 for exceptions

Safety of witnesses

National security

See also: Aniket Patel V AG (Constitutional Petition 2/2019)

The prosecution and the complainant shall grant the petitioner access to all materials and documents in their possession which the petitioner requires for his defense

Issues to note:

R 6 (1) (b) - Plea bargain may be entered with the accused wishing to cooperate as a witness against others (Cooperating accused in July 2010 bombings case)

R 6 (2) – PB may be entered with any of the accused; the agreement entered into binds only that accused.

A proper record on file of the plea bargain is necessary

Do not entertain plea bargains where there is no police file

The parity principle requires similar sentences imposed on offenders for similar offenses committed in similar circumstances.

## Rule 11: Victim/ complainant /community interests

Courts to incorporate victim-centred approach

UN Declaration of Basic Principles for Victims of Crime and Abuse of power A/RES/40/35 of 1985 :

Involving them:

- Will help the court confirm a just sentence
- Justice is for victim and community/ must be seen to be done
- Compensation Orders: Victims loss or injury must be ascertained to guide the court on appropriate compensation

Victim or community impact statements



## Sentencing Guidelines: Legal Notice No 8/2013

PB does not abrogate the court of its duty to ensure an appropriate sentence in each criminal case.

Rule 15 (3): The Court can reject PB where it is of the view that a more severe sentence than the one recommended in the plea bargain agreement is deserved.

Guidelines necessary:

Part 11: Purpose of Sentencing: eg deterrence, punishment, rehabilitation

Part 111: General sentencing principles: gravity, nature of offense, degree of participation, previous convictions

Part IV: Sentencing Options and Orders



The Judicial officer has the duty to superintend over the proceedings to ensure there is no miscarriage of justice or abuse of process making it a mockery of Justice. The judge may recommend a particular sentence which in his or her view serves the interests of justice (Inensiko)

- Rule 8 (1) court may participate in the plea bargain discussions
- (2) The parties shall inform the court of the ongoing plea bargain negotiations and shall consult the court on its recommendations with regard to possible sentences before the agreement is brought to court for approval and recording.
- (3) Subject to sub-rule 1, a judicial officer who has participated in a failed plea bargain negotiation may not preside over a trial in relation to the same case.

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The consultations under R2 are part of the record of the court and should be properly kept.

Lwere v Bosco versus Uganda CACA 531/2016,

*“The record shows that the trial judge read the charge and the facts to the appellant but it does not show that court was informed of the ongoing negotiations or consulted with regard to the possible sentence prior to court’s approval...the accused and his lawyer must labor to inform the court about the ongoing Plea Bargaining negotiations and consult court on its recommendations on possible sentence especially before the agreement is brought to court for approval and recording. This would be the appropriate stage in the proceedings for the court to recommend to the parties to consider the mitigating factors, and the period an accused person would have spent on remand.”*

## Pointers

The recommendation is to limit your participation in negotiations

“May” is used in sub-rule 3 in a discretionary sense, not mandatory

The court’s superintendence over the process also requires:

- Ensure the charge is amended if the PB agreement is for a minor or cognate offense so the right particulars are read out at plea;
- Ensure the plea bargain agreements are properly filled as per the format in Schedule 1; Rule 9;
- Where PB involves a child, ensure the agreement is executed by a guardian, parent, probation and welfare Officer, or legal representative of the child



## Rule 12: Recording of the plea agreement

Parties prepare a plea bargain agreement which they present to court if they are voluntarily in agreement

The format of the agreement is in schedule 1 of The Rules. Please look out to ensure the agreement is properly executed. Especially the agreed facts, the aggravating and mitigating factors, additional factors e.g. illness, victim's forgiveness of the accused or other interests

The procedure to be followed by Court in recording the plea bargain agreement is outlined in Schedule 2.

## Procedure in court: Schedule 2

Party Called

Representatives introduced

State introduces the plea agreement: What offense have they agreed upon? What sentence? How have they catered for the period spent on remand? Compensation agreed?

The defense confirms the plea agreement

The Court informs the accused of his or her rights in a criminal trial and the effect of a plea of guilty

Apply Rule 12; The Court is to inform the accused of his or her rights, and shall satisfy itself that the accused understands the following;

## Procedure

- The right to plead not guilty, or having already so pleaded, the effect of that plea;
  - The right to be presumed innocent until proven guilty
  - To remain silent and not to testify during proceedings
  - Not to be compelled to give self-incriminating evidence
  - To a full trial and to be represented by an advocate of his or her choice at his or her expense or in a case triable by the High Court to legal representation at the expense of the State
- b. That by accepting the plea agreement, he or she is waiving his or her right as provided under paragraph (a)
- c. the nature of the charge he or she is pleading to
- d. any maximum possible penalty, including imprisonment, fines, community service order, probation or conditional discharge
- e. any applicable forfeiture
- f. The court's authority to order compensation and restitution or both

## Procedure

g. that by entering into the plea bargain agreement he or she is waiving the right to appeal except as to the legality or severity of sentence or if the Judge sentences the accused outside the agreement

Lwere Bosco's case:

*The court set aside the plea bargain agreement because though the appellant had pleaded guilty, the record was silent as to whether the appellant had a full understanding of the plea bargain procedure. The court was by the provisions of Rule 12 of the plea bargain rules under duty to explain this to him but did not do so..failure to follow the procedure of recording a plea bargain agreement occasioned a miscarriage of justice which could not be condoned*

## Procedure

- Court finds out from the accused whether he voluntarily signed the agreement after it had been explained to him or her and translated to him or her in a language he or she understands
- If the accused so confirms, he or she is invited to execute a confirmation
- The confirmation to be signed by the accused is in the format in Schedule 3 to the Rules. It is signed by the accused, his advocate and the State Attorney before the Trial Judge/Magistrate, who also signs and dates the same.
- The confirmation reads *“I.....before this Honorable Court confirm that I freely and voluntarily sign the plea bargain agreement”*
- It is then filed as part of the court record



## Procedure

- If the agreement is accepted by court the same is received on court record
- The charge is read and explained to the accused in a language he or she understands
- If he or she confirms that he or she understand the charge he or she is invited to plead to it
- Plea is recorded
- If he or she pleads guilty, state summarizes the facts
- If accepted to be true by the accused, he or she is found guilty and convicted on his or her own plea of guilty
- The procedure for taking plea as set out in Adan versus Republic (1973) EA 445 must be followed

## Adan V Republic

- Charge and particulars read out in accused's language/ one he understands
- Explain the essential ingredients of charge
- Ask accused if he admits them
- Record his answer as much as possible in his own words
- Enter a plea of guilty
- Prosecutor states facts of the case bringing out essential elements
- Ask accused if facts are true, or if he wishes to clarify or provide other relevant facts
- If accused denies facts or raises facts which question his guilt, change plea to not guilty - proceed to trial
- If he does not dispute the facts, record conviction

## Adan

- The state is heard in aggravation
- Defense is heard in mitigation
- The convict is heard in allocutus.

These factors are pertinent to arriving at the right sentence. They should be clearly set out in the agreement and the court must show that it considered them. Experience shows not all factors are usually raised in the agreement, and the court may guide on this during consultations.

## Procedure

- Convict is sentenced
- A Judicial Officer should not sentence outside the plea agreement
- Agaba Emmanuel and 2 others versus Uganda CACA 139/2017
- The appellant was convicted of murder and sentenced to 25 years under a plea bargain. The agreement reflected 18 years. An appeal against sentence outside the agreement was allowed and the sentence was set aside.
- The court observed *“In our view, plea bargaining creates an agreement between the prosecutor and the accused, with all the features of an agreement in the law of contract. The court plays the role of the regulator of the agreement to ensure that the agreement conforms to the needs of the justice of the case. But the court is not privy to the agreement and cannot redefine it. What the court may*

## Cont'd

- *do is to reject the plea bargain agreement where it is satisfied that the agreement may occasion a miscarriage of justice... Should the court reject the agreement, it shall a) record the reasons for the rejection and inform the parties b) the agreement becomes void and shall be inadmissible in subsequent trial proceedings or in any trial relating to the same facts and c) refer the matter for trial*
- Katumba Alawi versus Uganda CACA 540/2015
- An accused person is entitled to assurances that the sentence agreed upon in PB will be respected and not substituted by a judge-imposed sentence. If the judge disagrees with the sentence he/she should reject the plea bargain and refer the matter to trial

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- Period spent on remand must be considered as required under **Article 23 (8) of the Constitution**
- *Where a person is convicted and sentenced to a term of imprisonment for an offense, any period he or she spends in lawful custody in respect of the offense before the completion of his or her trial shall be taken into account in imposing the term of imprisonment*
- The Supreme Court has settled the manner of how this should be done in **Nashimolo Paul Kibolo versus Uganda, Criminal Appeal No 754/2014-** it must be deducted arithmetically
- Vagueness in addressing the period spent on remand, and failure to do so makes the sentence illegal
- *Eg “I sentence the accused to 15 years, the period spent on remand having been considered”*

# Challenges

(NB Cases have been returned for trial by appellate courts for failure to adhere to the procedure in Schedule 2)

- Failure to record plea of guilt (Adan case)
- Passing a sentence not agreed upon (enhancing and reducing)
- Failure to include time spent on remand when passing a custodial sentence- Constitutional Requirement. Failure makes the sentence illegal
- Confirming sentence where the accused's plea was equivocal
- Failure to inform the accused of his constitutional rights



## Children

- R 9 (2) Agreement to be executed by parent, guardian, probation officers, legal representatives of the child
- Part IX of sentencing guidelines R 50
- Keep best interests of the child in focus

### **Withdrawal from PB**

**Rule 14, any party may withdraw at any point before sentencing**