



THE APPLICATION OF
NEW RULES AND DIRECTIONS IN THE
CRIMINAL JUSTICE ARENA

16TH SEPTEMBER 2024

Legal representation in Criminal Trials

The Judicature (Legal Representation at the Expense of the State) Rules, S.I. 55/2023

Foundation:

Article 28(3)(c) of the Constitution

(3) Every person who is charged with a criminal offence shall— (e) in the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the State

S. 41 (1) of the Judicature Act

The Rules Committee may, by statutory instrument, make rules for regulating the practice and procedure of the Supreme Court, the Court of Appeal and the High Court of Uganda and for all other courts in Uganda subordinate to the High Court.

This committee is established under S. 40 and is headed by the Hon. The Chief Justice

Issues:

-Quality of representation by State Brief Lawyers

-Right to a fair trial for all accused persons charged with this category of offenses

-Unfair trial outcomes in capital and semi-capital cases that are difficult to resolve on appeal

Appellate representation; Kawooya Joseph versus Uganda SCCA 50/ 1999 (unreported); less commitment and attention to detail; accused rejecting state-appointed counsel

-Identification of lawyers ready to be engaged

-Identification of qualified and experienced lawyers

Easier in the metropolitan areas, but difficult upcountry

-Remuneration

Disincentive; unknown, unascertainable, no uniform fees structure; fees realistically covering the advocate's efforts/expenses

-Monitoring the efficiency of appointed advocates

Matters of discipline, ethics, appearances, client interactions

Structure:

R 3: Objectives of the Rules

R 5 and 6: Implementation Committee, its membership and functions

Part 111: Roll of State Appointed Advocates

Process of admission; qualifications; no record of previous professional misconduct; removal from the roll; circumstances under which an advocate not on the roll may be appointed

Part IV: How Chief Magistrate/Registrar calls for interested advocates on the roll to represent accused persons at the start of session/ trial, factors to be considered in making the specific appointments; timelines; acceptance or decline of instructions; rotational appointments; duties of the appointed advocate; Duration of appointment; Remuneration; legal representation on appeals; M&E, Reports

Schedule 1- Formats for expression of interest, Notices of acceptance/refusal of instructions, undertaking

Schedule 2- Certificate of trial readiness

Schedule 3- Remuneration of Advocates (full trial, Nolle, No case to answer, plea bargain, appeals)

Schedules 4 and 5- Feedback Forms from accused and advocate

Schedule 6- Report of the state-appointed Advocate

Bail in Criminal Trials

The Constitution (Bail Guidelines for the Courts of Judicature) (Practice) Directions, Legal Notice No 8/2022

Article 133 (1) (b) of the 1995 Constitution

Administrative functions of the Chief Justice.

(1) The Chief Justice (b) may issue orders and directions to the courts necessary for the proper and efficient administration of justice.

Foundation:

Article 23 (6)(a) of the Constitution

(6) Where a person is arrested in respect of a criminal offence—

(a) the person is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable;

(b) in the case of an offence which is triable by the High Court as well as by a subordinate court, the person shall be released on bail on such conditions as the court considers reasonable, if that person has been remanded in custody in

respect of the offence before trial for one hundred and twenty days;

(c) in the case of an offence triable only by the High Court, the person shall be released on bail on such conditions as the court considers reasonable if the person has been remanded in custody for three hundred and sixty days before the case is committed to the High Court.

Article 28 (3)(a) of the Constitution

(3) Every person who is charged with a criminal offence shall— (a) be presumed to be innocent until proved guilty or until that person has pleaded guilty;

The Trial on Indictments Act: Sections 14- 21

The Magistrate Courts Act: Part IX

The High Court (Anti-Corruption Division) (Case Management Rules) 2021

Issues

Bail is a contentious matter; case law demonstrates this

Uganda versus Col (Rtd) Dr Kizza Besigye:

Constitutional Reference No 20/2005

The main thrust was whether a court has the discretion to grant/ reject bail

(Bail not to be denied unreasonably, not to be refused as punishment as it contravenes the presumption of innocence, the refusal to grant shouldn't be based on mere allegations, the grounds must be substantiated, both High Court and Subordinate courts have discretionary powers to set bail conditions they consider reasonable though this must be done with caution)

-Discretion to be exercised judiciously; *Involves a balance of the interests of the public/ social safety, right to personal liberty, and the presumption of innocence. The decision must meet the ends of justice*

-Public criticism on the grant of bail e.g. for murder and other serious offenses;

- Public criticism of monetary bail amounts imposed;

-Delays in the delivery of bail rulings

-Bail pending appeal (legal basis and grounds)

SC Misc. Application 11/2019- Joshua Magombe versus Uganda held that the concept of bail pending appeal has no constitutional basis- **and** *SC Misc. Application No 15/2019 - Nakiwuge Racheal Muleke versus Uganda*

The issue was finally resolved in Criminal Reference No. 12/2020 by a three-member panel of Justices of the Supreme Court (Nakiwuge case)

-Proof of Exceptional Circumstances

Foundation for Human Rights Initiative versus Attorney General (Supreme Court Constitutional Appeal No 003/2009).

-Questions on the parameters along which the discretion may be exercised

-Inconsistencies

-Challenges of the cost of remand prisoners and increased pre-trial detention

NB Aspects of the Rules have been challenged in ***Stephen Kalali versus AG, Constitutional Petition No 32/2022***)

The Judicature (Plea Bargain) Rules, SI No 43 / 2016

Plea Bargaining was formally introduced to Uganda's criminal Justice landscape in May 2016 by the Rules Committee through SI 43/2016, allowing the parties to work out a mutually satisfactory disposition of a criminal case subject to court approval.

(Rule 4) defines it 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. Where successful it results in a plea bargain agreement in respect of a charge and sentence.

The Court of Appeal of Uganda, in the case of **Agaba Emmanuel and 2 others versus Uganda, Criminal Appeal No 139/2017**, quoted US Chief Justice Burger's comments on plea bargain in **Santobello vs Newyork 404 US 257** as follows;

"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.

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

Objectives of Plea Bargaining

Rule 3: Enhance efficiency of Criminal Justice System (*Cambridge definition of efficiency: Achieving the largest amount of useful work using as little energy, effort, resources*); facilitate backlog reduction and prison congestion; encourage accused to own up to their responsibility; enable the accused, the prosecution and the victim to reach an amicable agreement on sentence; involve the victim in the adjudication process; enable quick relief from the anxiety of criminal trials (*unpredictability of the trial system*)

Constitutional principles on the exercise of Judicial power:

Article 126 and 127 of the Constitution: These include the 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, and justice being done to all

Plea Bargaining is a move towards restorative rather than retributive justice where the focus is on reconciliation rather than

punishment of the offender for the crime committed- A form of alternative dispute resolution in criminal matters

Initiation of Plea Bargain:

Rule 5: It may be initiated orally or in writing by the accused or prosecution at any stage of the proceedings before the sentence is passed. Usually, either party will inform the court that they wish to consider the PB at the commencement of the trial. However, it may come as late as after conviction.

The duty of the court at the stage of plea initiation has been discussed in **Inensiko Adams versus Uganda, Mukono Criminal Appeal No 263/2017**

In that case 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. The magistrate had instead proceeded to handle the matter as a plea of guilty. The accused was misled into thinking he was in a plea bargain. From the record of proceedings, the case was at defense hearing when the accused stated, *"I am for plea bargaining"*

The State replied *"The case came for trial the accused was put on the list for PB 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 20th March 2017"*

The state said *"Let him pay the two million shillings from prison"*

The trial magistrate then read the charges afresh and the accused pleaded guilty. Previously the accused had informed the court that his lawyer was coming and they would sign the plea bargain agreement.

It was held that on appeal that 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.

It was also held that ideally, PB should be at the time of plea taking to enable the state, the accused, and the defense counsel to agree on amending the charges where necessary. In that case, the magistrate blocked the PB at the defense stage. Where the request is made during the hearing, the court should suspend the proceedings and give the parties time.

Ultimately, he or she has the power to reject the same if it does not meet the ends of justice.

It is good practice for the accused to be notified that the option of PB is open to him or her the moment he or she is produced before the court. At the commencement of criminal proceedings, charges are read and the accused is asked whether he admits the case or not. He may then plead guilty or not guilty. The accused may be willing to plead guilty if he knows he can negotiate an agreeable sentence right from the start.

The High Court (Anti-Corruption Division) (Case Management) Rules, 2021 require the judicial officer to inform the parties of the option of entering into a plea bargain. It is good practice.

In criminal sessions, the judicial officer may guide the parties that the option is available to them, at the pre-session meetings.

Court participation in the Plea Bargain process:

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 view serves the interests of justice (**Inensiko case**)

Rule 8 (1): the 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.

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

In **Lwere v Bosco versus Uganda CACA 531/2016**, the justices of the Court of Appeal held;

“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.”

Courts superintendence over the process also requires:

1. Alertness and consideration of sentences handed down to other accused persons in the same case, who may have entered PB earlier and been convicted; **Parity in sentencing**
This would safeguard against passing varied sentences for persons who committed the offense in similar circumstances. Where there is a need to vary the sentence for one of the accused, we must be convinced that there are other factors that justify a variance e.g. the degree of participation
2. Ensure the charge sheet or indictment is amended if the PB agreement is for a minor or cognate offense so the right particulars are read out at plea;

3. Ensure the plea bargain agreements are properly filled as per the format in Schedule 1; **Rule 9**;
4. Where PB involves a child, ensure the agreement is executed by a guardian, parent, probation and welfare Officer, or legal representative of the child. Also apply the proper sentencing regime under the Children Act. No sentences above three years should be imposed.
5. Ensure disclosure of all relevant information to the accused; copies of documentary exhibits are to be provided to the accused to enable him or her to make an informed decision; See **Rule 7**

Soon Yeon Kong Kim and another versus Attorney General Constitutional Reference No 6/2007 outlawed trial by ambush in criminal matters. Disclosure of prosecution's evidence must be made except in some circumstances e.g. national security, the safety of witnesses. All the exceptions are cited by the Constitutional Court in the above decision. ICD Rules are also detailed in regard to disclosure.

It is good to be mindful of the protection of witnesses even during PB for sensitive cases. Many accused persons use PB as a fishing tool to know the case against them and may adversely prepare.

6. Keep a proper record of the proceedings (including exhibits). It is good practice to admit to the record some pertinent exhibits that may support the sentence arrived at and the circumstances under which the crime was committed. These include Post Mortem Reports, Medical Records for examination of the accused and the victim of crime (PF 3, PF 24, PF 48)

These are relevant because appeals against the severity of a sentence are allowed under the PB Rules

Procedure for Plea Bargain in Court:

(A study of decisions of appellate courts shows that most appeals emanating from plea bargain succeed because of failure of the lower court to follow procedure)

This is therefore a critical aspect that ought not to be downplayed. The step-by-step court procedure for confirming the plea bargain is set out in Schedule 2 to the Rules.

Schedule 2

1. Party Called

2. Representatives introduced

3. **State introduces the plea agreement:** What offense have they agreed upon? What sentence? How have they catered for the period spent on remand? What Compensation was agreed? Other Orders e.g. confiscation?

4. **Defense confirms the plea agreement**

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

The accused's rights in a criminal trial are set out in **Rule 12**;

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

a) 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 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
- 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 the sentence or if the Judge sentences the accused outside the agreement

Lwere Bosco's case: Court set aside the plea bargain agreement because though the appellant had pleaded guilty, the record was silent as to whether the appellant fully understood 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

The 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

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 understands the charge he or she is invited to plead to it

Plea is recorded

If he or she pleads guilty, the 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

- Charge and particulars read out in the accused’s language/ one he understands
- Explain the essential ingredients of the charge
- Ask the 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 the accused if the facts are true, or if he wishes to clarify or provide other relevant facts
- If the 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 the conviction

The state is heard in aggravation

Defense is heard in mitigation

The convict is heard in allocutus.

NB: The above 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 relevant factors are usually raised in the agreement, and the court may guide on this during consultations.

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

Rule 15 (3): 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. It **MUST NOT** impose a sentence not agreed upon by the parties

The court should also keep in mind that pleas of guilty get consideration when sentencing, so leniency should be exercised.

Victims' or complainant's views on the sentence are heard

UN Declaration of Basic Principles for Victims of Crime and Abuse

of Power A/RES/40/35 of 1985: Courts to adopt a victim-centered approach. Involving victims will help the court confirm a just sentence. Justice is for the victim and the community and must be seen to be done

Consider the victim or community impact statements envisaged under the Sentencing Guidelines (if any). Ensure the interests of the victims have been considered during the plea bargain negotiations. (Recall however that the victim's views are not binding on the court. It is ultimately the duty of the prosecution to manage the expectations of the victims of crime.)

Nevertheless, a victim's expression of forgiveness of the accused could lead to a more lenient sentence, the offense and circumstances of the case allowing

Each case is unique and must be considered on its own merits.

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 a 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 do is 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

The 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"

The END