PLEA BARGAINING PROCEDURES IN TANZANIA: AN ANALYSIS OF THE EFFICACY OF THE LAWS

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ABSTRACT

The criminal justice in Tanzania is delivered to offenders through the established criminal justice system. It consists of series of government institutions like the police, prosecution services, defense attorneys, courts and prisons. However, due to increase of population and rate of crime in Tanzania, the criminal justice system encounters some challenges.

The congestion in prisons and accumulation of cases in Tanzania's courts has made it difficult for judges and magistrates to deliver justice in a timely manner, especially in criminal cases, and the introduction of a plea-bargaining system was therefore considered essential. This delay and unresolved problem are even more acute in criminal cases. This is because of the restriction imposed by arrest and subsequent detention stays intact throughout, including the time of investigation, interrogation but also during the entire trial. A plea bargain is about what should happen to the accused and what punishment is best for him/her.

Despite the introduction of plea bargaining in Tanzania, criminal justice is still facing some challenges. The correction facilities are still encountering congestion and courts are still fighting backlog cases. Existence of these challenges raises questions on whether the laws which govern plea bargain in Tanzania have met the purposes.

There was a need therefore to assess the effectiveness of the laws governing plea bargaining procedures in Tanzania. The answers from the respondents were to the effect that the laws are not effective to the extent that the plea-bargaining agreements could lead to conviction of innocent accused persons.

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INTRODUCTION

Black's Law Dictionary defines the term plea bargaining to mean "A negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offence or to one of multiple charges in exchange for some concession by the prosecutor, as it refers to a more lenient sentence or a dismissal of the other charges".

In Tanzania, prior 2019 plea bargaining was informally practiced because Criminal Procedure Act was silent about it. From 2017 to 2019, there was an increase of disposal of cases through plea bargaining and this occurred to economic crimes cases where the accused persons voluntarily admit offences and the prosecution side either substitutes or withdraw some of offences. Plea bargaining has a number of advantages; first, it saves time whereby instead of an accused person going through a long process of trying a criminal case, an offender may appear before a court and plead guilty to the charges and the court will proceed to convict and sentence him. Second, it reduces congestion in prisons in the sense that, those who are charged with non-bailable offences if entered into plea bargaining agreements, they will not stay in custody for a long time while the trial is taking place. Third and last, instead of serving a custodial sentence, an offender may enter into plea bargaining and negotiate the sentence whereby he may wish to serve conditional discharge, community service, absolute discharge or probation as alternative punishment to custodial sentence.

Plea bargaining was formally introduced in Tanzania in 2019 by the Written Laws Miscellaneous Amendment Act (Act no.4 of 2019) where by Criminal Procedure Act was amended through insertion of the definition of plea bargaining in section 3 and introduction of new sections which are section 194A, 194B, 194C, 194D, 194E, 194F, 194G and 194H. These are the provisions which introduced plea bargaining and set forward the procedures to be followed during plea bargaining arrangements. The Chief Justice of Tanzania was empowered by section 194H to make rules for plea bargain and as a result in the year 2021 he made The Criminal Procedure (Plea Bargain Agreement) Rules 2021, which were published in GN 180 of 2021.

Therefore, plea bargaining was introduced in Tanzania to foster criminal justice by eliminating backlog cases in courts and remove congestion in prisons. The legal framework governing plea bargaining in Tanzania is centered in Criminal Procedure Act and the plea-bargaining rules.[i]

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Plea bargaining has a number of advantages; first, it saves time whereby instead of an accused person going through a long process of trying a criminal case, an offender may appear before a court and plead guilty to the charges and the court will proceed to convict and sentence him. Second, it reduces congestion in prisons in the sense that, those who are charged with non-bailable offences if entered into plea bargaining agreements, they will not stay in custody for a long time while the trial is taking place.[ii] Third and last, instead of serving a custodial sentence, an offender may enter into plea bargaining and negotiate the sentence whereby he may wish to serve conditional discharge, community service, absolute discharge or probation as alternative punishment to custodial sentence.

MEANING OF PLEA BARGAINING

Plea bargaining means the process whereby an accused person and public prosecutor agrees and reach a mutual agreement without going through long court proceedings.[iii] In the plea-bargaining procedures the accused has to voluntarily admit to the charges and the prosecution voluntarily discharges some or all the charges or and may plead to the court to reduce or drop all the charges and withdraw the custodial punishment to the accused upon conviction. In development of criminal justice, plea bargaining is paramount as it helps the courts to lower the case load, they would have face if everyone charged were to demand a trial, it allows for prosecutors and defense attorneys to work out a deal and eliminates the need to take the case before a magistrate or judge.

Plea bargaining began in the early 1800's in a case known as Commonwealth v. Battis.[iv] In this case, the judge refused to allow the defendant to plead guilty, until the defendant could prove he was not coerced into pleading guilty and thus the judge allowed examination of himself, the sheriff, and the jailer. This case set precedence for other cases to use plea bargaining as a means to obtain

a guilty plea. In the year 1969, James Earl Ray pleaded guilty to assassinating Martin Luther King, Jr. to avoid execution sentence and he finally got an imprisonment of 99 years.[v] In a landmark judgment Bordenkircher Vs Hayes,[vi] the United State Supreme Court held that, "the constitutional rationale for Plea Bargaining is that no elements of punishment or retaliation so long as the accused is free to accept or reject the prosecutions offer". The US Supreme Court uphold the life imprisonment of the accused because he rejected the *'Plea of Guilty'* offer of 5

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years imprisonment. The Supreme Court in the same case however in a different context observed that, it is always for the interest of the party under duress to choose the lesser of the two evils.

Therefore, the concept of plea bargaining finds its origin in the American Judiciary from 19th century, despite the fact that the Bill of Right makes no mention of the practice of plea bargaining when establishing the fair trial principles in the sixth amendment but the constitutionality of plea bargaining had constantly been upheld there. In the jury system the need for plea bargaining was not felt because there was no legal representation. Later on, in 1960 legal representation was allowed and the need for plea bargaining was felt although the traces of the origin of the concept of plea bargain are in the American Legal history. This concept has been used since the 19th century; judges used this bargaining to encourage confessions.

PLEA BARGAINING IN TANZANIA

In Tanzania, prior 2019 plea bargaining was informally practiced because Criminal Procedure Act was silent about it. Mostly of homicide cases ended through plea bargain whereby accused persons offered to plead guilty to lesser offence of manslaughter from the offence of murder. From 2017 to 2019, there was an increase of disposal of cases through plea bargaining and this occurred to economic crimes cases where the accused persons voluntarily admit offences and the prosecution side either substitutes or withdraw some of offences.

Plea bargaining in Tanzania, came with the amendment of the Criminal Procedure Act which was done through The Written Laws (Miscellaneous Amendments) (No.4) Act 2019. This Act amended section 194 of the CPA by introducing new sections 194A, 194B, 194C, 194D, 194E, 194F, 194G and 194H. In the exercise of his power given under section 194H, the Chief Justice have made The Criminal Procedure (Plea Bargain Agreement) Rules 2021, GN 180 of 2021. This shows clearly that Plea Bargaining as a means of solving disputes in our courts is something which is relatively new. Upon successful Plea bargaining between Prosecutor and Accused the outcome is the plea agreement. The term plea agreement has been defined as an agreement entered into between the prosecution and the accused in a criminal trial in accordance with sections 194A, 194B and 194C of the Criminal Procedure Act[vii] and The

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Criminal Procedure Act[viii], the plea-bargaining rules[ix] and the plea-bargaining guidelines[x] set out the procedure for Plea Bargaining.

Since its introduction, Plea bargaining is slowly gaining its popularity in Tanzania. There are however different schools of thoughts on the matter. There are those who support it and there are those who are strongly opposing it. Supporters of plea bargaining establishes that plea bargaining is advantageous because it shortens trial and guarantees conviction.[xi] They further argued that plea bargain is beneficial to prosecutors because it helps them to dispose as many cases as they wish in a short period of time. To them, plea bargain is a means to reduce backlog cases and congestion in prisons. On the other hand, opponents of plea bargain claim that plea bargain is too coercive and undermine important constitutional rights and that Plea bargaining can pressure the innocent to plead guilty to avoid a more serious charge. The adoption of plea-bargaining as a means of shortening trials was expected to bring changes to court registries and prisons by reducing backlog cases and congestions in prisons. However, the registries and prisons are still overwhelmed, thus there is a need to examine its effectiveness and suggest recommendations.

Types of Plea Bargain.

In plea bargaining, the prosecutor and accused person do bargain in different aspects. They may wish to bargain on number type of charges, number of counts, type of sentence and compensation to victim.

i. Charge Bargaining

In this type of plea bargaining the defendant agrees to plead guilty to reduced charges (aggravated assault than attempted murder). This type of bargaining involves assurance of lighter sentences in return for a defendant's pleading guilty.[xii] A charge bargaining will enable an accused individual to plead guilty to lesser crime than the one type they are charged with. Here the defendant pleads to only one or more of the original charges and the prosecution drop the rest.

ii. Sentence Bargaining

Sentence bargaining occurs after the prosecution and the defendant come to an agreement on the sentence for which the prosecution will argue.[xiii] The defendant then pleads guilty or on

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contest to the charge against them in return for the previously agreed upon sentence. Sentence bargaining involves assurances of lighter or alternative sentences in return for a defendant's pleading guilty.[xiv] One of the most visible forms of sentences bargaining occurs when defendant pleads guilty to murder in order to avoid death penalty. Sentence bargaining saves prosecution time by no having to prove the defendant guilty at trial. In exchange the defendant also benefits by not having to serve as much time if any in jail. In case where jail time is not a threat, the fines and fees the defendant t faces can be reduced.[xv]

iii. Count Bargaining

Count bargaining is essentially a subsection of charge bargaining where the defendants plead guilty to one or couple of the initial charges against him in exchange for the prosecution dropping the reminder of the charges. [xvi]

iv. Facts Bargaining

This is the process by which the defendant pleads guilty based on a particular set of facts prove their guilty.[xvii] The prosecution in exchange omit some of the facts that would have otherwise increased the severity of the sentences due to the laws surrounding sentencing. This is the least popular type of plea bargaining.

THE CONDUCT OF PLEA- BARGAINING

The chief justice of Tanzania published the Criminal Procedure (Plea bargaining) Rule 2021 Rules under section 194H of the Criminal Procedure Act Cap 20 RE 2019 for better carrying out of the plea bargaining. Before the making of the rules, the practice has been that the accused initiates a plea bargaining by writing a letter to the DPP through the prison authority under the current practices the court was involved after the conclusion of the agreement between the prosecution and the defense. The rule however requires that parties to a criminal offence to engage the court from the beginning by notifying it orally or in writing of the intention to negotiate a plea agreement. The court is vested with power to fix a time within which a plea of agreement should be concluded. The maximum time that can be granted is 30 days.

The rule also gives victims the right to be involved in the plea-bargaining process specially to protect their right to compensation or restitution. The victims are also accorded an opportunity to include their proposal for compensation in the agreement. The rules allow the accused and

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the defendant to propose a penalty in the final plea prescribed a lesser penalty than the statutory minimum penalty prescribed by the laws suggested by the parties, the court is not bound by the sentence recommended by the parties. The rule also prescribes the format of peal agreement and the form of an application for setting aside a conviction founded on plea of agreement formerly there was no statutory format of the plea agreement.

Initiation Of Plea Bargain

The law stipulates that a plea bargain may be initiated by any of the following persons; a public prosecutor, accused person, advocate, friend, relative or a representative of accused person.[xviii] Where the accused or his advocate has notified the court his intention to negotiate a plea agreement he shall, by a letter inform the DPP or authorized officer his intention to negotiate a plea agreement.

Where the authorized officer has agreed to enter into plea agreement negotiation he shall; consult the relevant investigative agency and or the victim about the plea agreement negotiation.

Formation of a team of two or more prosecutors to negotiate the plea agreement and keep the record of consultation with the investigative agency and the victim confirming the consultation made.

Rationale Behind Plea Bargaining

Plea bargaining is an essential tool which bring together judges, magistrates, prosecutors, and advocates to work together in delivering justice. Plea bargaining avoids unnecessary litigation, and reduces the strains on resources as well as minimizing inconveniences to witnesses. Prosecutors benefit from plea bargains as it guarantees the positive outcome which is conviction. Proper disposal of cases is important for both prosecution and defense attorneys. Therefore, plea bargaining was introduced in the system in order to serve and achieve the following:

- Expeditious Disposal of Many Criminal Cases

Normally a criminal justice system requires that cases be conducted in a timely manner and the judiciary was challenges by the presence of bulkiness of case files, Thus, with the introduction of plea bargaining in the country the judiciary is expected to have a timely disposition of criminal cases.[xix]

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- It Guarantees Win to The Prosecution Side

With the introduction of plea-bargaining practices, the prosecution side is assured that no matter what the situation may be there is greater chances of court to rule on the favor of the government. This is because with plea bargaining the person tends to admit the charges against him and so the only lesser charges are taken into account.[xx]

- Leniency

Leniency refers to the lessening of punishment or chore, this is the practice or tendency for forgiveness, mercifulness or compassion when issuing a punishment for a crime after a conviction. Since plea bargaining tends to give an accused the opportunity to be charged with the lesser offence the plea bargaining has similar implication because it reduces the heaviness of the punishment that an accused could suffer as the result of the offence so committed

Aid other Cases

Sometimes, plea bargaining gives and opportunity for the accused person to support the investigation process. This happens when the accused is promised to serve a lesser offence only if he/she supports the efforts of the investigative department and by so doing plea bargaining aids other cases to be determined and finalized timely.[xxi]

- Normally No Maximum Sentence is Imposed

Normally in other criminal laws each offence is provided with its maximum sentence or punishment. This is not the case on the side of plea bargaining which gives an opportunity for the accused person and the prosecution side to negotiate on the nature of offense they should take, the nature of punishment and even the sentence to be imposed. Thus, by doing to the plea bargain takes away the power to give sentence for the criminal charges after an accused have been convicted already. [xxii]

- It Reduces the Inmate's Congestion in Prison Facilities

The ordinary trial methods have caused the presence of massive inmate in the prison facilities because it does not offer other forms of punishment for serious criminal offences. However, with the introduction of plea bargaining the number of inmates in prison facilities is reduced

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because instead of taking a person to prison, he is only required to negotiate the sentence as an alternative to prison.

FACTORS TO CONSIDER BEFORE ACCEPTING AN OFFER FOR PLEA BARGAINING

The public prosecutor before accepting an offer for plea bargaining shall where plea bargaining involves negotiation of counts in a charge, accept the counts that will results to adequate compensation to the victim or mitigate the consequences cause by the criminal conduct to the society.

But again, Where the public prosecutor involves negotiation of a sentence, the public prosecutor shall take into account; The gravity of the offence; Recidivism (offender who repeats offences); Nature and extent of harm injury or damage caused to the victims or society; Aggravating factors (such as high level of planning, organization, sophistication of offence, high level of financial profit from the offence; abuse of position of trust and of power.) and also Mitigating factors (such as previous goods character, cooperation with the investigative agency after arrest, the minor role played by the offender in the commission of the offence, health condition of the accused, young or old age, compensation or restitution contributed by the accused.)

Not only that, but also where the plea bargaining involves negotiation of compensation the public prosecutor shall take into account the proposal of compensation made by the victim, where there is an identifiable victim. It is also important to assess the amount involved in a charge provided that where the accused offer to pay less amount than which is stated in a charge, lesser amount shall not be accepted unless there are reasonable basis, which must be reflected in the minutes of negotiation proceeding to justify that position. It is also important to acknowledge the financial circumstances of the accused but also the interests of justice, so that compensation should not defeat the end of justice.

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THE LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING PLEA BARGAINING IN TANZANIA

Examining the plea-bargaining process in the context of legislative law is an essential step in establishing the fairness of the procedure. Plea bargaining is regulated and governed by a number of laws and institutions.

Constitution of the United Republic of Tanzania

When an accused enters into a plea agreement, he forfeits a number of fundamental rights, including the right to a trial, the right to an appeal, the right to be heard in court, and the right to the presumption of innocence. All people are equal and free at birth.

According to the constitution of URT,[xxiii] every person has a right to have his or her dignity recognized and respected. It further stipulates that everyone is entitled to protection and equality before the law without exception and that everyone is equal before the law. One of the democratic foundations is equality before the law.[xxiv] Plea-bargaining laws ensure that the accused is treated equally before the law rather than being seen negatively by society and subjected to discrimination. Plea agreements help to restructure criminals by allowing them to accept responsibility for their trial and commit willingly to the law without incurring costly fines.

The Criminal Procedure Act

Plea Bargaining Procedures are one of the processes that this law regulates. Section 3 of this Act was recently amended by adding the word "plea agreement" to denote an arrangement made in a criminal trial between the prosecution and the accused. Additionally, the term "plea bargaining" was added to describe a negotiation in a criminal case between a prosecutor and the accused in which the latter agrees to: (a) plead guilty to a specific offense, a lesser offense, or a specific count or counts in a charge with multiple counts; or (b) cooperate with the prosecutor in the provision of information that may result in the discovery of additional information relating to the case. The detailed procedure for plea bargaining is stipulated from **S. 194A** to **S194H** of the Act.

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- The Criminal Procedure (Plea-bargaining) Rules, 2021

These rules were made under section 194H of Criminal Procedure Act,[xxv] and were published on 5th February 2021 vide Government Notice No.180 of 2021. These rules are for better carrying out of the provisions of plea-bargaining Act. The rules address among others, scope of plea agreement, procedures to be adopted, time limit within which a plea agreement should be concluded, prosecution's duty to disclose evidence to the accused during bargaining, involvement of the victims of crime in bargaining the value or form of compensation to be paid, sentencing recommendations to be considered by the court and form of application to set aside conviction the end.

- The Police Force

The Tanzanian police force is under the civilian control of the Ministry of Interior, considered part of the civil service. It is largely subject to the same control and disciplinary mechanisms as the civil service. In Tanzania, the law that gives this power to the police is the Criminal Procedure Act.[xxvi] When investigating a crime, the police are empowered by law to go to any place where they have reasonable grounds to suspect that a crime has been committed and then conduct an investigation. If a crime is detected, the police have the right to arrest the suspect. However, the police do not have the power to arrest without a warrant unless the offense is one of the offenses under the Penal Code Act.[xxvii]

Although the Director of Public Prosecutions may insist, in accordance with the law, that only police officers of the appropriate rank act as prosecutors, the decision as to who is promoted to that rank is not within about the Director of Public Prosecutions which belongs to the police, the agency that employs prosecutors.

A regional judicial police officer and a district judicial police officer respectively supervise the judicial police units, reporting of course to the regional police commander. Police force prosecutors are under the general supervision of regional crime officers, who are the main supervisors of criminal investigations at the regional level. However, they must coordinate their work with other officers, such as the officer in charge of a police station when cases referred to them for prosecution originate directly from the police station, e.g.in the event of offenses that may be tried in court. by lower courts.[xxviii]

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In appropriate circumstances, the Director of Criminal Investigation will give Regional Crime Officers instructions on how to proceed. This may tie the equation together. We can infer that the Regional Crime Officer's responsibility is to coordinate the investigation and prosecution processes as both the Public Prosecutor and the investigator work under his or her supervision.[xxix]

- The Evidence Act [Cap. 6 R.E 2019]

This act provides for judicial proceedings in or before the District court or Resident Magistrate's court, High Court and Court of Appeal of Tanzania. Section 3 (2) (a),[xxx] provides that, in criminal matters the prosecution should prove their case beyond a reasonable doubt unless the statute or the law provides otherwise and this position was affirmed in the case of Woolmington V DPP.[xxxi] The bargaining agreement does not bind the judge or the magistrate, thus they are free to decline to register the plea-bargaining agreement in court.

This is so that if a judge considers that a plea bargain was provided in bad faith, he or she may suggest that a case that has achieved a plea agreement proceed to trial. After the prosecution or the plaintiff has finished presenting their evidence, the case is often dismissed for lack of adequate evidence; but, on appeal, the trial court's decision may be overturned.[xxxii]

- The Penal Code [Cap 16. RE 2022]

This code deals with matters of penal law concerning crimes against people, things, and the state, as well as their punishment. Among the offences which may be subjected to plea bargaining are: sexual offences whose punishment does not exceeds five years or involving victims under eighteen years, offences relating to unlawfully assembly and riots, offences relating murder and manslaughter, assaults, grievous harm, stealing, offences related to false pretences and so many others. However, there are offences under penal code which are not subject to plea bargaining these include sexual offences whose punishment exceeds five years or involving victims of less than eighteen years and offences of treason and treasonable offences. In alternative, the accused committing the stipulated crime may use provocation as a defense. In order to find a culprit who had been violating their peace and property for a very long time, they had illegally congregated in the street.

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Institutional Framework Governing Plea Bargaining

Fair and adequate justice involves not only treating the individual who claims to have been offended but also the offender themselves with appropriate and just decisions and fair trial procedures. The institutions that oversee plea bargaining agreements in Tanzania include:

- The Judiciary

The judiciary consists of various judicial courts and is independent of the government. The constitution provides for the establishment of an independent judiciary and respect for the principles of the rule of law, human rights and good governance.

Plea negotiations in Tanzanian courts are conducted by prosecutors on behalf of the Office of the Director of Public Prosecutions. This means that in every court in which a prosecutor may work, plea negotiations may be conducted in accordance with the guidelines set out by the Criminal Prosecutions Act.

In the high Court and Court of Appeals, the prosecutor or any other judge appointed as attorney general may conduct plea negotiations in court. The majority of defendants want to resolve their cases through plea bargaining.

The prosecutor chooses the defendant, the charges, and comes to the negotiating table with the greatest influence. Defense attorneys tried their best to show leniency but ultimately encouraged their clients to compromise. Judges ensure that guilty pleas are informed and "voluntary," but they essentially ratify most plea agreements and sentence defendants according to the parties' agreement.[xxxiii]

Once they reach an agreement, a hearing will be scheduled to change the plea. Plea agreements typically require prosecutors to dismiss the charges or not bring specific charges. The agreement usually contains a sentencing recommendation that is not binding on the court, although the court usually follows that recommendation.[xxxiv] Additionally, the agreement may include a binding sentencing recommendation. The judge can, but rarely does, reject a plea agreement that dismisses the charges or binds the court.[xxxv] In this case, the defendant can withdraw his guilty plea.

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- The National Prosecutions Services

With the exception of magistrates' courts, the task of prosecuting suspected violators of the law is carried out almost entirely by specific branches of government on behalf of the state. All criminal prosecutions report directly to the Director of Public Prosecutions (DPP).

In all cases deemed appropriate, the Director of Public Prosecutions has the following powers:

(a) institute and prosecute criminal proceedings against any person in any court (other than a military court) for any offense alleged to have been committed by that person. (b) continue and continue any criminal proceedings instituted or carried out by any other person or authority, and (c) terminate any criminal proceedings conducted or performed by that person or any other agency or person.[xxxvi]

The main role of the DPP office is to appoint prosecutors who are required by law to conduct plea negotiations in criminal prosecutions in Tanzania.[xxxvii] Any person appointed as a prosecutor shall comply with the directives, instructions and directives issued by the Director. It is also important to note in this context that the Director of Public Prosecutions' power to appoint prosecutors is exercised generally rather than specifically. Except in rare cases where specifically named individuals are appointed as prosecutors, this appointment is more likely to take the form of appointment of position or rank, as is the case with the appointment of all officers. Police officers with the rank of deputy inspector or higher can become prosecutors.

THE CHALLENGES FACING THE EFFECTIVE APPLICABILITY OF THE LAWS RELATING TO PLEA-BARGAINING

The emergence of plea bargaining in Tanzania has come up with number of challenges which touches different aspects:

The law offers the accused person or his advocate or public prosecutor to initiate a plea – bargain and notify the court of their intention to negotiate a plea agreement.[xxxviii] When an accused person enters at plea of guilty, he pleads without antedating any benefits but also acknowledging the indictment accusations.[xxxix] In a "plea agreement," the prosecution and the defendant agree to decrease the charge or the punishment in exchange for the defendant's admission of guilt. Most often, the contentious practice of plea bargaining is used by justice

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systems that rely on guilty pleas to end trials. Plea negotiating is a mostly ambiguous process that almost seldom involves both charges and sentences.

Normally, the court is not involved in the entire process of plea bargaining but rather in certain aspects of the bargaining process. This may affect the effectiveness of plea bargaining. Courts that are overcrowded with backlog cases or having insufficient number of workers may have difficulty managing plea negotiations. A voluntary agreement is an agreement signed according to the free will of the parties without being influenced in any way.

One of the most difficult tasks the court will face is to prove the absence of free will in an agreement between one party who has the power to forgive or accuse and another party who is merely powerless. In practice, it is difficult for a court to ensure that such an agreement is voluntary, because the law prohibiting plea bargains prohibits the court from doing so. Negotiations always take place secretly between the prosecutor and the defendant. Ability to engage an advocate for legal representation for the accused persons is critical factor for ensuring a fair plea-bargaining process.

Accused persons who have been availed with representation by competent advocates are more likely to make sound decisions about whether to accept a plea negotiation or not. Therefore, an accused who enters into a plea bargain under without having a strong advocate for representation cannot have equal bargaining power with a prosecutor who is free to work to lighten or aggravate his or her case.

The plea-bargaining agreements are mostly prepared in English language which sometimes may become a barrier to an accused person who should sign it. Despite the fact that an accused person is allowed to invite next of kin during signing of the plea agreement, it may happen that the invitee is illiterate or does not comprehend English language at all. In such instances, the duty to translate the agreement to accused person remains in the discretion of public prosecutor.[xl]This poses a threat and a challenge as well to the accused.

Unregulated pleas of guilt in the normative right to a fair hearing engage the voluntariness of plea bargain by accused. human rights law does not regulate the voluntary nature of plea bargaining, since the negotiations don’t include the right to defend oneself, nor right to be heard, breaching human rights.

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CONCLUSION AND RECOMMENDATIONS

Conclusion

It follows therefore that the laws just aim at quickly reducing the number of under-trial prisoners and increasing the number of convictions, with or without justice. The provisions allow the prosecutor, after consultation with the victim or investigator, as the circumstances warrant, at any time before sentencing, to enter into a plea bargain agreement with the defendant and his or her attorney if represented or, if unrepresented, a relative or friend, or any other person legally authorized to represent the defendant. The law also gives the defendant or his or her attorney the right to enter into a plea agreement and notify the court of their intent to negotiate a plea agreement.

However, the existing legal and institutional framework is inefficient because the enforcement machineries are vested with discretionary powers which can be abused and the court is prohibited from participating. Again, the public prosecutors available are not seriously involved in discharging their duties in conducting investigation and yet they want to win the case, resulting to them coercing and induce defendants to accept the plea deal.

Furthermore, the continuing trend of challenges facing implementation of plea-bargaining laws is generally recognized, however there have been no or less efforts to contain the revealed obstacles, regardless of defendant's lack of awareness but enforcing machineries or responsible organs took little or no measures to ensure the citizens (defendants) are aware of their substantive and procedural rights as well as the avenues to go through in order to get redress in cases of any infringements of their rights.

The law gives accused the option to compensate the victim, to restitute or to face confiscation of the proceeds and means used to commit the crime. However, the law is silent at what time should such payment of compensation be implemented. There are no directives on whether the amount of compensation should be deposited prior registration of the plea agreement or after the agreement has been registered.

There are instances where an accused person dies before completion of payment compensation especially where an accused person opted to pay compensation by installments. The law is also silent on what should be done where such events occur.

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The provisions regulating plea bargaining stipulates that parties can propose sentence to be imposed on the accused person and such recommendation shall be included in the plea agreement which shall be registered before court. However, the same provisions provide that despite the recommendations, the court remains with the discretional powers on the type of the sentence to be imposed on the accused person. This provision creates uncertainty to accused person who enter into plea bargaining agreements as most of them fears that despite the amount of compensation they have paid to the government, they may still need to pay either fine or serve jail sentences as punishments which might be imposed by court. It could hereby be concluded that, Laws Governing Plea Bargaining Procedures in Tanzania are ineffective.

Recommendations

Sentencing is a matter of primary concern in any legal system. This requires considering the facts of the case and the defendant to determine the appropriate sentence. Criminal proceedings in the adversarial system are designed to resolve conflicts of guilt or innocence. Thus, the following are recommended to make the laws on plea bargaining effective:

Firstly, The provisions of plea bargaining should be amended to incorporate mode and time frame for payment of compensation

Secondly, The law governing plea bargaining in Tanzania should be amended to give the courts full control of the plea-bargaining procedure.

Furthermore, Balancing bargaining power is necessary because most of the defendants in these negotiations are involved in non-bailable offences. The prosecutor, having a lot of power over them, easily encouraged them to plead guilty to the crimes with which they were charged.

In addition to that, Criminal Procedure Act[xli], needs to be amended to balance negotiating power between negotiating powers and also Limiting the discretion of prosecutors under the law could achieve this.

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BIBLIOGRAPHY

Journal Articles

ADELSTEIN, R (2019) "*Plea Bargaining in South Africa: An Economic Perspective*." Constitutional Court Review. Volume 9, 81–111.

ADEOGUN-Phillips, Charles A. "The Evolution and Practice of Guilty Pleas in International Criminal Law." *Contemporary International Criminal Law Issues: Contributions in Pursuit of Accountability for Africa and the World*. The Hague: TMC Asser Press, 2023.

385-452.

AIDONOJIE, Paul Atagamen, Anne Oyenmwosa Odojor, and Patience Omohoste Agbale. "*The Legal Impact of Plea Bargain in Settlement of High Profile Financial Criminal Cases in Nigeria.*" Sriwijaya Law Review 5.2 (2021): 161-174.

ALABI A.A. (2004) Case Flow Management in the Lower Courts – *Problems and Solutions. In Conference of All Nigeria Judges of the Lower Courts* 2002 (Lagos:

ALBERT W. Alschuer,(1979) *"Plea Bargaining and Its History*",79 Colombia Law Review, 1 (1979) p.3.

ALKON, Cynthia. "*Hard bargaining in plea bargaining: When do prosecutors cross the line*." Nev. LJ 17 (2016): 401.

ALSCHULER, Albert W. "*Plea bargaining and its history*." Columbia Law Review 79.1 (1979): 1-43.

ALSCHULER, Albert W. "*The changing plea-bargaining debates*." Calif. L. Rev. 69 (1981): 652.

ALSCHULER, Albert W. "*The defense attorney's role in plea bargaining*." The Yale Law Journal 84.6 (1975): 1179-1314.

BIBAS, Stephanos. "*Plea bargaining outside the shadow of trial*." Harvard Law Review (2004):

ISSN 2581 3382
© All Rights Reserved – The Law Brigade Publishers (2023)

2463-2547.

BITURO, Kenneth. *Plea Bargaining in Tanzania: An Assessment of Its Implication on The Rule of Natural Justice*. Diss. Mzumbe University, 2020.

BOLIFAAR, Andhy H. "*Access to Justice of Plea Bargaining in Addressing the Challenge of Tax Crime in Indonesia*." Scientium Law Review (SLR) 1.1 (2022): 1-12.

CHEESMAN, J.S., (2014) *A Comparative Analysis of Plea Bargaining and the Subsequent Tensions with an Effective and Fair Legal Defence,* A PhD thesis submitted in the University of Szeged, Faculty of Law and Political Science, at page. 12-21

CHIPETA, B D (1982) *The Public Prosecutor and the Law of Criminal Procedure*: A handbook for Public Prosecutors. Eastern Africa Publications Limited. Arusha. Dar Es Salaam, p. 16

CLARK, Janine Natalya. "Plea bargaining at the ICTY: *Guilty pleas and reconciliation*." European Journal of International Law 20.2 (2009): 415-436.

CRESPO, Andrew Manuel. "*The hidden law of plea bargaining*." *Columbia Law Review* 118.5 (2018): 1303-1424

DAKYEN, I.C. (2006) *The Nigerian Judicial System Problems, Challenges and Prospects*, In Judicial Integrity, Independence and Reforms. Essays in Honour of Hon. Justice M.L Uwais (GCON, CJN) (Enugu: Snaap Press Ltd) at Pp.350-352.

DAVID M. Crowe, (1979) *"Cost and Plea-Bargaining Process*,"89, Yale Law Journal, at page.333

DI LUCA, Joseph. "*Expedient McJustice or Principled Alternative Dispute Resolution*-A Review of Plea Bargaining in Canada." Crim. LQ 50 (2005): 14.

FISHER, T. *The Boundaries of Plea-bargaining: Negotiating the Standard of Proof*, The Journal of Criminal Law and Criminology (1973) Vol. 97, No.4 Summer, 2007), p.943

GABAGAMBI, Julena Jumbe. "The Untreated Wounds of Crime Victims in Tanzania: A Psychological Consideration." *Restorative Justice: Promoting Peace and Wellbeing*. Cham: Springer International Publishing, 2022. 193-211.

ISSN 2581 3382
© All Rights Reserved – The Law Brigade Publishers (2023)

GASTORN, Kennedy. "Reforming Criminal Justice in Mainland Tanzania: *Balancing the Pleas of Guilty and Guilty by Trials in Assuaging the Blockage of Criminal Dockets through a Plea-Bargaining Scheme*." Tuma L. Rev. 4 (2016): 113.

GORR, Michael. "*The morality of plea bargaining.*" Social theory and practice 26.1 (2000): 129-151.

GUIDORIZZI, Douglas D. "Should we really ban plea bargaining: *The core concerns of plea-bargaining critics*." Emory Lj 47 (1998): 753.

HEUMANN, Milton. "*A note on plea bargaining and case pressure*." Law & Society Review 9.3 (1975): 515-528.

KAPINGA, W. B., (1990) The Police Force and Human Rights in Tanzania, Third World Legal Studies p. 41

KILEKAMAJENGA, Ntemi N. "Learning from contemporary examples in Africa: *Referral mechanisms for restorative justice in Tanzania.*" South African Crime Quarterly 63 (2018): 17-26.

KOREJO, Muhammad Saleem, et al. "*Plea bargain dilemma, financial crime and asset*

Books

CARISSA Byrne Hessick (2021). Punishment Without Trial*: Why Plea Bargaining is A Bad Deal* 1st edition, Abrams Press.

CHIPETA, B. D. A (2006) *Handbook for Public Prosecutors*, Mkuki and Nyota Publishers, p. 17

DAN Canon (2022). Pleading Out: *How Plea Bargaining Creates a Permanent Criminal Class 2nd* edition*, Basic books.*

GARNER B.A., (2004) *Black's Law Dictionary*, 8th edition.

REGINA Rauxloh (2014). *Plea Bargaining in National and International Law,* 1st edition, Routledge publisher

THE NATIONAL PROSECUTIONS SERVICE, Plea Bargaining Guidelines June,2022.

ISSN 2581 3382
© All Rights Reserved – The Law Brigade Publishers (2023)

WEBSTER'S and JOHN Wiley & Sons, Inc.*New World Law Dictionary Copyright* 2010 by Wiley Publishing, Inc.,

Websites

https://www.ojp.gov. accessed on Saturday, 12th February, 2022 at 10:20AM

https://www.thecitizen. co.tz/news/1840340-5285176-9d691d/index.html, visited February 2020

https://www.thecitizen.co.tz/tanzania/news/national/cj-plea-bargaining-ideal-for-tz-2504412

https://scholarship.law.nd.edu/law_faculty_scholarship/272

https://www.thecitizen.co.tz.accessed on Saturday, 12th February, 2023 at 21:15PM

https://www.thecitizen.co.tz.accessed on Saturday, 12th February, 2022 at 20:20PM.

https://www.thecitizen.co.tz. accessed on Saturday, 12th February, 2022 at 21:15PM

ENDNOTES

[i] Bituro, Kenneth. Plea Bargaining in Tanzania: An Assessment of Its Implication on The Rule of Natural Justice. Diss. Mzumbe University, 2020.

[ii] Mkinga, Glasio C. Plea Bargaining Agreement in The Administration of Criminal Justice in Tanzania: Analysis of The Law and Practice. Diss. Mzumbe University, 2020.

[iii] Adelstein, R (2019) "Plea Bargaining in South Africa: An Economic Perspective." Constitutional Court Review. Volume 9, 81–111.

[iv] Commonwealth v. Battis, 1 Mass. 72, 1 Will. 72 (1804).

[v] Langbein, U.J., (1979) "Understanding the Short History of Plea Bargaining," 13 Law and Society Review 261 at page 11.

[vi] Bordenkircher Vs Hayes, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604, 1978 U.S.

[vii] Section 2 of the Criminal Procedure Act [CAP 20 R.E 2022].

[viii] Section 194A, 194B, 194C, 194D and 194E.

[ix] G.N 180 of 2021.

[x] The National Prosecutions Service, Plea Bargaining Guidelines June,2022.

[xi] Mudasiru, Surajudeen Oladosu. "Democracy, plea bargaining and the politics of anti-corruption campaign in Nigeria (1999-2008)." African Journal of Political Science and International Relations 9.9 (2015): 335-348.

[xii] Aidonojie, Paul Atagamen, Anne Oyenmwosa Odojor, and Patience Omohoste Agbale. "The Legal Impact of Plea Bargain in Settlement of High Profile Financial Criminal Cases in Nigeria." Sriwijaya Law Review 5.2 (2021): 161-174.

[xiii] Maynard, Douglas W., and Douglas W. Maynard. Inside plea bargaining. Springer US, 1984.

ISSN 2581 3382
© All Rights Reserved – The Law Brigade Publishers (2023)

[xiv] Alschuler, Albert W. "The defense attorney's role in plea bargaining." The Yale Law Journal 84.6 (1975): 1179-1314.

[xv] Guidorizzi, Douglas D. "Should we really ban plea bargaining: The core concerns of plea-bargaining critics." Emory Lj 47 (1998): 753.

[xvi] Schneider, Andrea Kupfer, and Cynthia Alkon. "Bargaining in the dark: The need for transparency and data in plea bargaining." New Criminal Law Review 22.4 (2019): 434-493.

[xvii] Gorr, Michael. "The morality of plea bargaining." Social theory and practice 26.1 (2000): 129-151.

[xviii] Section 194A of the Criminal Procedure Act [CAP 20 R.E 2022]

[xix] Gorr, Michael. "The morality of plea bargaining." Social theory and practice 26.1 (2000): 129-151.

[xx] Reinganum, Jennifer F. "Plea bargaining and prosecutorial discretion." The American Economic Review (1988): 713-728.

[xxi] Miller, Herbert S., William F. McDonald, and James A. Cramer. Plea bargaining in the United States. Department of Justice, Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice, 1978.

[xxii] Korejo, Muhammad Saleem, et al. "Plea bargain dilemma, financial crime and asset recovery." Journal of Money Laundering Control 26.3 (2023): 628-639.

[xxiii] Article 12 (1) and (2)

[xxiv] 136 The Constitution of URT,1997[Cap. R.E 2002] (as amended from time to time). Article 13 (1)

[xxv] [Cap. 20 R.E 2019]

[xxvi] Sections 11-21, Criminal Procedure Act, R.E 2002

[xxvii] The Penal Code, Cap 16, R.E 2002

[xxviii] Robert shaw, R; Louw, A and Mtani, AW (2001) Crime in Dar es Salaam: Results of a City Victim Survey. A studysponsored by the United Nations Centre for Human Settlements (UNCHS) – Habitat and the Institute for Security Studies (ISS) Pretoria South Africa, p. 44

[xxix] Chipeta, B D (1982) The Public Prosecutor and the Law of Criminal Procedure: A handbook for Public Prosecutors. Eastern Africa Publications Limited. Arusha. Dar Es Salaam, p. 16

[xxx] The Written Laws (miscellaneous Amendments) (No. 4) Act, 2019

[xxxi] (1935) AC 462. See also, Miller v Minister of Pension (1943) 2 all E.R

[xxxii] Chipeta, B. D. A (2006) Handbook for Public Prosecutors, Mkuki and Nyota Publishers, p. 17

[xxxiii] Ibid, Section 3

[xxxiv] Section 194 D

[xxxv] Turner, J.I., (2006) Judicial Participation in Plea Negotiations: A Comparative View, 54 AM. J. COMP. L. 199, 201-02, 206, p. 68

[xxxvi] Ibid, Section 90

[xxxvii] Section 22 of the National Prosecution Service Act, 2008

[xxxviii] Malangahe, Shaban Jumanne. Plea-Bargaining Jurisprudence in Criminal Cases in Tanzania. Diss. The Open University of Tanzania, 2020.

ISSN 2581 3382
© All Rights Reserved – The Law Brigade Publishers (2023)

[xxxix] Ngilangwa, Abel Mathias. "Exploring the suitability of alternative dispute resolution mechanisms in tanzania criminal cases." (2023).

[xl] Section 17 of the law of Contract Act, Cap 345, R.E 2002

[xli] [CAP 20 R.E 2022]

ISSN 2581 3382
© All Rights Reserved – The Law Brigade Publishers (2023)