



Assessment of plea-bargaining agreements in the administration of criminal justice in Zanziba

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Abstract

Plea bargaining has existed in the Zanzibar Criminal Procedure since 2004. Enshrined under section 254 of the Criminal Procedure act no. 7 of 2004 which has now been repealed. However, its existence had not been put into use. Section 244-246 of the Criminal Procedure Act no 7 of 2018 incorporated the Plea-bargaining agreement giving the right of initiation to accused persons and their advocates while tying the hands of the Director of Public Prosecutions who is on behalf of the state. In Zanzibar, the greatest drawback among others in the administration of criminal justice system is the delay of cases disposal. The presence of this concept in the Laws of Zanzibar has not reached its core aim as to why use plea bargaining because the society and the stake holders have less knowledge on the significance of incorporating the agreements in the administration of criminal justice. The delay in application of this principle has not only increased the number of cases but the burden of backlog cases as well. Challenges of putting this principle into use are not only faced by the victims who have not been considered during enactment of the law but the accused persons as well who opt to plea on offences just to get out of custody and be free. Putting the right forum of application will motivate stake holders to put it in application for the better administration of criminal justice. The researcher involved qualitative methodology of research and included both primary in form of interview and secondary data collection. The findings show that plea bargaining concept in Zanzibar needs to be reassessed by the Law-making organ and stakeholders because there are a lot of merits involved in its use as compared to the challenges involved. important not only to the society, the prosecutors and victims of crimes but also to establish a better system in administration of criminal justice.

Keywords: Plea bargaining, criminal justice, Zanzibar

Introduction

Plea bargaining, in law is the negotiation of an agreement between the prosecution and the defense sides, whereby the defendant pleads guilty to a lesser offense or (in case of multiple offenses) to one or some of the offenses charged in exchange for more lenient sentencing, recommendations or a dismissal of other charges.

According to Black's Law Dictionary, a plea-bargaining is the process whereby the accused and the prosecutor work out a mutually satisfactory disposition of the case subject to Court approval.

It has also been defined as an agreement in criminal law proceedings, whereby the prosecutor provides a concession to the defendant in exchange for a plea of guilt or *nolo contendere*. This means the defendant will plead guilty to a lesser charge or one of the several charges in return for dismissal of others or plead guilty to the original charge in exchange for a more lenient one. Plea bargaining allows both parties to avoid lengthy criminal trials.

By far studies have proved that the plea-bargaining agreements have been successful in getting back the funds lost or stolen. Therefore, it will be a good idea to incorporate plea bargaining in the administration of criminal justice system. The same should follow the rules of agreements by way of offer, acceptance and if either party is dissatisfied can either walk away or in exchange provide a better offer.

Section 245 of the Criminal Procedure Act No. 7 of 2018, the Laws of Zanzibar defines plea-bargaining as an agreement by the Director of Public Prosecution not to charge the accused or to a plea of guilty by the accused to a

reduced or lesser charge or to plea of guilty by the accused to a particular charge in exchange for dismissal of other charges.

Therefore, plea-bargaining involves a process through which the DPP undertakes not to prosecute an accused person following an agreement entered between him and the accused. An agreement in which an accused pleads guilty to an agreed criminal charge with the expectation of receiving some consideration from the prosecuting authority in respect of the prosecution. The accused may, for example, plead to a less serious charge than the one originally filed. The principal effect of a plea of this nature is to reduce the potential sentence. In this situation, plea bargain is therefore, a compromise between the two parties; the accused who agrees to enter a plea of guilty to a lesser charge and the State Attorney representing the DPP who agrees to drop the actual felonious charge and secure the conviction with respect to the plea entered.

Unquestionably, speedy trial is a core factor of the criminal justice system and delay in trial may results in justice denial. With respect to this core factor, plea-bargaining seems to be an important universal remedy left to bail out from the situation of cases accumulations. Because cases are settled as early as one session upon finalizing agreement in those cases with watertight evidence.

In providing a forum to manage and settle cases that have taken a long time to solve and clear the backlog without prejudicing the rights of either party as it also helps in speeding up the investigation process in cases lacking evidence.

The law of Criminal Procedure in Zanzibar is inseparably linked with the history of British colonialism. It was exported from England to India and ultimately it was imported into Zanzibar with some modifications. It underwent different amendments. Criminal Procedure Act No. 7 of 2004 was enacted to accommodate the changes. The issue of Plea-bargaining in Zanzibar was first incorporated in this new legislation that existed for fifteen good years. However, in March 2018 that piece of legislation was also repealed and replaced by the Criminal Procedure Act, No. 7 of 2018. The Plea bargaining is also enshrined in section 244 of the Act. This section provides; *“At any stage during investigation of a crime or at the time of trial, the Director of Public Prosecutions or a person authorized in writing in that behalf, in consultation with a victim or his next of kin, may enter into a plea bargain process with the accused or his or her advocate”*

The Director of Public Prosecution is allowed to enter into a plea-bargaining process with the accused or an advocate representative. This can be done at any time prior close of prosecution case or pronouncement of judgment. The Chief Justice has already made special rules for the procedure of plea-bargaining. To date, plea-bargaining has been practically used in cases related to offences of Road Transport Act No. 7 of 2003 of the Laws of Zanzibar and very few other minor cases where Murder offences are reduced to Manslaughter.

Prior this dissertation, Plea bargaining was practiced in Zanzibar mostly in traffic cases and moved further to some criminal cases involving Murder reduced to Manslaughter. Thus, this dissertation aims at focusing on the gap for those cases having motive, malicious or political sentiments so as to be able to settle them without elongating court procedures and avoiding hatred.

This dissertation examines how and to what extent these agreements can be an effective procedure in settling cases without infringement of rule of law and natural justice.

The output will influence the law makers, authorities, Director of Public Prosecutions and the Government at large to review the requirements and the consequences by enacting regulations and drafting policies that do not prejudice the rights of the accused or the virtue of natural justice by incorporating plea agreements for better administration of criminal justice.

1.3 Statement of the Problem.

Plea bargaining agreements in the criminal procedure in Zanzibar has existed for about 23 years now from the date it was introduced that is 2004. However, the application of this concept has not been in its real sense of application as the systems use it sparingly in cases regarding traffic offences and very few criminal cases.

The delay in application has caused slow disposition of criminal cases in Zanzibar just like most of the jurisdictions in the world who went ahead and adopted the principle in everyday use. Some jurisdictions such as the United States of America, India and other countries uses plea-bargaining as an alternative measure to get rid of the said problem. In Zanzibar, the greatest drawback in the administration of criminal justice system is the delay of cases disposal. It is an undisputed fact that one case takes a substantial time of more than five to ten years without being disposed.

In 2018, 476 criminal cases were instituted before the Regional Magistrate Court at Vuga and only 19 cases were

disposed of by the end of that year. In 2019, about 460 criminal cases were instituted before the Regional Magistrate Court at Vuga and only 36 cases were disposed of in that year.

The presence of this concept in the Laws of Zanzibar has not reached its core aim as to why use plea bargaining because neither the society nor the stake holders know the significance of the plea-bargaining agreements in the administration of criminal justice.

This study aims to show the core factors to be considered in entering plea agreements by focusing on the significance and how the agreements can safeguard the rights of the involved parties in the offences starting with the victims, witnesses, and the State and ensuring the best interest of the public.

2.1 Literature Review

In this study, the researcher reviewed different literature from textbooks, journals, articles and case laws in connection with the topic from various authors to show how they have conceptualized the subject matter on plea bargaining as a legal process.

Sarkar (2010), is on the view that plea bargaining is an agreement between the parties that is accused and prosecutor in criminal cases prior to commencement of trial and the basis and rationale of plea bargaining in India and how it progressed over the years.

Sarkar has pointed out that minimizing backlog of cases and trial delays are the reasons that gave rise to plea bargaining in India. However, does not give a detailed account on the requirements for initiating a plea agreement. Likewise, did not entail the situation in Zanzibar on the applicability and the merits or demerits of the agreements to it.

In India, it was the Gujarat High Court that recognized the utility of plea-bargaining in the case of *State of Gujarat v Natwar Harchandji Thakor* (2005) Cr. L.J 2957 by stating that plea bargaining is an alternative measure of redress to deal with huge arrears in criminal cases. The Court reasoned the charge as follows; *the very best object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in disposal of cases in the administration of law and justice, fundamental reforms are inevitable*. There should not be anything static. It can thus be said that it is really a measure and redress and it shall add a new dimension in the realm of judicial reforms.

For *Frieman, Robinson and Wilmshurst* (2010) have advised that the concept of plea bargaining as an agreement between parties on issues relating to guilt and sentencing falls on both parties. It further introduced the effectiveness of plea-bargaining on the judicial financial resources towards handling criminal cases. They appreciate the practice of plea-bargaining on both regional and international instruments, International Criminal Tribunal for Rwanda (ICTR) and International Criminal Court (ICC). Yet, the writers did not portray steps and procedures on how such agreement are entered between parties to a case. They did not give the detailed elaboration on plea-bargaining as the best mechanisms used to bail out from the delays of criminal cases in the world.

This research entails on reliability of incorporating the agreements in the administration of criminal justice starting

with the significance and how to safeguard the welfare of the victims, witnesses, the state and the accused persons. In the case of *Jansen v, the State, Mathopo JA*, (with *Maya DP* and *Theron JA* concurring) showed that plea bargaining opens the door for parties to have enough time for decision making on either accepting or refusing the process provided it is the accused who initiates the same. The case also provides the need for considering interest of both victims as well as society while parties agreed to enter plea bargaining. However, in the above case, it does not depict on what to be done in the circumstances where the victims' and/or public welfare and rights are at stake.

This dissertation moves further in showing when the prosecutor can step in to initiate a plea bargaining for taking into consideration the victims' request, government loss or other adverse consequences.

According to *Heuman*, the Plea-Bargaining agreements arose due to the case pressure, limited staff, resources and time as these factors compromise the delivery of real justice by hindering efficiency and creating backlog of cases, thus attorneys cannot utilize their time to fight cases in trial. Thus, to him parties must be fair and of equal status to be able to enter into the negotiations. This is typically the same case in Zanzibar the number of cases is increasing on daily basis and the resources are scarce. Heumann thus portrays the benefit of these agreements to case reduction and saving resources. By far these agreements have managed to retrieve what was lost by the government in Tanzania mainland from various institutions like TRA. In Zanzibar these agreements first managed to settle disputes caused by misunderstandings between victims and accused persons in traffic cases that caused death.

This dissertation focus on how these agreements can create ways to ease the prosecution process in the administration of criminal justice for the sole purpose of removing the delays in trials. Because when the agreements are in use to most cases capable of settlement, more efforts will be focused on the other cases requiring extensive research and investigation.

In the Revised Prosecution Manual for Zanzibar State Attorneys and Prosecutors (2015), plea bargaining is defined as;

“An agreement between the accused and the State Attorney or Prosecutor whereby, accused agrees to plead guilty to an agreed criminal charge with the condition of receiving some consideration from the prosecuting authority in respect of the prosecution”

The manual specifies the important role of plea-bargaining for immediate clearance of criminal cases; however, it does not explain anything about the same agreements being incorporated as part of investigation in the evidential aspect nor the challenges of the same. According to the researcher, the perception stipulated in the Manual is valuable but it seems there was no exhaustive analysis of the topic on the objective of plea-bargaining and that is why the Manual emphasizes that the prosecutor should not initiate the process of plea-bargaining which is quite different from the object of Plea-bargaining. This dissertation analyzes the laws relating to plea bargaining and how the same can be merged in the prosecution process to aid the clearance of cases and remove delays.

Strange, R (2013) viewed plea agreement as a way of admitting guilt in consideration of either shorter sentence or another alternative disposition of criminal cases. The author

also shows characteristics of plea-bargaining, analyzes merits and problems obtained through plea bargaining. The characteristics and benefits discussed by author such as time saving, cost reduction ensuring penalty by guaranteeing success as well as increasing efficiency are vital in this study; it is from such benefits that this study will proceed in looking at the requirements to be considered in establishing the agreements focusing on the welfare of both parties that is victim, accused and witnesses.

Flynn and Freiberg believe that victims do not have the power to make determinate decisions in the criminal justice process. As once the police take over the cases, the victims merely receive the status of prosecution witness, with little input or participation in the decision making of their cases. This is typically the case in Zanzibar legal system as once cases are filed with the police the victims' become witnesses. The prosecution is the decision maker in the entire trial in whether to prosecute or not.

The authors shows that the prosecutor having the major role to play as the middle man to safeguard the rights of victims and ensuring justice has the ultimate hold of the situation though they did not show how the same prosecutor can manage the situation and clear the debris of hatred between the two sides for the sole purpose of justice.

This dissertation further entails the status of the prosecutor in discharging his duties for the purpose of removing delays in the administration of criminal justice as well as solve what remained unsolved for years in the cases that kept on waiting investigation.

Research methodology

1. Population size

This is the method in which a researcher used in choosing the respondents to represent the total population. The total population of this research was 50 people this is because it was easier for the researcher to analyze the data based on that sample, The sample distributed as following in the sample size charts below.

2. Sample size

These were the respondents chosen from total population and they were 30 respondents. The following are the distribution of respondents

Table 1: Population and Sample size

Population	Frequency	Sample size
Public prosecutors	10	5 from the office of the DPP
Judges	3	3 from High Court of Zanzibar at Tunguu
Magistrates	5	4 (2 Magistrates from Mwanakwerekwe RM's court, 2 from RMs court at Vuga
Advocates	10	4 advocates from different law firms in Unguja
Ordinary Persons	10	6 (3 ordinary citizen, 3 Accused persons at High Court of Zanzibar)
Police officers	5	3 (2 from Mwanakwerekwe Police station 1 from Police Headquarters)
Legal personnels	7	5 (3 from Zanzibar Anti- Corruption and economic Crimes authority, 2 from Attorney General's Office)
Total	50 Population	30 Sample Size

3.4 Research Approach

This research employed both qualitative research approach. In qualitative research approach the researcher was able to gain a deep understanding of the topic and avoid the

mistakes that would have happened by using quantitative research approach. The researcher was able to test the quality and relevance of the data collected and the idea of the respondents based on the problem.

Analysis of Relevant Legal Materials

1. Evidential test.

This is the fundamental principle for prosecutors; the evidential test is essential whereby the case when addressed before the court there is a great chance to convict the accused person. The Prosecutor must be convinced that there is tangible evidence that justifies a genuine probability of conviction against each defendant on each count. This principle is in the view that when any criminal case does not surpass the evidential test, the case should not be addressed before the court no matter how significant that case is. It should be considered that, any plea bargaining entered between parties should concur the principle.

Some criminal justice stakeholders during the interviews had different opinions that are contrary to the fundamental principle of law. While interviewing, one among the respondents was in the view that there was no need for the case to pass the evidential test for it to be entered into plea bargaining, as long as the defendant agreed voluntarily hence, it is enough for the DPP to agree and not bother whether the evidence is watertight to allow prosecution for the same.

The above perception as viewed by the respondent is against the object and principles of plea-bargaining and by doing that; the prosecution will turn into persecution.

The purpose of evidential test is to protect the case from doubt or certainty, as well as safeguard the case from interest, emotions, biases, political affiliation or prejudice. Hence abiding to the principles set prior entering negotiations and agreement is mandatory for the sole purpose of ensuring justice and transparency in adhering to the rule of law.

Absence of Criminal Justice Policy

The criminal justice policy is guidance to the criminal justice stakeholders. Policies can be mainly suitable in cases where there are high levels of discretion. Changes in criminal justice policy arise in reply to a problem that faces the criminal justice system and society in general.

Some respondents were of the view that law is the product of the society but plea bargaining is not the product of the society thus leading to the difficulty in implementing it. There is a need to have the criminal justice policy. A good example was given of UNDP legal Aid where there was a policy of legal Aid and the Law before the enactment of the same. The respondent further cemented on the importance of having criminal justice policies in Zanzibar for the effective application of laws including plea-bargaining. Having a system that recognizes and value the victims' rights is better than having a number of cases settled in agreements without giving room to the society to decide.

While interviewing one of the respondents, a victim from a grievous harm, was on the view that giving the accused the sole right to bargain plea and neglecting the victim's opinion in the matter is denying them their rights, as victims feel justice is not served in relation to what happened to them.

Findings

According to the data collected, the researcher came out with the following findings: -

First there is Lack of knowledge on plea bargaining agreements for the society in Zanzibar. Even the stakeholders in law admitted having basic knowledge regarding plea bargaining agreements in relation to the practical aspect. Among the respondents interviewed were judges, magistrates and state attorneys who were clear that all they know about plea bargaining agreements is that contained in the present Criminal Procedure Act no. 7 of 2018. Most of them had no idea about the Plea-Bargaining Rules of 2006. Out of the 44 respondents interviewed 30 of them had no idea what Plea Bargaining was all about. Hence, gave their opinion that they need to get educated thoroughly to be able to put the agreements in practice.

Also, there is Inadequacy of the Laws and regulations pertaining to the Plea-Bargaining agreements in Zanzibar. The existing Criminal Procedure Act no. 7 of 2018 does not provide detailed procedure on the Plea-Bargaining agreements. It has given the sole power to initiate the plea on the part of the accused and the advocate leaving the right to enter or refuse to the Director of Public Prosecution. Section 244(1) and (2) of the Criminal Procedure Act no. 7 of 2018 does not give the power to initiate to the Public Prosecutor. 40 Out of the 44 respondents, were on the opinion that if the Prosecutor was to initiate the plea-bargaining to the accused most cases could have different outcomes than pending in court.

This was also seen through the existing Plea-Bargaining Rules of 2006 that despite the Criminal Procedure Act being amended, the rules remain the same where under Rule 5, the prosecutor is barred to initiate the plea bargaining.

Further to that through data collected it was revealed that there is poor investigation on criminal cases by the police hence reluctant in practicing plea bargaining. As one among the key factor is transparency by disclosing all the evidence at hand to the accused and the advocate. All of the respondents admitted that if transparency is a factor, plea bargaining agreements cannot push through as the investigation is poorly conducted on cases and some of them just work per habit and not procedures.

Moreover, the data collected revealed that there is unequal bargaining power among the parties. Since the accused is the one to initiate the plea bargaining, most of them are in custody thus to them they believed it to be a form of force. As the accused are willing to do anything to get out even entering plea and retracting them later. Looking at the case of *Peter Michael Madeleka v. Republic* where the appellant voluntarily lodged a notice to enter into plea bargaining as he was denied bail having among other charges Money laundering, upon negotiation and agreement the appellant agreed to deposit two million Tanzanian shillings and a reduction of charge to Obtaining credit by false pretense. However, upon being convicted as per the plea-bargaining agreements the appellant appealed on the sentence.

Lastly, through the data collected and analyzed, it was revealed that there is fear of overriding objective. Since the principle seeks to ensure cases are discharged and dealt with fairly and in most cost-efficient way, the fact that most respondents had no idea about plea bargaining agreements created fear that these cases will not be handled efficiently and just.

Recommendations

The researcher had performed an extensive reading of various textbooks, case laws, articles, journals and scrutinizing different scholarly websites, the following recommendations are highly recommended to the House of Representatives together with the Law Review Commission in Zanzibar.

It is highly recommended to amend the laws relating to plea-bargaining in Zanzibar for the purpose of making it an effective tool in transforming the criminal justice system. (The Criminal procedure Act No. 7 of 2018 and Plea-bargaining Rules of 2006, the Laws of Zanzibar). This will enable victim participation as well as their protection. This is due to the fact that the rules are required to direct as to proper, adequate and efficient techniques on application of the concept of plea bargaining.

To enable practical use and application, it is highly recommended that proper and extensive education be given to criminal justice stakeholders such as advocates, state attorneys, magistrates, Judges, Police Force and the society who play a major role in this system. The stakeholders in criminal justice system, including the central government of Zanzibar, should take necessary steps in making public highly aware on uses of plea bargaining regarding all offences triable before the High Court and Regional Courts. The measure could help society in having high degree of utilizing the practice and hence, a number of criminal cases can be disposed in a very short period of time.

It is further highly proposed to the defense attorneys to embrace the culture of advising their clients to a considerable understanding on the merits of plea-bargaining and its consequences. In the scenario of clear and overwhelming evidence, defense lawyers are advised to opt for plea-bargaining rather than regarding plea-bargaining as a threat to their profession. More so adequate analysis should be done prior agreements so that neither of the party is infringed or feels left out or feels there is coercion or undue influence on his part.

Investigators should discharge their duties in conducting extensive investigation and analysis of evidence prior institution of charge and not just rely on accused persons opting to Plea so as to avoid incriminating the innocent and tarnish the reputations as well as soaking the justice system.

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