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Assessing the Implication of Plea Bargain under ACJA, 2015 in Nigeria's Anti-corruption Crusade: Lessons from Kenya

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ABSTRACT

The fight against corruption under the Nigerian Criminal Justice System has gradually witnessed the use of plea bargain in the prosecution of corruption cases; drawing criticism and approval from stakeholders. Plea Bargain is an agreement between the prosecutor and defendant whereby the defendant concedes to plead guilty to a particular charge in exchange for some concession from the prosecutor. This paper assesses the implication of plea bargain under the Administration of Criminal Justice Act, 2015 in the fight against corruption in Nigeria; drawing lessons from Kenya. The paper is doctrinal, using primary and secondary sources of law such as case law, books, articles in journals, and internet materials. It examines plea bargain and innovations under Administration of Criminal Justice Act, 2015 as well as complementary analysis of plea bargain under Administration of Criminal Justice Law (ACJL) of states and Kenya's application of plea bargain in its anti-corruption fight. The paper finds that judicial decisions considered both in Nigeria

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and Kenya reveals that plea bargaining is a useful tool in fighting corruption. One of the key recommendations of this paper is having a Plea Bargain Guideline and Rule pursuant to ACJA 2015 as obtainable in Kenya. This will act as a guide for prosecutors, accused persons and other stakeholders in negotiating a plea bargain agreement.

Keywords: Plea bargaining; corruption; ACJA 2015; Kenya, complementary; anti-corruption crusade.

1. INTRODUCTION

Historically, the jurisprudence of Plea bargain as a medium of combating crime is traceable to the nineteenth century having its deep root in the adversarial criminal justice system of the United States of America (USA) [1]. "The introduction of plea bargain was necessitated by the need for prosecutors to convict accused person despite the legal technicalities that accompanied the criminal justice system in USA that complicated simple administration of criminal justice system" [2]. As a result of these technicalities, most criminals escaped from justice and there were high records of unnecessary detentions of accused persons and delays in the conclusion of criminal cases [3]. "Against this background, the concept of plea bargaining was introduced as a compromise to ensure that criminals were properly punished. The notion behind this is that where someone who has stolen property accepts to negotiate what he has stolen back, society would benefit more by receiving back the property that has been stolen, and the criminal gets a lesser punishment" [4].

With the emergence of plea bargain in the nineteenth century, it was met with skepticism considering that neither the legislature nor the courts sanctioned the practice. It was also criticized publicly for threatening the rights of criminal defendant, and shifting the focus of criminal proceedings from courtrooms to corridors [5]. Also, it was criticized for giving prosecutors too much latitude in deciding the fate of the accused as there is no specific guideline for every case. Additionally, some critics expressed concerns that some prosecutors use threats to ensure plea bargain agreements and there is the likelihood of bias on the part of the prosecution. However, despite these criticisms, in the early 20th Century, plea bargaining practice was utilised in criminal case disposition and by the later part of the 20th century, it gained an aura of respectability and increased usage in the criminal justice system. With time it became famous and its practice spread across various climes and jurisdictions in combating crimes including financial crimes, bribery and corruption.

"In Nigeria, plea bargaining was introduced to combat the endemic nature of corruption by the Economic and Financial Crimes Commission Act, 2004" [6]. "The Act permits the Commission to enter plea bargain agreement with anyone who has been alleged of financial crime. It also permits the Commission and the Defendant to negotiate in a bid to lessen charges or sentences against him or her in as much as the suspect is ready to forfeit and yield the loot and proceeds of financial crime" [7]. "This position was also recognised by the Administration of Criminal Justice Laws of Lagos State, 2007" [8]. "However, the application of plea bargaining under the EFCC Act had several challenges occasioned as a result of the defects and lacuna under the EFCC Act on the application of plea bargaining. Basically, it was criticised for encouraging corrupt practices such that, plea bargaining was viewed as a medium that affords clemency for offenders in corruption charges" [9]. It is against this background that the ACJA, 2015 introduced some innovations on plea bargaining.

This paper assesses the application of plea bargaining under ACJA, 2015 and its implication in anti-corruption crusade in Nigeria. It also did a complementary analysis of application of plea bargaining in Kenya in a bid to point out gaps. Besides Part 1 which is the introduction, Part 2 clarifies concepts, and discusses plea bargaining and innovations under ACJA, 2015. Part 3 did a complementary analysis of plea bargaining under ACJA and considers the implication of plea bargaining on Nigeria's Anti-corruption crusade. It also considers gaps in the ACJA, 2015 on plea bargaining. Part 4, did a complementary analysis of the application of plea bargain in Kenya and considers the implication of the application of plea bargaining on Kenya's anti-corruption crusade. Part 5 concludes and makes recommendations.

2. CONCEPTUAL CLARIFICATION

2.1 Plea Bargain

"Plea bargaining also known as Plea Agreement, Plea Deal or Copping a Plea; is an agreement

between the prosecutor and defendant whereby the defendant agrees to plead guilty to a particular charge in return for some concession from the prosecutor" [10]. "It is a Pre-Trial procedure whereby a bargain or deal is struck between the accused and the prosecution with the active participation of the trial judge" [11]. The court in the case of *Ojike Oghenemaro Peace v Federal Republic of Nigeria* [12] defined plea bargain in accordance with the Black's Law Dictionary, [13] as a negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offence or to one of the multiple charges in exchange for some concession by the prosecutor, usually a more lenient sentence or a dismissal, of the other charges.

"Plea bargaining requires the defendant to plead guilty to a lesser charge, or to one of several charges and the prosecution's recommendation of leniency in sentencing. However, the judge is not bound to follow the prosecution's recommendation. Most plea bargains are subject to the approval of the court, but some may not be (e.g., prosecutors may be able to drop charges without court approval in exchange for a "guilty" plea to a lesser offense)" [14]. "Plea bargaining is basically a private process, but with the recognition of victim's rights groups, this is fast changing in many climes" [15].

"There are four different types of Plea Bargaining; charge bargaining, fact bargaining, sentence bargaining and count bargaining. Charge bargaining requires the defendant to tender a plea of guilty or nolo contendere to one charge in return for a prosecutorial commitment to drop, reduce, or refrain from bringing additional charges" [16]. "Sentence bargaining takes place when the defendant pleads guilty to the original charge in exchange for a recommendation from the prosecutor of sentencing concessions, for instance, a suspended sentence, probation, or imprisonment not to exceed an agreed term of years reviewable by the judge" [17]. "Count Bargaining is where the accused plead guilty to a subset of multiple original charges" [18]. "In Fact bargaining, the defendant pleads guilty pursuant to an agreement in which the prosecutor specifies certain facts that will affect how the defendant is punished under the sentence guidelines. In other words, fact bargaining happens when a defendant agrees to certain facts in order to prevent other facts from being introduced into evidence" [19].

"Plea Bargaining was acknowledged for the first time in the case of *Santabello v. New York"* [20]. The court noted that:

> *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 the Federal Government would need to multiply by many times the number of judges and court facilities.*

"Plea Bargaining has some advantages which some authors who are proponent of plea bargaining have recognised. According to Hessick and Saujani, the advantages of Plea bargaining benefit the prosecution, the defense, and the judge. It benefits the prosecution considering that a reduced plea decrease court costs and jury duty thereby leading to less taxation" [21]. "Reduced costs also allow prosecutors to spend more of their budget on more demanding and challenging cases" [22].

There are several criticism against plea bargaining, which some opponents have observed. Tina Wan [23] expresses "concerns that plea bargaining can coerce innocent defendants into pleading guilty". "The author noted that the prosecutor's unlimited discretion or option to pick and choose which charges to bring against defendants and ability to create substantial sentencing differentials between similar defendants can lead to the practice of overcharging and the use of threats to seek the harshest sentence to keep defendants from going to trials" [24]. Other critics such as Guidorizzi[25] argues that "plea bargaining weakens the integrity of the criminal justice system and allows the government to evade severe standards of due process and proof imposed during trials". "Also, Guidorizzi opined that plea bargaining allows defendant to escape full punishment by providing them with more lenient sentences, suggesting that justice can be bought and sold" [26].

2.2 Corruption

"Corruption has been defined as an abuse of public power for private direct or indirect gain which hinders public interest" [27]. "Corrupt practices involve public officials acting in the best interest of private concerns (their own or those of others) regardless of public interest" [28].

"Corruption is a phenomenon with many faces. It is characterised by a range of economic, political, administrative, social and cultural factors, both domestic and international in nature. Corruption is not an innate form of behaviour, but rather a symptom of wider dynamics. It results from interactions, opportunities, strengths and weaknesses in socio-political systems. It opens up and closes down spaces for individuals, groups, organisations and institutions that populate civil society, the state, the public sector and the private sector. It is, above all, the result of dynamic relationships between multiple actors" [29]. Corruption manifests in several forms such as:

i. Extortion: It involves coercing or pressuring a person to pay money or to provide personal favours or other valuables in exchange for certain actions or inactions. This coercion can be under the threat of violence, physical harm, or restraint.
ii. Embezzlement, fraud and theft: these crimes involve theft of resources by person trusted with control and authority over government property. These can include public officials and private individuals.
iii. Exploiting a conflict of interest/ influence peddling, insider trading: these involve engaging in transactions, "selling" influence, or getting a position or commercial interest that is irreconcilable with one's official role and duties for the purpose of illegal enrichment.
iv. Offering or receiving of an unlawful gratuity, favour or illegal commission. This offence is directed at public officials who obtain anything of value as extra compensation for the performance of official duties.
v. Nepotism, favouritism and clientelism: This is the allotment of appointments, services or resources according to family ties, tribe, party affiliation, religion, sect and other preferential groupings. For example, a public servant provides commissions, extraordinary services, jobs and favours to political allies, family and friends while members of the general public would not receive this special treatment.
vi. Legal political contributions. This happens when political parties or the government in power accepts money in exchange for non-interference and good-will towards the entity or group making the contribution. It is closely related to bribery.
vii. Bribery: "bribery involves the promise, offer or giving of any benefit or advantage that improperly affects the decisions or actions of a public official. It can also include those who may not be public officials per se, but may also include members of the public who serve on government committees. A bribe may consist of company shares, money, gifts, inside information sexual or other favours, entertainment, a job, promises etc. The advantages or benefits gained by corrupt officials can be direct or indirect" [30].

2.3 Plea Bargaining and Innovations under Administration of Criminal Justice Act, (ACJA) 2015

"The ACJA has provided clear guidelines to govern the use of plea bargain with the aim of ensuring that the system of administration of criminal justice in Nigeria promotes efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crime and protection of rights and interests of the suspect, defendant and victims" [31]. (ACJA) 2015, introduced plea bargain in section 270 (subsections 1-18) as one of the pleas available to an accused person.

According to Section 494(1) of the ACJA 2015, "plea bargain is the process in criminal proceedings whereby the defendant and the prosecution work out a jointly acceptable disposition of the case including the plea of the defendant to a lesser offence than that charged in the complaint or information and in conformism with other conditions imposed by the prosecution in exchange for a lighter sentence subject to the court's approval. The ACJA, 2015 revolutionized the criminal justice system in Nigeria".

"Some of the changes it introduced regarding plea bargain are as follows. Section 270(1) permits a prosecutor to accept plea bargain offer from the defendant or propose same to the defendant. Subject to the proviso of sections 270(2)(a)(b)(c), plea bargain can only be entered into at any time prior to the defendant entering his defence with the consent of the victim. Section 270(3) places a responsibility on the prosecutor to ensure that plea bargaining's offer or acceptance should be in the interest of justice, public interest, public policy and the need to prevent abuse of legal process. It is imperative to note that the issue of public interest is one that has no acceptable standard or measure. However, the ACJA, 2015 provides factors as a guide which prosecutors should consider" [32].

These factors are stated in Section 270(6) which include amongst others the following:

a. defendant's readiness to cooperate in the investigation or prosecution of others,
b. defendant's history of criminal activity,
c. defendants remorse or penitence and his readiness to assume responsibility for his conduct,
d. desirability of prompt and firm disposition of the case,
e. the probability of obtaining a conviction at trial and probable effect on witnesses,
f. the probable sentence or other concerns if the defendant is convicted,
g. the need to prevent delay in the disposition of other pending cases and the expenses of trial and appeal and;
h. the defendant's readiness to make restitution or pay compensation to the victim where appropriate.

These factors, particularly the one on victim's compensation and restitution are a welcome development and innovation. Section 270(6) requires that the consent of the victim should be sought and obtained before concluding a plea bargain. This section obligates the prosecution to include compensation and restitution order in the plea bargain agreement and allow the victim or his representative make representations on the content of the plea bargain agreement. This innovation was contrary to what was obtainable prior to ACJA, 2015 where victims' compensation was not considered in plea bargain. It only provided for punishment as a sanction for the accused person if found guilty.

More so, ACJA, 2015 requires that the agreement the prosecutor and the defendant or his legal practitioner enter into shall be in writing and the presiding judge is precluded from participating in the plea agreement before the court. The rationale for the judge's non-involvement is to uphold the impartiality or fairness of the proceedings and ensure transparency. After receiving the plea bargain agreement, the court shall ascertain the voluntariness of the defendant's admission to the charge and also ascertain if he made the agreement voluntarily without undue influence. Where the presiding judge is satisfied, he shall convict the defendant on his plea and award compensation in accordance with the terms of the agreement to the victim [33]. Also, section 270(10) permits the judge to exercise the discretion of recording a plea of not guilty and proceed with trial in an instance where the defendant cannot be convicted of the offence, he pleaded guilty to or where the agreement is in conflict with the defendant's right.

3. COMPLEMENTARY ANALYSIS OF PLEA BARGAINING UNDER ADMINISTRATION OF CRIMINAL JUSTICE LAW (ACJL) OF STATES

As of 2022, thirty (30) states have enacted the ACJL [34]. This paper will highlight the following states' ACJL representing the six geopolitical zones of Nigeria i.e. north central, north west, south south, north east, south east, and south west. This will enable this paper relate the perspective of these states as it relates to plea bargaining.

a. Lagos State Administration of Criminal Justice Law, 2015 [35]

To start with, Lagos State passed its Lagos State Administration of Criminal Justice Law in 2007, and this was reenacted in 2011, 2015 and recently amended in 2021 as the Administration of Criminal Justice (Amendment) Law (ACJL) of Lagos State, 2021 [36]. Plea Bargain as a concept found its root into Nigeria's penal law with the recognition accorded to it by section 75 of the Administration of Criminal Justice Law of Lagos State, 2007. It provides that the Attorney-General (AG) of Lagos State shall have power to consider and accept a plea bargain from a person charged with any offence where the AG is of the view that the acceptance of such plea bargain is in the public interest, the interest of justice and the need to prevent abuse of legal process. Also, section 76 provides for plea and sentence agreements as brought by the prosecutor and a defendant or his legal practitioner.

Section 76(2) requires that the prosecutor consult with the police officer responsible for the investigation of the case and if reasonably feasible, the victim, with due regards to the nature of the circumstances relating to the offence, the defendant and the interest of the community before entering a plea bargain agreement [37]. More so, by the import of this law, the complainant or the representative shall be given the opportunity to make representations to the prosecutor as it relates to the content of the agreements as well as the inclusion compensation or a restitution order in the agreement. Furthermore, by this law plea agreement between the prosecutor and the

defendant shall be in writing, and should include that the defendant is aware of the agreement having been informed and has a right to remain silent and the consequences of not remaining silent stated or any admission or confession made by the defendant [38].

Section 76(5) of the law precludes the presiding judge or magistrate from participating in the agreement. However the presiding judge or magistrate is required to inquire from the defendant to confirm the correctness of the agreement [39]. Also where the defendant admits the allegation the judge or magistrate is required by this section to ascertain the voluntariness of the admission and also ascertain if the offence is such that the defendant can be convicted for [40]. It is also imperative to note that the presiding judge or magistrate is required to sentence the defendant, where such is convicted based on the agreement, or impose a lesser sentence or higher sentence agreed by the parties [41]. Where the judge or magistrate imposes a higher sentence other than the one agreed by the parties, the defendant can choose to abide by his plea of guilty as agreed upon in the agreement , or withdraw his plea agreement and in this case the trial shall proceed denovo before another presiding judge or magistrate [42]. In this case, no reference shall be made to the agreement nor the admission made [43].

This paper notices some differences between the ACJA, 2015 and the ACJL of Lagos State. To start with, in Lagos State, while the AG of the state has the power to consider and accept plea bargain bought by a defendant,[44] under ACJA, the prosecutor may accept and consider the plea bargain and even offer plea bargain to the defendant. ACJA, 2015 did not peg the power of accepting a plea bargain agreement to the AG alone, considering that other than the AG as prosecutor, a legal practitioner authorised by the AG, a legal practitioner authorised to prosecute under specified law and even a police officer who is a legal practitioner can prosecute offences in court under the constitution [45].

b. Administration of Criminal Justice Law 2016 of Edo State

Section 270(1) of ACJL of Edo State provides for plea bargaining. This paper notices that the provisions of this law are similar to ACJA, 2015 on plea bargaining.

c. The Administration of Criminal Justice Law, 2016 of Oyo State [46]

Plea bargain and plea generally is provided by section 269(1) of ACJL, 2016 of Oyo State. It provides the guidelines for plea bargain, noting when the prosecution may receive and consider a plea bargain from the defendant or offer a plea bargain to a defendant charged with an offence. The law provided conditions that must be present for the prosecution to enter a plea bargaining with the defendant [47]. This law also replicates the provisions of ACJA, 2015 on plea bargaining.

d. Ogun State Administration of Criminal Justice and Other Related Matters Law, 2017

The Administration of Criminal Justice and Other Related Matters Law of Ogun State, 2017[48] provides for plea bargaining in section 281(1), requirement of plea bargaining and other terms of plea bargaining. The provision of this law is similar to other states' ACJL.

e. Adamawa State Administration of Criminal Justice Law, 2018, Imo State Administration of Criminal Justice Law, 2020 and Kaduna State Administration of Criminal Justice Law, 2017

Adamawa State Administration of Criminal Justice Law, 2018, [49] Imo State Administration of Criminal Justice Law, 2020 [50] and The Kaduna State Administration of Criminal Justice Law, 2017 [51] made provision for plea bargain and replicate the provision of ACJA, 2015 on the nature of plea bargaining.

f. Enugu State Administration of Criminal Justice Law, 2017

The Enugu State Administration of Criminal Justice Law W [52] provides for plea bargain in sections 367. While the provisions of this law are similar to ACJA, 2015, there is some noticeable dissimilarity. For instance, section 367(15) of Enugu State ACJL mandatory requires the written consent of the AG of the State or any officer of his department authorised by him in writing for a plea agreement to be entered. There are no similar provisions under the ACJA, 2015. Also in Enugu State, plea bargain cannot be entered for any charge involving murder, rape, kidnapping, defilement, armed robbery, sexual assault or terrorism [53]. There is no express exclusion on charges that cannot be plea bargained under the ACJA, 2015.

g. Bayelsa State Administration of Criminal Justice Law, 2019

The Bayelsa State Administration of Criminal Justice Law, 2019 [54] in section 71, gives the AG of the State the power to consider and accept a plea bargain from a person charged with any offence in instances where the AG is of the opinion that the acceptance of such plea bargain is in the interest of justice, public interest and the need to prevent abuse of legal process. Also the prosecutor and a defendant, subject to the AG's power may enter into a plea bargain [55].

h. Anambra State Administration of Criminal Justice Law, 2010

The Anambra State Administration of Criminal Justice Law, 2010 [56] in section 167 empowers the AG of the State to receive, consider and accept plea bargain from any person charged with any offence either directly from that person charged or on his behalf, by way of an offer or accept to plead guilty to a lesser offence than that charged. By this law, only the AG can accept plea bargain where he considers that it is in the interest of justice, public interest, public policy and the need to prevent abuse of legal process, upon which the court shall proceed to enter a guilty plea to the offence and impose the due punishment. Considering that the provision of this law pre-dates ACJA, 2015, the provision of this law reflects the position of plea bargaining prior to ACJA, 2015.

i. Jigawa State Administration of Criminal Justice Law, 2019, [57] Kano State Administration of Criminal Justice Law, 2019, [58] Kogi State Administration of Criminal Justice Law, 2017,[59] Administration of Criminal Justice in the Courts of Nasarawa State, and the Related Matters, 2018,[60] River States Administration of Criminal Justice Law, No 7 of 2015[61] and Plateau State Administration of Criminal Justice Law, 2018.[62] These laws provide for plea bargaining. The provision of these laws and ACJA, 2015 are similar.

j. Ondo State Administration of Criminal Justice Law, 2015 [63]

In Ondo State, section 247 empowers the AG of the State to receive and consider a plea bargain from an individual charged with any offence either directly from the person charged or on his behalf by way of an offer to accept to plead guilty to a lesser offence, other than that charged.

Having considered the ACJLs of the above-mentioned states, it is noteworthy that, while there are similarities between some state's ACJLs with the ACJA, 2015 on plea bargaining and its guidelines, some states however accommodated some peculiarities on the powers of the AG on plea bargaining. Also, in some states, not all charges can be plea bargained, as there are exemptions on matters that can be plea bargained. Some states also emphasise the involvement of the victims in the agreement.

3.1 Implication of the Application of Plea Bargaining under ACJA, 2015 on Nigeria's Anti-Corruption Crusade

Corruption is a huge problem that has negatively impacted the country over the years. Researchers have observed that it is the root cause of Nigeria's stunted growth in terms of socio-political and economic development [64]. According to Mudasiru, corruption has lingered as a pandemic despite numerous initiatives and the formation of structures and institutions by successive governments to fight the crime of corruption. These structures and institutions however have been unable to effectively tackle corruption in the country [65]. Transparency International in its 2020 corruption perception index ranked Nigeria 149th of 180 countries [66]. In various climes, plea bargain has been utilised as a tool in handling criminal issues, considering its advantages such as it saves time and cost in prosecuting offences or undertaking lengthy trials as well as aiding in the decongestion of correctional facilities [67].

Borrowing from other climes, Nigeria in her attempt to fight corruption, introduced plea bargaining in her criminal justice by the EFCC Act, 2004 [68]. However, several challenges occasioned as a result of the defects and lacuna under the EFCC Act on the application of plea bargaining was criticized and this further encouraged corrupt practices such that, plea bargaining was viewed as a medium that affords clemency for offenders in corruption charges [69]. It is against this background that the ACJA, 2015 introduced some innovations on plea bargaining. This section considers the implication of plea bargaining under ACJA, 2015 in anti-corruption crusade in Nigeria.

To start with, ACJA, 2015 expressly and elaborately provided for plea bargain as against the provision of the EFCC Act, 2004 that has been criticised for not providing for plea bargaining expressly,[70] nor its guidelines as noted by the court in the case of *Gava Corporation Ltd V. FRN* [71]. The implication of these guidelines is that it ascertains fairness in the plea bargain process in the fight against corruption.

Another implication of applying plea bargaining under ACJA, 2015 is its express provision in section 270(7) which requires plea agreement to be reduced to writing. The implication of this provision is that it helps prevent inconsistencies that oral trial evidence will present, such as distortion of agreement terms by parties. This was the position of the court in ROMRIG Nigeria Ltd v. FRN [72] Where the court noted that documentation of plea bargain agreement is not only desirable, it is most logical as it would prevent the inconsistencies at trial of oral evidence such as distortion of agreement terms by parties at will. Similar opinion was expressed by the court in Igbinedion v FRN [73].

Furthermore, the provision of section 270(11) of ACJA, 2015 that empowers the presiding judge or magistrate to consider the sentence agreed by the parties for the purpose of imposing a lesser sentence or imposing a heavier sentence than that agreed by the parties where the judge or justice consider that the accused deserves such is also a measure of curbing corruption. This helps in preventing a situation where parties use plea bargain as a medium of perverting justice.

This is in line with the court's judgment in Yakubu v FRN, [74] where the court's ruling on whether a crimina l can through plea bargain profit from the proceeds of his or her crime. In the case, the Appellant was a civil servant and the Chief Accountant of the Nigerian Police Pension Fund. As the Chief Accountant, he was one of the signatories to the account of the Nigerian Police Pension Fund which he managed with other persons. Between 2011 and 2012, the EFCC investigated the financial activities of the Nigerian Police Pension Fund, and the outcome of the investigation indicted the appellant and 7 others for misappropriating billions of Naira belonging to the Police Pension Fund, consequent upon which the appellant and 7 other defendants were charged at the Federal High Court. The appellant made a plea bargain based on his proposal to the respondent, which the respondent agreed to.

The Appellant agreed to forfeit 32 landed properties and the sum of N325, 187,867.18 as refund of the N3 billion misappropriated by the appellant. Based on the forfeiture of the properties and the sum, the appellant was to be charged under section 309 of the penal code for a lesser punishment. The plea bargain arrangement was presented to the trial court that made it the judgment of the court without much ado. Dissatisfied with the judgment of the trial court, the respondent appealed to the Court of Appeal. The Court of Appeal set aside the judgment of the trial court and substituted same with stiffer and harsher sentences of fine of 20 billion naira, 1.4 billion naira and 1.5 billion naira. Dissatisfied with the Court of Appeal's Judgment, the appellant appealed to the Supreme Court. The Supreme Court in dismissing the appeal noted that,

> *The forfeiture of proceeds of crime, the payment of fine, does not constitute sufficient punishment for the heinous crime committed by the Appellant. It is the law that a criminal must not be allowed to benefit from the proceeds of crime in his possession. It is reckless, outrageous and immoral to allow a criminal fling plea bargain as an instrument for retaining proceeds of crime…The court must , contrary to any other disposition by any other organ of government, continue to fight, condemn, and endeavour to eradicate corruption in the country.*

The position of the Supreme Court in this case, shows the implication of the application of plea bargain by the court in the fight against corruption. Also the duty of the court to fight corruption was re-iterated in the case of *EFCC v Fayose & Anor* [75].

It is pertinent to state at this juncture that where the court decides to impose a higher punishment on the defendant contrary to the punishment in the agreement, section 270(11)(C) requires that the judge or the magistrate should inform the defendant of the decision of the court to do so, before imposing such heavier punishment. This is the position of the court in the case of *Bando v FRN,*[76] *Ijire v. F.R.N* [77] and *Albert v FRN* [78]

3.2 Gaps in the Application of Plea Bargaining in Nigeria

Despite innovations introduced by ACJA, 2015 to plea bargain, there are still gaps in the application of plea bargaining in Nigeria. The process of plea bargaining has been criticised for allowing prosecutors too much discretion compared with judges who follow concise sentencing guidelines. This position was noted by the court in the case of *Peace v. FRN* (Supra). Owing to the wide discretion given to the prosecution, prosecutors have been found to use threats that coerce defendants into accepting pleas to secure a conviction when the evidence in a case is insubstantial. This wide discretion leads to prosecutorial biases which can influence the plea bargaining processes, especially as it relates to the wide latitude given to the prosecutor to reduce charges for offenders.

Though section 270(10) of ACJA, 2015, requires the presiding judge or magistrate to ascertain that the defendant voluntarily admitted the allegation in the charge without undue influence before convicting the defendant, however this does not rule out the likelihood of prosecutorial biases that influences plea negotiations.

4. COMPLEMENTARY ANALYSIS OF THE APPLICATION OF PLEA BARGAIN IN KENYA

This aspect considers Kenya's approach in applying plea bargain. The rationale for choosing this country is based on the fact that it is an African country whose administration of criminal justice is tailored after the British colonial penal philosophy that emphasised retribution and incapacitation of offenders with inhumane and cruel penalties similar to Nigeria [79]. However, in accordance with international best practices, Kenya's criminal justice system emphasizes the rehabilitation of offenders.

Plea Bargain was introduced into the Kenyan judicial system in 2008 as an amendment to the Criminal Procedure Code[80] to deal with issues facing the courts and prisons in Kenya by section 137A-137O [81]. Prior to the codification of plea bargain in the criminal procedure code, plea bargain in Kenya had no proper legal framework and was prone to abuse, considering that it was an informal arrangement, where the prosecution discussed with the accused person or his/her advocate on a bargain over his/her plea [82]. By this arrangement, the accused agrees with the prosecution to plead guilty to a lesser offence, thereby saving the time of the court on the hearing of the case as seen in Kupele Ole Kitaiga v Republic [83]

Section 137A of the Criminal Procedure Code provides that the prosecutor and an accused person or his representative may negotiate or discuss and enter into an agreement in respect of

a. Reduction of a charge to a reduced included offence
b. Withdrawal of the charge or a stay of other charges or the undertaking not to proceed with other possible charges

The section provides that the plea agreement may provide for payment of restitution or compensation by an accused person.

By section 137A(4), where a prosecution is undertaken privately, no plea agreement shall be concluded without the written consent of the Director of Public Prosecutions (DPP). Section 137B of the code provides for plea agreement on behalf of the Republic, and requires that such agreement should be entered by the DPP or officers authorised by the DPP.

Just like Nigeria, plea agreement may be initiated by a prosecutor or an accused person or his legal representative [84]. Also, similar with the ACJA, 2015, the court is precluded from participating in plea negotiation [85]. Another point of similarity is as it relates to the involvement of victims in plea bargain. In Kenya and Nigeria, the prosecutor is required to consult with the police officer investigating the case, as well as the victim or his legal representative, and afford same the opportunity to make representations to the prosecutor as it relates to the contents of the agreement [86].

Another point of similarity in both jurisdictions relates to the nature of plea agreement which is required to be in writing, reviewed and accepted by the accused having stated in full, the substantial facts of the matter and all other relevant facts of the case, terms of the agreement and any admissions made by the accused person [87]. Furthermore, similar to ACJA, 2015, section 137F of the Kenyan Criminal Procedure Code provides for some rights of the accused person such as the right to

full trial, right to plead not guilty, presumption of innocent, right to remain silent, right not to be compelled to give self-incriminating evidence etc. of which the accused person must be informed and made to understand [88]. While under both legislations, the court is required to ascertain the voluntariness of the accused person or defendant's involvement in the plea agreement before recording or entering the plea, a slight difference under the Kenya's law requires the court in ascertaining the competence of the accused person in making the plea agreement to also inquire if the accused is of sound mind [89].

Similar provisions exist in both legislations on the court's obligation to enter a plea agreement or reject the plea agreement [90]. However , while section 270(11)(c) of ACJA, 2015 provides for imposing heavier punishment on the defendant in an instance where the presiding judge or magistrate considers that the sentence is inappropriate, the Kenyan Criminal Procedure Code has no similar provision. The Kenyan court in the case of ***State v David Odhiambo Oloo*****, [91]** illustrates a situation where the court rejected the plea agreement of the parties. The accused person was charged for murder of his friend, but entered a plea bargain with the prosecution. Considering the brutal circumstances of the accused butchering the deceased, the court refused to enter the parties' plea bargain and sentenced the accused to life imprisonment in accordance with section 205 of the penal code, though the accused was a first offender. Also, in Kenya, plea bargain has been used to reduce the offence of murder to manslaughter as seen in *Republic v James Kiragu Wambugu* [92] *and Republic v NMO* [93]

While the Kenyan Criminal Procedure Code precludes plea bargain from being applied to offences under the Sexual Offences Act, 2006 and genocide offences , war crime and crimes against humanity [94]. ACJA, 2015 did not state the nature of offence that cannot be plea bargained. In fact, from the wordings of the provision of section 270(1) of the ACJA, 2015, it can reasonably be inferred that any offence can be plea bargained [95]. Although in Nigeria, plea bargain has been used and is used mostly in cases of financial crimes and corruption matters [96].

Another distinguishing factor between both provision is the requirement under the Criminal Procedure Code that requires parties to address the court on the issue of sentencing and the need for court to take into account the period during which the accused person has been in custody, a victim impact statement, the stage in the proceeding at which the accused person indicated his intention to plea bargain, and the nature and amount of any compensation or restitution agreed to be made by the accused person, as well as the need for the court to take into cognisance a probation officer's report where necessary and desirable [97]. The ACJA, 2015 does not have similar provision on the requirement for a probation officer's report.

It is important to note that Kenya has a Plea Bargaining Guidelines [98] and Rules[99] developed pursuant to section 137A-O of the Criminal Procedure Code. The Plea Bargaining Guidelines and Explanatory notes are meant to guide and direct public prosecutors as well as other prosecutors who have prosecutorial powers, in the application and best practices on plea bargain provisions in Kenya [100]. It provides for general principles on plea bargaining, how to conduct plea bargaining, conducting plea negotiations, liaison with other agencies and / or regulations, the plea agreement, execution of plea agreement, termination of plea negotiation process, termination of plea agreements and monitoring and evaluation.

The Office of the Director of Public Prosecutors Rules (ODPP) Draft Rules on plea bargain provides a set of rules that guide plea bargain negotiations which amongst others provide for the time frame of negotiations which must not exceed 6 months, consulting with the victim's family etc. These rules aid in the transparency, objectivity and certainty of plea bargain and thereby reduce the wide discretionary powers prosecutors have in plea bargain agreement. Nigeria has no similar Guidelines or Rules that curtails the excessive powers of prosecutors and guarantee that negotiations are not entered on a prejudicial basis. This also guarantees that the accused person voluntarily entered the plea negotiations, without coercion, undue influence, or misrepresentations of facts.

4.1 Implication of the Application of Plea Bargaining on Kenya's Anti-Corruption Crusade

Prior to 2018, the concept of plea bargaining as an ADR mechanism was unwelcomed in cases of corruption. This was informed by some factors which majors on the impact of economic crimes

on the economy and erosion of public trust [101]. As such, the Kenyan court did not entertain ADR in cases of corruption , because the court have reasoned that corruption is a crime against the entire population of Kenya which have negative direct impacts on the entire Kenyan population . This was the court's position in the case of *Director of Public Prosecutions (DPP) v Nairobi Chief Magistrate's Court & another [102].*

However with time, in a bid to accord with international standards and happenings in other climes, Kenya found a way to justify the application of plea bargain to corruption cases, especially against the background that economic crimes do not fall within the four types of crimes that are excluded from plea bargaining [103]. As such, the Kenyan courts have employed plea bargain to discharge and acquit public officers charged with cases related to corruption, bribery and misuse of public office.

In *Joyce Gwendo v Chief Magistrate's Court at Nairobi Anti-Corruption Division & 2 Ors; Kisumu East Cotton Cooperative Society (Interested Party), [104]* The appellant was arraigned before the Nairobi Chief Magistrate's Court facing five counts of stealing, forgery, issuing bad cheques and abuse of office. A plea bargain agreement was entered by the applicant and prosecution in accordance with section 137A-O of the Criminal Procedure Code, wherewith charges relating to stealing and forgery was withdrawn by the prosecution in fulfillment of the conditions set out in the Agreement. From the terms of the agreement, the applicant (accused) agreed to plead guilty to the charges of issuing bad cheques and abuse of office contrary to section 316 A (1) (a) (4) of the penal code and section 48(1)(a) of the Anti-Corruption and Economic Crimes Act No 3 of 2003 voluntarily, consequent upon which the prosecution dropped the charges of stealing and forgery.

The court entered the plea agreement and directed the accused to pay the amount due and owing in four installments with effect from the 6th of September 2018, 8th October 2018, 6th November 2018 and 6th December 2018. On the hearing date to confirm the payment of the first installment, it was discovered that the accused / applicant had failed in paying the first installment but rather sought for an extension. After several dates of hearing with no progress on payment, the applicant was classified as a dishonest person and sentenced to serve 6 months imprisonment in respect of the count on the abuse of office. There was no right of appeal granted to the terms of the plea bargain. Aggrieved by the decision, the applicant brought the application to the High Court seeking to set aside the decision of the magistrate court. The High Court upheld the application to revise the decision of the chief magistrate by setting aside the term of imprisonment imposed on the applicant and extended the period for which the accused/applicant to pay the bond in accordance with the plea agreement of the parties. The court rationale is premised on the need to apply non-custodial measures in decongesting custodial centres. Similar decision was reached in *Republic v Joy Adhiambo Gwendo [105].*

It is important to note that in cases of corruption, the prosecution or the state has no obligation to enter a plea bargain agreement with an accused person. This was the position of the court in *Florence Wanjiku Muiruri v Republic [106].* Where the accused, a public servant employed by the Nairobi City County Government was charged with the offence of receiving a bribe contrary to section 6(1)(a) of the Bribery Act, No. 47 of 2016 for demanding for financial benefits of Kshs 10,000 from Faith Jeruto Kiplagat as an bribe to fast track the processing of a liquor permit. The accused was also charged with abuse of office contrary to section 46 of the Anti-corruption and Economic Crimes Act, No 3 of 2003. The accused pleaded guilty to the charges and the court convicted the accused to the term of imprisonment of 1 year of a fine of Kshs 300,000 consequent upon which the accused brought an application against the court's judgment on the basis that the state ought to have considered the applicant's request for plea bargain and that the sentence is onerous considering that the accused did not inflict body injury. In dismissing the application, the court noted that bribery has a deleterious effect, and bribery as a category of corruption has a devastating consequence in the social and economic fabric.

Plea bargain is a useful strategy adopted in prosecuting and investigating corruption and money-laundering cases. It has increased the conviction rates in corruption cases and encouraged expeditious conclusion of minor corruption cases, thereby creating more room for hearing and determination of complex cases [107]. In Kenya, it has been recognised that plea bargaining is not a short cut to justice, but it is aimed at enabling the accused plead guilty in an agreement for some concessions by the prosecution.

Plea bargaining has been utilized in cases of money laundering considering that section 137 of the Criminal Procedure Code allows the DPP's office to make or accept plea bargaining offers from or on behalf of the accused [108]. This has been utilised in numerous cases that have been of immense benefit in ensuring the full cooperation of the accused in the case. For instance, the DPP entered into a plea bargain agreement with different persons at Family Bank accused of money laundering over the lender's role in the National Youth Service Scandal case of *Asset Recovery Agency v Charity Wangui Gethi & Anor* [109]. There they pleaded guilty to six counts and the DPP's office let go three counts after the financial institution accepted to cooperate with the prosecution [110].

Also, the unreported case of Peter Munyiri and 7 others, [111] illustrates a situation where plea bargain was used in money laundering. In this case, there was a criminal charge against a financial institution and its employees who failed to file a suspicious activity report or a suspicious transaction report on suspected proceeds of crime (stolen public funds) contrary to section 5 as read with section 44 and 16 of Proceeds of Crime and Anti-Money Laundering Act, 2009 (POCAMLA). Among other charges, they were charged with abetting money laundering. A plea bargain agreement was signed and presented to court on 2nd May 2019 which convicted the accused person. The financial institution was sentenced to pay a fine of Kshs. 64.5 millions.

The robust use of plea bargain in corruption cases is encouraged because of the advantages it presents. Also plea bargain allow prosecutors to protect their witnesses, some of whom have criminal records which could potentially collapse cases [112]. In fact, plea bargain success was recorded in the September 2022 Mutual Evaluation Report of Kenya's Anti-Money Laundering and counter-terrorist financing measures [113]. The report recorded that the key avenue for conviction-based recovery of proceeds of crime is through plea bargain arrangement under the plea bargaining provisions under s. 137A to 137O of the Criminal Procedure Code and ODPP's plea bargaining Guidelines for recovery of property or benefit acquired from the commission of an offence [114].

5. CONCLUSION

Judicial decisions considered both in Nigeria and Kenya reveals that plea bargaining is a useful tool in fighting corruption. Considering the immense benefits it presents to prosecutors, defence and even judges which among others include reduced cost, saves time of the parties and allow parties including the victims settle on a mutually acceptable way there by minimising potential losses. By advocating for plea bargaining in combating corruption and economic crimes, this paper is not undermining the use of full trials in seeking the conviction of the accused person; instead it will be pragmatic and cheaper to enter agreements with accused persons to enter a guilty plea, in exchange for lesser charge or punishment without going through the full trial. This will yield better result, reduce cost, save time and still achieve conviction.

Having considered the application of plea bargain in combating corruption in Nigeria and Kenya as well as legal regimes for the application of plea bargain and the gaps in ACJA, 2015 on plea bargaining, this paper recommends the following:

a. Borrowing a cue from Kenya, there is the need for Nigeria to have a Plea Bargain Guideline and Rule pursuant to ACJA, 2015 that guide the conducts of prosecutors and accused persons in negotiations. This will reduce the wide discretionary powers of prosecutions and guide against the use of threats and coercion on the defendants into accepting pleas in a bid to enable prosecutors secure convictions. It will also reduce prosecutorial biases which can influence the plea bargain process.
b. In a bid to ascertain the voluntariness of the defendant's involvement in the plea agreement; it will be necessary to ascertain the soundness of mind of an accused person in entering the agreement. Considering that ACJA, 2015 did not include it as a requirement, there will be need to revisit the ACJA, 2015 to include this requirement, following what is obtainable in Kenya.

COMPETING INTERESTS

Authors have declared that no competing interests exist.

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