

UGANDA / JUDGMENT

Bazibu v Attorney General and 2 Others
(Miscellaneous Cause No. 110 of 2021)
[2022] UGHCCD 38 (24 January 2022)
[2022] UGHCCD 38

COURT

HC: Civil Division (Uganda)

BEFORE

Musa Ssekaana, J

CASE / FILE NUMBER

Miscellaneous Cause No. 110 of 2021

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****(CIVIL DIVISION)****MISCELLANEOUS CAUSE NO. 110 OF 2021****BAZIBU BRUNO FRANCIS ::::::::::::::::::::::::::::::::::: APPLICANT****VERSUS****1. ATTORNEY GENERAL**

- **2. THE COMMISSIONER OF PRISONS**
- **3. THE CHIEF OF MILITARY INTELLIGENCE::::::::::::: RESPONDENTS**

BEFORE: JUSTICE SSEKAANA MUSA**RULING**

The applicant brought this application under Articles 23(2), 23(7) & 24 of the Constitution, Section 3 & 4 of the Human Rights Enforcement Act, 2019 and Regulation 5(2) of the Uganda People's Defence Forces (application to Civilian) Regulations S. I 307-8. They sought for orders that;

- 1. The applicant be released forthwith since he is under illegal trial. In the alternative.

- 2. A declaration that the remand of the applicant who is a civilian in military barracks is illegal.
- 3. The applicant be transferred back to civil government prison.
- 4. That the applicant be compensated for illegal detention and trial.
- 5. Costs of the application be provided for.

The application was supported by the sworn affidavit of Namazzi Phiona, the applicant's wife whose grounds were briefly that;

- 1. The applicant was arrested by state agents belonging to the Special Forces Command on 31st October 2020 at Okello House in Kampala and on the 10th December 2020, he was charged with the offence of unlawful possession of ammunitions contrary to Section 3(1) & 2(a) of the Firearms Act before General Court Martial.
- 2. The applicant was then remanded to Kitalya government prison on 10th December 2021.
- 3. On 15th December 2021, the deponent visited the applicant in kitalya government prison.
- 4. When the deponent returned to Kitalya prison on 26th December 2020, she was informed that her husband had been picked by military personnel of the 3rd respondent and taken to Makindye military barracks.
- 5. The applicant has ever called the deponent and confirmed that he was indeed in Makindye military barracks under very bad conditions and that the soldiers are demanding colossal sums for his release.
- 6. Picking the applicant, a civilian from lawful custody at Kitalya government prison and detaining him in a military barracks at Makindye is unconstitutional and hence illegal.
- 7. It is fair and just that an order for release of the applicant be issued by this honorable court.
- 8. In the alternative, and without prejudice, the applicant be remanded in a lawful place/civil prison.
- 9. Justice and law demand that the reliefs sought in this application be granted.

The respondents filed affidavits in reply opposing the application whose grounds were briefly that;

- 1. That the applicant was subject to military law having been found in unlawful possession of the ammunitions which is a monopoly of the defence forces.
- 2. That the applicant was produced before the Unit Disciplinary Committee of the 3rd respondent where the preferred charges were read to him and he was referred to the General Court Martial which has jurisdiction to try civilians.

- 3. That the applicant was arraigned before the General Court Martial, pleaded not guilty and was remanded to Kitalya government prison.
- 4. That there was intelligence information about the threat to the safety of the applicant at Kitalya prison upon which they applied to court have the applicant transferred from Kitalya prison to Makindye police headquarters for his own safety.
- 5. That the court issued an order on the 24th December 2020, directing the 2nd respondent to hand over the suspect to military police headquarters which decision the applicant can appeal before the Court Martial Appeals Court as provided for under the UPDF Act.

The applicant filed an affidavit in rejoinder, Namazzi Phiona stated;

- 1. That as regards to the threats of insecurity in Kitalya prison, she was informed by her advocates that Kitalya prison is a gazetted prison with many detainees lawfully remanded and as such a government prison cannot be a threat to the applicant.
- 2. That she was informed by the applicant that he is living under horrible conditions in a special room which is not good for human habitation and that the officers were demanding him to sell his properties to give them money for his freedom.
- 3. That she was informed by her lawyers that military courts lack impartiality to try civilians.

The applicant was represented by *Counsel Iduuli Ronald* and *Counsel Lukwago Umar* while the respondents were represented by *Muwonge Mark (State Attorney)*

The parties filed written submissions that were considered herein by this court.

The respondents raised a preliminary objection that this court was not the appropriate forum to entertain the application.

Counsel Mark Muwonge for the respondent submitted that Captain Guma Ambroz in his affidavit in reply stated that the General Court Martial issued an order directing the commissioner of prisons to hand over the applicant to the military police headquarters for his own safety which decision the applicant should have appealed.

Counsel cited **Section 199 of the UPDF Act Cap 308** which provides that an appeal shall lie to the General Appeals Court from the decision of the Court Martial. Counsel submitted that Article 210 of the Constitution empowers parliament to make laws regulating the UPDF. Section 197 of the UPDF Act establishes the General Court Martial which has unlimited jurisdiction under the Act and the applicant is now subject the same.

Counsel prayed that this court finds that the General Appeals Court is the appropriate forum to hear the application since it is a disguised appeal from the decision of the General Court Martial.

The applicant brought this matter under Section 3 and 4 of the Human Rights Enforcement Act seeking for enforcement of rights under Articles 23(2), (7), and 24 of the Constitution. An application of this nature is a preserve of this court.

Section 4 of the Human Rights Enforcement Act which provides that; The High Court shall hear and determine any application relating to the enforcement or violation of non derogable rights and freedoms guaranteed in Article 44 of the Constitution.

The Preliminary objection is therefore dismissed.

I will now proceed to determine the issues raised by counsel in their submissions.

Issue 1: Whether the General Court Martial has competent jurisdiction to try the applicant.

Counsel for the applicant submitted that military courts are not courts of competent jurisdiction to try anybody more so a civilian with any offence outside the UPDF Act. Counsel cited the case of **2 nd Lt. Ambrose Ogwang vs Uganda Court of Appeal Criminal Appeal No. 107 of 2013** where it was held; *"*courts that try any criminal or civil offences must be independent in terms of Article 28(1) of the constitution which military courts are not. Military courts are manned by military personnel, inclusive of the judges, the prosecutors and at times the defence counsel. The military are not independent of the executive. They belong to the executive by the army, the institution to which they belong."**

That that decision was upheld in **Lt. Col John Kaye vs Uganda Court of Appeal Criminal Appeal No. 0315 of 2015**.

Counsel submitted that as held in **2 nd Lt. Ambrose Ogwang vs Uganda (supra)**, military courts are quasi-judicial bodies similar to police tribunals established to instill military discipline in soldiers whereas the applicant is not a soldier. That the applicant is under illegal trial and that an appeal would not suffice in this case because the Court Martial Appeals Court lacks jurisdiction to hear an appeal outside the offence outside the UPDF Act.

Counsel concluded that the two cited cases were binding on this court since they were decisions of the Court of Appeal. It was counsel's prayer that this court finds that the General Court Martial lacks competent jurisdiction to try the applicant.

Mark Muwonge for the respondents submitted that the General Court Martial has jurisdiction to try the applicant for the offence of unlawful possession of ammunitions contrary to Sections 3 (1) & (2) of the Firearms Act Cap 299. Counsel cited the case of **Namugera Hadija vs Attorney General SCCA No. 04/2012** where the appellants were arrested and charged before the General Court Martial with aggravated robbery and offences relating to the Firearms Act. The appellants challenged the jurisdiction of the General Court Martial to try civilians for non-service offences. Justice Jotham Tumwesigye on page 15 paragraph 2 of his judgment noted that civilians in Uganda can become subject to military law and once they become subject, they will be tried by the General Court Martial.

Further that; *"for the offence of being in unlawful possession of firearms, the court held it had to be shown that the accused persons being civilians, were subject to military law, by for example, showing in the charge sheet that the weapons they were alleged to have been found possession of were ordinarily the monopoly of the defence forces."*

Counsel submitted that as particulars of the offence in the charge sheet attached to the application stated that; *"Bazibu Bruno Francis on or around 11th day of November 2020 while at Bugembe in Wakiso District was found in unlawful possession of one (1) round of AK47 ammunition the said ammunition being ordinarily a monopoly of the Defence Forces."*

Counsel concluded that the General Court Martial therefore had jurisdiction to try the applicant.

Analysis

The applicant was arrested and charged with; *Unlawful possession of ammunition c/s 3(1) & (2) of the Firearms Act Cap 299.*

The Particulars of Offence;

Bazibu Francis Bruno on or around the 11th day of November 2020 while at Bugembe in Wakiso District was found in unlawful possession of one (01) round of AK47 ammunition, the said ammunition being ordinarily a monopoly of the defence forces.

The applicant became a person subject to military law by virtue of Section 119(1)(h)(i) of the Uganda People's Defence Forces Act, 2005.

In the case of *Namugerwa Hadija v DPP & Attorney General Supreme Court Civil Appeal No. 04 of 2012* noted as follows;

"It is clear to me that civilians in Uganda can become subject to military law once they become subject to military law they will be tried by the General court martial. I am unable to see any exemption of civilians from the application of Section 179 of the Act once they become subject to military law under section 119(1)(g) and (h) of the Act. Ordinarily civilians who are not involved in fighting wars should be tried in civilian courts, not military courts. Therefore, section 119(1)(g) & (h) of the UPGF Act is rather unusual. However, the constitutionality of this Section was upheld by the Constitutional Court in Uganda Law Society vs Attorney General (supra) *and when its decision was appealed to this court the constitutionality of the section was not raised and argued by the cross-appellant (Uganda Law Society), and so this court did not address it.*"

Therefore, until Section 119(1)(g) & (h) of the UPDF Act is repealed or declared to be unconstitutional by a competent court, it will remain valid, effective and enforceable regardless of the misgivings of human rights advocates about it."

The applicant is lawfully charged and is rightfully under a legal trial since he is subject to military law by virtue of *Section 119(1) of the UPDF Act which provides as follows.*

"119. Persons subject to military law

(1) The following persons shall be subject to military law

(g) Every person, not otherwise military, who aids and abets a person subject to military law in the commission of a service offence; and

(h) Every person found in unlawful possession of i. arms, ammunition or equipment ordinarily being the monopoly of the Defence Forces; or

ii. other classified stores as prescribed."

According to the above provision, civilians like the applicant herein who find themselves in the circumstances described in the above section will be subject to military law.

Whether the continuous detention of the applicant in a Military Prison is lawful?

The applicant's counsel submitted that the applicant was removed from the civilian detention of Kitalya and taken to Makindye Military Prison which in his view this is illegal and contrary to the law.

The respondents' counsel submitted that the Chieftaincy of Military Intelligence received intelligence about threats on the applicant's life in Kitalya Government Prison. As a result, Captain Ambroz Guma made an application to the General Court Martial to have the applicant transferred from Kitalya Government Prison to Makindye Military Barracks for his own safety.

Therefore, the respondent justified the transfer to Makindye Military Barracks because the state has a constitutional obligation to protect his life.

Analysis

The applicant was indeed transferred from civilian detention at Kitalya Government Prison to military detention at Military Police Headquarters at Makindye pursuant to an order of General Court Martial.

The law requires that any civilian charged before the General Court Martial to be detained in a civil prison. Regulation 5 of the Uganda Peoples' Defence Forces (Application to Civilians) Regulations provides as follows;

"When a civilian is brought before a military court under subregulation (1) of this regulation, the military court shall remand that person in a civil prison from where, whenever that person is required to be produced before the military court, he or she shall be brought."

The above provisions of the law do not envisage any other circumstances when a civilian should ever be in detention of the military facility. This would imply the order made by the General Court Martial to have the applicant remanded under a military detention is contrary to the law and therefore illegal.

The reason advanced by Captain Ambroz Guma could very correct that indeed there was a threat to the safety of the applicant, but this is not sufficient ground to give illegal orders of detention in an area not provided by the law. A military court is obliged to follow the law and avoid giving orders contrary to the laws of Uganda since it is itself a creature of the law.

Persons detained on suspicion of committing criminal offences triable by under military law need to be protected from the unfamiliar detention of military establishment. This is because the detention in a military barracks or establishment indirectly infringes on their right to a fair trial since such establishment are not easily accessible to civilians. The suspects' lawyers or family members may not be able to meet or discuss their case in preparation for a trial.

The applicant was wrongly and illegally transferred from a Kitalya a Civilian Prison to Makindye Military barracks.

I order that the applicant be immediately transferred back to a civil prison.

I so Order

SSEKAANA MUSA JUDGE 24th January 2022

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Prepared on 14 October 2026 · Esheria