

UGANDA / JUDGMENT

Buchanan v Attorney General

(MISCELLANEOUS CAUSE NO. 266 OF 2019) [2020] UGHCCD 11 (13 March 2020)

[2020] UGHCCD 11

COURT

HC: Civil Division (Uganda)

BEFORE

Musa Ssekaana, J

CASE / FILE NUMBER

MISCELLANEOUS CAUSE NO. 266 OF 2019

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA CIVIL
DIVISION MISCELLANEOUS CAUSE NO.266 OF 2019 (ARISING FROM THE GENERAL
COURT MARTIAL COURT CR. CASES NO. UPDF/GCM/045/2019) BUCHANAN
SAM:::APPLICANT VERSUS
ATTORNEY GENERAL:::RESPONDENT

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

The applicant filed this suit by way of notice of motion seeking for orders that;

- 1. The decision of Uganda Police, UPDF and the General Court Martial (GCM) to proffer charges of unlawful possession of a firearm c/s 3(1) (h) of the Firearms Act (Cap.299) and unlawful possession of ammunition c/s 3(1) and (2) (a) of the Firearms Act (Cap 299) before the General Court Martial and try the applicant vide General Court Martial Criminal Case No. UPDF/GCM/045/019 be revised.
- 2. General Court Martial, like other military courts, is an organ of the army and a quasi-judicial body with limited jurisdiction intended to ensure operational efficiency and discipline of officers and militants of the UPDF, but not vested with the jurisdiction to try criminal cases.
- 3. The charges of unlawful possession of a firearm c/s 3(1) (h) of the Firearms Act and unlawful possession of ammunition c/s 3(1) and 2(a) of the Firearms Act, before the General Court Martial (GCM) against the applicant constituted an illegality hence nullity.

- 4. The proceedings against the applicant vide General Court Martial Criminal Case No. UPDF/GCM/045/019 be terminated and/or withdrawn forthwith.
- 5. Costs of this application be provided for.

The grounds supporting this application are contained in the affidavit of the applicant, Buchanan Sam attached to the application.

The respondent filed an affidavit in reply deposed by RO/07043 Col. Richard Tukachungurwa a Judge Advocate of the General Court Martial opposing this application.

The applicant was represented by *Mr. Rwahinda Godfrey, Mr. Mushabe David and Mr. Tumuhimbise Johnson Njoki* whereas the respondent was represented by *Mr. Johnson Natuhwera.*

During scheduling, the parties proposed the following issues for determination by this court.

- *1. Whether the High court has revisionary powers over the General Court Martial.*
- *2. What remedies are available to the parties?*

The parties were ordered to file written submissions which they accordingly filed. Both parties' submissions were considered by this court.

DETERMINATION OF ISSUES

Issue 1

Whether the High court has revisionary powers over the General Court Martial.

Counsel for the applicant submitted that the High court shall subject to the constitution have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this constitution or other law (see: Article 139 (1), sec.14 (1) and sec.33, Judicature Act. It was stated that the High court is clearly vested with unlimited original jurisdiction under the cited laws to adjudicate over all matters and finally determine all multiplicities of legal proceedings.

Counsel stated that the applicant is facing criminal prosecution before the General Court Martial vide CR. CASE No. UPDF/GCM/045/2019 for unlawful possession of a firearm and ammunition under the UPDG Act, 2005 hence this civil revision to

determine whether or not the General Court Martial is the proper court to try the applicant.

The applicant argues that the General Court Martial does not have the subject matter jurisdiction to try criminal cases and injustice shall be occasioned if the proceedings are not stopped.

Counsel stated that the General Court Martial is a subordinate court to the High court and to that extent, this court's decision would be binding to the General Court Martial. See *Tumushabe Joseph v Attorney General Constitution Petition. No.6 of 2004.*

Counsel further submitted that the General Court Martial does not have jurisdiction to try criminal cases and as such does not have jurisdiction to try the applicant of the alleged offences (*see: 2nd Lt. Ambrose Ogwang v Uganda, Criminal Appeal No. 107 of 2013, RA/1946843 L/ Cpl Nasasira Grace & 5 Ors v Uganda Criminal Appeal No. 250 of 2017.* It was submitted that the General Court Martial is limited to service offences and it is not free to exercise impartiality and independence envisaged under the letter and spirit of Article 128 (1) and (2) of the constitution. It was stated by counsel that the applicant is not a soldier and did not commit any service offence whatsoever but is being tried by the General Court Martial which has been declared as lacking jurisdiction and to do so would contravene the law of precedent.

Counsel therefore prayed that court affirmatively holds that the High court has jurisdiction to entertain such an application in favour of the applicant.

Counsel for the respondent defined revision to mean a re-examination or careful review for correction or improvement or an altered version of work. He submitted that jurisdiction is conferred upon any court by a statute *(see: Mbalaganya v Sanga [2005] E. A 152)*.

He stated that revisional jurisdiction which is set out in section 83 of the Civil Procedure Act provides that the high court may call for the record of any case which has been determined under this Act by any Magistrate's court and if it appears to have exercised a jurisdiction not vested in it in law, failed to exercise a jurisdiction so vested or acted in exercise of its jurisdiction illegally or with material irregularity or injustice, the high court may revise the case and may make such order in it as it thinks fit. He stated that from this, it is clear that decisions are revised whenever the trial magistrate fails to exercise his or her jurisdiction or where he or she acts illegally or with material irregularity or injustice.

While it is true that the General Court Martial is neither lower than the High court, the General Court Martial is neither a magistrate court in the meaning of section 83 of the CPA nor does any law vest in the High court supervisory or appellant jurisdiction over the General Court Martial.

Counsel therefore submitted that this honourable court lacks in entirety revisionary jurisdiction over the General Court Martial and the application is therefore misconceived, frivolous, vexatious and an abuse of court process and should be dismissed with costs from the onset.

As to whether civilians can be tried in the General Court Martial, this was covered where the supreme court held that the jurisdiction of the General Court Martial is conferred by the statute that creates it namely the UPDF Act which provides in sec. 197 (2) that it shall have unlimited original jurisdiction under this Act and shall hear and determine all appeals referred to it from decisions of divisional courts martial and Unit Disciplinary Committees (see: *Hadijja Namugerwa v Attorney General SCCS No. 04 of 2012*). He stated that the Act confers on the General Court Martial unlimited jurisdiction to try offences under the Act which include service offences under sec. 170 committed by persons subject to military law.

Counsel therefore submitted that any civilian who is subject to military law can commit a service offence whether under the UPDF Act or any other Act and once civilians in Uganda can become subject to military law and once they become subject to military law, they will be tried by the General Court Martial.

He stated that according to the charge sheet, the firearm which the applicant is alleged to have been in unlawful possession contrary to section 3(1) and (2) (a) of the Firearms Act Cap 299 is described in the particulars of the offence as a Black Star Pistol No. UG-INDT 6471-16AP 20050 which is ordinarily a monopoly of the Defense forces and that alone shows that the applicant is subject to military law by virtue of section 119 (1) (h) of the Act. Counsel stated that the state established a link between the accused and section 119 (1) (g) and (h) of the UPDF Act by stating that the applicant was found in possession of a firearm being ordinarily the monopoly of the Defense Forces, the truth of which is subject to proof in the trial court which is the General Court Martial. This is distinguishable from the case Attorney General v Uganda Law Society.

Counsel contended that the applicant is lawfully before the General Court Martial and that the High court has no revisionary jurisdiction over matters before the General Court Martial.

In the applicant's submissions in rejoinder, reiterated its submission that the General Court Martial is a subordinate court to the High court. It was further submitted that the respondent conceded to the fact that the General Court Martial is lower than the High Court and it is contradictory to fault the superior court's authority to revise the lower court's legality or propriety of any finding, order or any other decision and the regularity of any proceedings.

Counsel further rejoined that it is misleading for the respondent to submit that any civilian who is subject to military law can commit a service offence even when such a civilian has not aided and/ or abetted a serving soldier. The respondent's reliance upon section 119 (1) of the UPDF Act to argue that the applicant is subject to military law is misconceived and misplaced because the applicant never aided and/ or abetted any person subject to military law in commission of a service offence and the pistol and bullets allegedly found in the applicant's possession are not a monopoly of the Defense Forces because the police, prisons and private guards have such pistols. He further stated that any law abiding citizen can apply and obtain a pistol from Uganda Police upon approval.

He therefore submitted that the applicant is not a soldier and did not commit any service offence whatsoever and prayed that court affirmatively holds that the High court has revisionary powers to entertain such an application in favour of the applicant and grants the remedies sought thereby.

Determination

The applicant sought a revision order under section 83 of the Civil Procedure Act. I have considered the application as a whole. I have related the same to the respective submissions by both learned counsel. Both learned counsel are in agreement that the law governing powers of revision by this Court is enacted under S.83 of the Civil Procedure Act.

Under the said law, the High Court may or may be moved to call for the record of any case which has been determined by a Magistrate's Court or subordinate court and revise it if it appears: (i) *That there has been a wrongful exercise of jurisdiction; or (ii) That there was failure to exercise jurisdiction so vested in the court; or (iii) That the court has acted in exercise of its jurisdiction illegally or with material irregularity or injustice.*

The High Court can still call for the record of any case which has been determined by any subordinate court or Magistrate's Court and for the reasons set out in S.83 of the Civil Procedure Act revise the said case making such orders as it thinks fit (see: *Nadiope Bogere Richard & 8 Ors V Malukhu Development Association Ltd HCT-04-CV-MA-0073-2010)*

For a matter to qualify for revision, it must be apparent or shown that it involves a non-exercise or irregular exercise of jurisdiction. Revision does not concern itself with conclusions of law or fact in which the question of jurisdiction is not involved. Dissatisfaction with a decision by a court with jurisdiction in favour of the other party cannot be a matter for revision.

In the instant case, the applicant filed this application for a revision of the decision of Uganda Police, UPDF and the General Court Martial (GCM) to prefer charges of unlawful possession of a firearm c/s 3(1) (h) of the Firearms Act (Cap.299) and unlawful possession of ammunition c/s 3(1) and (2) (a) of the Firearms Act (Cap 299) before the General Court Martial and try the applicant vide General Court Martial Criminal Case No. UPDF/GCM/045/019 arguing that that court does not have jurisdiction to try criminal offences.

It is this court's opinion that this application for revision is wrongly before this court since this is a civil division of the High Court where the applicant is seeking to challenge criminal exercise of power or jurisdiction. The law is very clear on the instances where a party is entitled to bring an application for revision this being in circumstances where there has been a determination by the magistrate in a wrongful exercise of jurisdiction; or failure to exercise jurisdiction so vested in the court or in cases where the court has acted in exercise of its jurisdiction illegally or with material irregularity or injustice. Section 83 of the Civil Procedure Act strictly applies to civil jurisdiction and not criminal jurisdiction.

The Constitutional court has warned against challenging criminal proceedings in a civil court.

Similarly in the case of *Dr. Tiberius Muhebwa vs Uganda Constitutional Petition No. 09 of 2012 and also in Constitutional Petition No. 10 of 2008 Jim Muhwezi & 3 Others vs Attorney General and Inspector General of Government*, *the court cautioned against the stopping of criminal trials on allegations that the trial would not be free and fair*. In the latter case, court noted further as follows;

"The trial court is capable of fairly and accurately pronouncing itself on the matter without prejudice to the accused. Where any prejudice occurs the appeal system of this country is capable of providing a remedy. Was it to be otherwise, a situation would arise whereby anyone charged with an offence would rush to the Constitutional court with a request to stop the prosecution pending hearing his challenge against the prosecution. In due course, this court would find itself engaged in petitions to stop criminal prosecutions and nothing else. This could result into a breakdown of the administration of the criminal justice system and affect the smooth operation of the Constitutional Court"

It can be deduced from the above cases and by analogy, challenging criminal trials in a civil court will likely cause confusion in the criminal justice system.

In the case *Hussein Badda vs Iganga District Land Board & 4 others HCMA No. 479 of 2011* court noted that; *This court cannot, under the guise of an interim order interfere with the organs of state in executing their mandate in the administration of Criminal Justice.*

Citing *High Court Miscellaneous Application No. 348 of 2001 Arthur Rukikeire vs Uganda Telecom Ltd* Justice Mwangusya (as he then was) court further noted;

"I do not know how this court would determine that an arrest is unlawful or that prosecution is false unless the criminal culpability of the applicant is being determined by this court which would not be the case. I also do not know whether even if it was possible for this court to grant the prayer the applicant would be discharged of any criminal liability. The only pleas that I know of that would prevent a person from being prosecuted are pleas of *autofors convict* or *autofors acquit* and not an order arising out of a trial in a civil suit."

In another case of *Sarah Kulata Basangwa vs Inspectorate of Government in Miscellaneous No. 465 of 2011* the said judge held;

"In my view it is not proper for a court sitting in a civil matter to bar proceedings in a criminal trial because the circumstances under which a person is brought before a criminal court and the defences available for the accused before that court should be handled by the same court which can ably investigate them and determine them in one way or the other rather asking another Court to bar the proceedings. This application arises out of an application that seeks to bar proceedings in a criminal trial and I decline to grant it."

I entirely agree with the views espoused in the above authorities. This court being a civil court cannot delve into propriety of criminal proceedings in a criminal court or military court martial.

There is an appeal system in criminal trial system through which the applicant can raise his grounds of a mistrial or defectiveness of charge sheet or challenge of proceedings in Military Court Martial.

The applicant will be able to challenge the proceedings by way of appeal, to Court Martial Appeal Court, then to the appellate courts of Judicature, namely the Court of Appeal and the Supreme Court. See *Hon. Kipoi Tonny Nsubuga v Attorney General High Court Miscellaneous Application No. 230 of 2018*

In the final result for the reasons stated herein above this application fails and is hereby dismissed with costs.

It is so ordered.

SSEKAANA MUSA JUDGE 13th/03/2020

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