

UGANDA / JUDGMENT

Kasule and 2 Others v Uganda (Constitutional Reference 33 of 2019) [2023] UGCC 119 (3 March 2023) [2023] UGCC 119

COURT

Constitutional Court of Uganda

BEFORE

Egonda-Ntende, JCC, Musoke, JCC, Madrama,
JCC, Monica K. Mugenyi, JCC, Gashirabake, JCC

CASE / FILE NUMBER

Constitutional Reference 33 of 2019

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THE REPUBLIC OF UGANDA**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**

[Coram: Egonda-Ntende, Musoke, Madrama, Mugenyi & Gashirabake, JJA/JJCC]

Constitutional Reference No 33 of 2019

BETWEEN

ABDIJL KASULE & 2 OTHERS Applicant

AND

the Respondent

^J U IX; M ENT OF Ct I R. ISTOPIIEII GAS[I I ITABAK E. JA/. ICC**Introduction**

This is a constitutional reference from the Chief Magistrate's Court Buganda Road, in Criminal Case No. 623 of 2016. The applicants in this case are accused persons in a criminal case pending in the trial court at Buganda Road Chief Magistrate's Court. They were jointly charged with the offence of Obtaining money by false pretences contrary to section 305 of the Penal Code.

It was alleged in the charge sheet that the Applicants in 2014 at Muyenga in the Kampala District with intent to defraud obtained money to a tune of Uganda

25 Shillings one hundred ninety million only (190,000,000/:-) from Remmy Segujja by falsely pretending that they were selling to him a piece of land comprised on Block 244 Plot 7161 land at Muyenga measuring 28.8 decimals. The applicants were charged accordingly.

Thereafter the Applicants applied for bail before the Chief Magistrate's Court which was granted on the 24/11/2016. The matter proceeded for hearing before the Court.

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5 the Chief Magistrate's court sitting at Buganda Road. This matter went on for almost three years due to several adjournments. In between the hearing, the complainant and the accused persons entered a settlement.

The parties signed a settlement agreement and filed the deed with court. The court went ahead and promoted the reconciliation and stayed the proceedings. Later the settlement between the complainant, A1 and A2 failed. The State then reinstated the matter. On the 29/01/2018, the prosecution tendered in an amended Charge Sheet to exclude A3 Katongole Joseph who had settled with the complainant.

The applicants, through their counsel, applied that this matter be referred to this court. According to the applicants the conduct of the prosecution of withdrawal of charges by way of amendment and removing A3 Mr. Katongole from the charge sheet was contrary to and in contravention of article 120(3)(a) of the constitution and 120(4). The trial court therefore framed the following question for this court's interpretation:

"The issue is whether the withdrawal or amendment of charges against A3 by the State Prosecutor or State Attorney is contrary to 120(3)(a) and 120(4) which stipulates those powers under article 120(a) are exclusively exercised by the DPP. This is a matter in my observation which calls for constitutional interpretation of the above referred to provisions of the constitution. For justice to be seen to be done for the several reasons above, I hereby refer this matter to the constitutional court for interpretation. I so hereby order."

The respondent opposed the reference and stated that there was a charge sheet without A3, Katongole.

Representation.

During the hearing of this reference, the applicants and their counsel were absent.

30 Likewise, the respondent and the counsel were absent. Mr. Mark Muwonge State Attorney appeared on behalf of the Attorney General. Neither of the parties filed their submissions. Since the parties had ample time to file their submissions and they did not I will proceed and consider the reference without the submissions.

s Analysis.

Whenever an issue regarding constitutional interpretation is raised during the hearing of any proceedings it can be referred to this court according to Article 137(5) which provides:

- > "(5) Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a field court martial, the court-
- > (a) may, if it is of the opinion that the question involves a substantial question of law; and
- (b) shall, if any party to the proceedings requests it to do so, refer the question to the constitutional court for decision in accordance with clause (1) of this article"

20 What happened in the court was that an amendment of the charge sheet to the effect that one of the accused persons was dropped from the charge sheet amounting to a withdrawal of the charges against him. There was no question presented by the parties as to interpretation of the Constitution which had been put before the court for consideration before the court could exercise its mandate under article 137(5) of the constitution to determine whether the question was a substantial question of law or whether there was a request by any of the parties to refer the question to the constitutional court. What was raised was whether the withdrawal of the charges offended article 120(4) of the Constitution and therefore it was a submission made for enforcement of the article by the court. The proceedings in the lower court word verbatim were as follows:

"State: I have a witness in court. Am ready to proceed.

Counsel: before we proceed I have two applications to make. The first one is that we don't know which charge sheet. We are following Mr. Katongole has never taken Plea. We don't know whether the DPP has withdrawn the charges in question. Whether the WITHDRAWAL of charges by the prosecution by

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⁵ way of amendment of A3 Mr. Katongole contrary to and in contradiction to article 120(3)(a) of constitution and 120(4)

State: We have an amended charge sheet without Mr. Katongole.

Counsel: the resident State Attorney has no power to amend Charges. It's only the DPP with powers to amend the charges. The court has powers to refer the matter to constitutional for interpretation.

RULING:

I have heard both submissions from both counsel of accused and state. The issue is whether the withdrawal or amendment of charges against A3 by the State Prosecutor or State Attorneys contrary to 120(3)(a) and 120(4) which stipulates that powers under article 120(a) is exclusively exercised by the DPP. This is a matter in my observation which calls for constitutional

interpretation of the above referred to provisions of the constitution. For justice to be seen to be done for the several reasons above, I hereby refer this matter to the constitutional court for interpretation. I so hereby order.

Matter is adjourned to 25/11/2019 for further mention. 20

Signed

Principal Magistrate Grade one

23/10/2019"

Article 120(3Xa) states that:

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- (3) The functions of the Director of Public Prosecutions (the following- (a) to direct the police to investigate any information of a criminal nature and to report to him or her expeditiously.

The particular article 120(3) (a) cited by counsel for the accused and the basis on which the Principal Magistrate referred this case has nothing to do with the withdrawal or amendment of charge sheet by the State Prosecutor. It was just an ingenious way of staying the prosecution with the hope of getting the other accused off the hook. Article 120(3Xa) provides that the DPP should direct the police to investigate any information of a criminal nature and to report to him or her expeditiously.

As the reading of the file shows that, A,3 Mr. Katongole had satisfied the part of the bargain under the deed and ceased being a subject of the prosecution. It is my considered opinion that counsel for the accused who applied to the court to make a constitutional reference and the principal Magistrate erred.

That said, the appropriate provision ought to have been article 120 (3)(d) and (a) ¹⁰ (b), which provides inter alia that;

"(3) The functions of the Director of Public Prosecutions are the following-

- (d) to discontinue at any stage before judgment is delivered, any criminal proceedings to which this article relates, instituted by himself or herself or any other person or authority; except that the Director of Public Prosecutions shall not discontinue any proceedings commenced by another person or authority except with the consent of the court.
- (4) The functions conferred on the Director of Public Prosecutions under clause (3) of this article-
- (b) shall, in the case of the functions under paragraph (d) of that clause, be exercised by him or her exclusively. "

Under article 120(3Xd) of the Constitution, the DPP can discontinue any criminal proceedings as stipulated therein. Further article 120(b) of the Constitution is clear and unambiguous that the power to discontinue any criminal proceedings can only be exercised by the DPP exclusively while those in other clauses of 2s article 120 can be exercised by the DPP in person or by officers authorised by him or her in general or specified instructions.

The Cambridge online dictionary defines "exclusively" to mean,

" Limited to a specific thing or group"

The plain meaning of this word then means that when it comes to withdrawal of criminal cases it is a preserve of the DPP. Because the provisions sought to be enforced are so clear, there was no need to make a reference to the constitutional court and the learned Trial Magistrate ought to have applied the law as it is. I find that there was no question as interpretation of the Constitution by this court in

terms of article 137 (5) and 137 (1) of the constitution as the provisions sought to be interpreted speaking for themselves.

A.3 had a settlement agreement with the complainant, which he complied with. In the circumstances, the DPP ought to have withdrawn the case against „A.3 Katongole Joseph. According to the record of proceedings on the 29th /01 /2018

the State Attorney tendered in an amended charge sheet excluding „A.3 Katongole Joseph. There is no evidence that this was authorised by the DPP. A withdrawal operates as a discharge when entered during a trial but before the prosecution closes its case. I believe the proper procedure was for the prosecutor to first secure a withdrawal from the DPP then file the amended charge sheet before court.

15 Declaration

constitution.

For the reasons advanced above in this judgment I would declare that:

- 1. The discontinuation of all criminal matters is the exclusive mandate of the DPP, personally.
- 2. Presenting an amended charge sheet without the DPP discontinuing the case against r\3, was contrary to Article 120(3Xd) and (4)(b) of the
- 3. Proper withdrawal of charges against r\3 should be done.
- 4. The trial of A1 and A2 should thereafter proceed.

This file is returned to the trial court to comply with the directions of this court.

In the result, the reference question is answered accordingly. J"

Dated, signed and delivered at Kampala this day of .(-V*orr.

Christopher Gashirabake

Justice of Appeal/ Justice of Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke, Madrama, Mugenyi & Gashirabake, JJCq

Constitutional Reference No.33 of 2019

BETWEEN

| Abdul Kasule | Applicant No. 1 | |-----|-----| | Karnanzi John | Applicant No.2 | |
AND | | Uganda-:::: | Respondent |

Judement of Fredrick Esonda-Ntende, JCC

- till I have had the opportunity to read in draft the judgment of my brother, Gashirabake, JCC.
I agree with the directions given to the trial court and the reasons in support thereof.
- 12l As Musoke, Madrama and Mugenyi, JJCC, agree, this reference is determined in the
manner and with the directions pro sed by Gashirabake, JCC.

Dated, signed and delivered at Kampala this 2023 day of nAo"e&

Fredrick Egonda-Ntende Justice of the Constitutional Court

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THE REPUBLIC OF UGANDA

THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke, Madrama, Mugenyi & Gashirabake, JJCC)

CONSTITUTIONAL REFERENCE NO. 33 OF 2019

BETWEEN

1. ABDU KASULE 2. JOHN KAMANZI 3. JOSEPH KATONGOLE

AND

THE ATTORNEY GENERAL

THE REPUBLIC OF UGANDA,

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA.

(CORAM; EGONDA NTENDE, MUSOKE, MADRAMA, MUGENYI, GASHIRABAKE, JJCCIJA)

CONSTITUTIONAL PETITION NO. 033 OF 2019

¹⁰ ABDUL KASULE AND 2 OTHERS} PETITIONER

VERSUS

ATTORNEY GENERAL} RESPONDENT

JUDGMENT OF JUSTICE CHRISTOPHER MADRAMA IZAMA, JCC

I have read in draft the Judgment of my learned brother Hon. Mr. Justice Christopher Gashirabake, JCC.

I concur with the Judgment and the orders proposed. I would like to add that the issue of powers of the DPP to exclusively be the person to withdraw charges in criminal proceedings are so clear that there is no dispute as to

interpretation of the constitution or there is no substantial point of law which required reference to this court. 20

Articles 120 (3) and (4) of the constitution are clear and free of ambiguity as they provide that:

120. ...

²⁵ (3) The functions of the Director of Public prosecutions are the following-

- (a) to direct the police to investigate any information of a criminal nature and to report to him or her expeditiously;
- (b) to institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial.
- question presented by the parties as to interpretation of the Constitution S which had been put before the court for consideration before the court could exercise its mandate under article 137 (5) of the Constitution to determine whether the question was a substantial question of law or whether there was a request by any of the parties to refer the question to
- the constitutional court. What was raised was whether the withdrawal of 10 the charges offended article 120 (4) of the Constitution and therefore it was a submission made for enforcement of the article by the Court.

Because the provisions sought to be enforced are so clear, there was no need to make a reference to the constitutional court and the learned Trial

Magistrate ought to have applied the law as it is. I find that there was no 15 question as to interpretation of the Constitution by this court in terms of article 137 (5) and 137 (1) of the Constitution as the provisions sought to be interpreted speak for themselves.

The above notwithstanding, and to avoid protracted proceedings on a matter where the court sought guidance as to whether the amendment of the \$20\$ charge sheet in the circumstances amounted to a withdrawal by a person other than the DPP contrary to article 120 (3) (d) and 120 (4) (b) of the Constitution, I concur with the reasons and the orders proposed in the leadjudgment of my learned brother Hon. Mr. Justice Christopher Gashirabake, JCC. 25

\$\rightarrow\$ Lagrange day of \$\Box\$ Dated at Kampala the Morey 2023

Christopher Madrama Izama

Justice of the Constitutional Court

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