

UGANDA / JUDGMENT

**Lwakataka and 5 Others v Uganda
(Criminal Revision 7 of 2022) [2022]
UGHCCRD 62 (13 October 2022)
[2022] UGHCCRD 62**

COURT

HC: Criminal Division (Uganda)

BEFORE

Matovu, J

CASE / FILE NUMBER

Criminal Revision 7 of 2022

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT MUKONO****CRIMINAL REVISION NO. 007 OF 2022****(ARISING FROM MUKONO CHIEF MAGISTRATES' COURT CRIMINAL CASES NO.
0165 OF 2019, 53 OF 2019 AND \$12/2019\$**

1. PONSIANO LWAKATAKA
2. DEO LUKYAMUZI KIZITO
3. KABUUKA ABBAS
4. LUKWAGO BRIAN
5. NAKAFEERO ROSE
6. SSEKITOLEKO JOHN :::::::::::::::::::::::::::::::

VERSUS

UGANDA :::::::::::::::::::::::::::::::

BEFORE HON. MR. JUSTICE DAVID MATOVU**RULING****Introduction**

1. This is an application by way of notice of motion, brought under Articles 23(6) (a), 28 (3) (a) of the Constitution, Section 17 of the Judicature Act, Sections 48 and 50(1) of the Criminal Procedure Code Act and Rule 3 of the Judicature (Criminal Procedure Application) Rules SI 13-8)

Background

- 2. Ponsiano Lwakataka, Deo Lukyamuzi Kizito, Kabuuka Abbas, Lukwago Brian, Nakafeero Rose, Ssekitoleko John hereinafter referred to as applicants brought this application against the Respondent seeking for the following revisional orders: -
- 3. That the lower court proceedings and orders closing the Applicants' case in Mukono Chief Magistrates' Court Criminal Cases Nos. 165/2019, 53/2019 and 12/2019 be revised and set aside.
- 4. The applicants be allowed to present their respective defences, and the lower court orders leading to the issuance of warrants of arrest against the applicants be revised and set aside.
- 5. That the applicants' bail earlier granted by the lower court be reinstated pending the hearing and determination of the criminal cases and
- 6. That in granting bail, the 1st applicant be released from Kauga prison.
- 7. The said application is supported by two affidavits. One deposed by Akanyijuka Denis and another by Ponsiano Lwakataka, the 1st Applicant herein.
- 8. This Court has perused and taken note of the contents of these affidavits, but shall not reproduce this ruling.
- 9. The Respondent also filed an affidavit in reply to the said application and the same is deposed by Mr. Mugwanya Jonathan, a Chief State Attorney in the Office of Director of Public Prosecutions.
- 10. Court has also taken note of the contents of his affidavit, which shall also not be reproduced in this ruling.

Representation

11. This application came up for hearing on the 13th day of October, 2022 and the applicants were represented by Mr. Wabwire Dennis and Mr. Samuel Eyotre while the respondent was represented by Ms. Nanteza Victoria Ann, a State Attorney and Mr. Buwembo Joseph was on watching brief.

Preliminary points of law

- 12. At the commencement of the hearing, Ms. Nanteza, Counsel for the Respondent raised 3 (three) preliminary points of law to the effect that: -
- The instant application does not seek to challenge i. specific final finding, sentence or order of the trial Court.
- ii. The affidavits in support of the application are defective in nature as they contain hearsay evidence and as such they are inadmissible.
- Misjoinder of criminal cases in the instant application iii. as the various criminal cases from which this instant application arises are different files, different accused different complaints and handled by persons, different court.

Legal arguments on the preliminary points of law by the Respondent.

- 13. Counsel for the Respondent argued that the instant application is brought under Sec 50 (1) of the Criminal Procedure Code Act and argued that under subsection 5 of the Act, an applicant for a criminal revision must be aggrieved by a finding, sentence or order of the trial Court.
- Counsel relied on the case of Juliet Katusiime and \$14.\$ others versus Uganda Criminal Revision No. 2 of 2011 wherein it was stated that interlocutory orders, which do not finally determine the rights of the applicant are not revisable.
- Counsel argued that the affidavits in support of the 15. application were defective in nature as they contain hearsay evidence and as such they are inadmissible.
- 16. Counsel submitted that the affidavit of Akanyijuka Denis is incurably defective and inadmissible in law as it contains hearsay evidence since the deponent is neither a party nor counsel in personal conduct in any of the three mentioned cases and does not disclose his source of information.
- Regarding the affidavit of Ponsiano Lwakataka, the 1st 17. applicant herein, Counsel argued that his affidavit purports be deposed on behalf of the rest of the Applicants and yet it is trite law that criminal liability is personal and as such the said affidavit is incurably defective.
- On the issue of misjoinder of criminal cases in the 18. instant application were several criminal cases from which this instant application arises relate to different court files, different accused persons, different complainants and were handled by different Judicial officers.

- Counsel submitted that the instant application is 19. irregular in law and thus incompetent for misjoinder of cases. Counsel further submitted that the various criminal cases from which the instant application arises have different complainants, are at different stages of trial and being handled by different Courts and it is therefore irregular and frivolous to combine and mis-join them in the same application.
- Counsel prayed that the preliminary points of law be 20. upheld and the application dismissed.

Legal arguments on the preliminary points of law by Counsel for Applicants.

- 21. In reply to the preliminary points of law raised, Counsel for the applicants submitted on the first preliminary point of law that the instant application is proper before this Honourable Court as they were seeking to challenge the legality and propriety of the proceedings of the lower trial Court as envisaged in Section 48 of the Criminal Procedure Code Act.
- 22. Counsel relied on the authority of Musumba Yahaya and another versus Uganda Criminal Revision Cause No. 4 of 2019.
- Counsel further submitted that the orders they seek to \$23.\$ challenge, issued by the Learned Trial Magistrate in the instant application are final in nature and these are: -
 - An order for issuance of a warrant of arrest i.
 - An order for closure of the defence case ii.
 - An order for setting down the case for judgement. iii. Regarding the second preliminary point of law on the 24. affidavits in support of the application, Counsel submitted that the averments made Advocate Akanyijuka Dennis in his affidavit were facts well within his knowledge since he is an advocate in the law firm that is representing the applicants in the various criminal cases. Counsel relied on the authority of Electromaxx Uganda Limited versus Oryx Oil Uganda Limited MA No. 251 of 2020.
- Counsel further submitted that regarding the affidavit 25. sworn by the 1st applicant on behalf of the rest of the applicants, that there was a written authorisation by the rest of the applicants, which was executed on the 18th day of September, 2022 at Kauga prison.
- As regards the point of law on misjoinder of cases, 26. Counsel submitted that they made an omnibus application which is provided for and allowed under the law, He further submitted that the parties i.e the applicants were the accused persons in the various cases and that all the cases were at the stage of judgement and as such there was no issue of misjoinder as submitted by Counsel for the respondent.

- Counsel prayed that the preliminary points be over-ruled and the application be heard on its merits.

Decision of Court

- 28. This application is brought by way of notice of motion, under Articles 23(6) (a), 28 (3) (a) of the Constitution, Section 17 of the Judicature Act, Sections 48 and 50(1) of the Criminal Procedure Code Act and Rule 3 of the Judicature (Criminal Procedure Application) Rules SI 13-8)
- Section 48 of the Criminal Procedure Code Act provides 29. for the powers of the High Court to call for and examine the record of any criminal proceedings before any magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the magistrate's court.
- Section 50 (1) (b) provides for the powers of the High 30. Court on revision and is to the effect that "In the case of any proceedings in a magistrate's court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, when it appears that in those proceedings an error material to the merits of any case or involving a miscarriage of justice has occurred, the High Court may
- \$a)\$...
- b) in the case of any other order, other than an order of acquittal, alter or reverse the order.
- The orders for which the instant application seeks to 31. challenge are: - an order for issuance of a warrant of arrest, orders for closure of the defence case, and an order setting down the case for judgment.

7 | Page

- 32. This Court finds that these orders are interlocutory in nature. An interlocutory order can simply be understood as one which is issued by Court while a case is still on- going, i.e before the final resolution of the case. An interlocutory order does not have an effect of giving finality to a case or issue in dispute.
- This therefore follows that the orders that are purported 33. to be set aside in the instant application do not in any way conclude or give finality to the cases before the trial courts.
- 34. From the perusal of the court record of the trial court, an order for issuance of warrant of arrest against the 2nd to 6th Applicants was legally and properly issued as the Applicants had absconded from their bail bond and stopped attending court hearings and as such were frustrating the trial process.

- Upon any law abiding citizen learning of the existence 35. of a warrant of arrest or any other form of complaint against them, that requires them to appear before any authority to explain their side of the story the best course of action is to appear before the lawful authority and offer their explanation instead of hiding away from the authorities.
- The order for closure of the defence case is also proper 36. as the Applicants were given a chance to present their defences, instead, they presented only one witness and absconded from the hearing thereby frustrating the trial process.
- Furthermore, the order for setting down the case for 37. judgement is also proper because the Applicants were given

various adjournments to present themselves for the hearing during trial, however they chose to abscond.

- The Learned Trial Magistrate offered the Applicants a 38. chance to present their respective defences before fixing the case for judgement and it would therefore be improper for this Court to interfere in the proceedings before the lower court by directing the Learned Trial Magistrate to wait for accused persons who have eluded the authorities for some time in order to give their defence.
- Therefore, the conduct of the 2nd to 6th Applicant of 39. absconding and jumping their bail and further hiding, when they are aware that warrants of arrest have been issued against them is questionable.
- In the case of **Kiggwa Hannington and others versus** 40. Uganda, Revision Cause No. 005 of 2018, My Learned Brother Hon. Justice J. W. Kwesiga stated that revisional powers are generally not exercisable in interlocutory orders but to final orders. The High Court will therefore not interfere in an on-going trial by way of revision unless there is a glaring defect in the procedure or a manifest error in law, which has resulted in or threatens to result in a miscarriage of justice.
- I am persuaded by the above decision of my Learned 41. brother.
- I also agree with Counsel for the Respondent that the 42. orders in the instant application are interlocutory in nature and as such revision does not apply in the instant case.
- This preliminary objection is upheld. 43.
- 44. With regard to the objection that the affidavits in support of the application are defective in nature as they contain hearsay evidence and as such they are inadmissible.
- Affidavits are statements of truth that confirm the 45 existence of certain facts in any case.
- 46. The cardinal principle of law regarding affidavits is that they are confined to facts that the deponent is able of his or her own knowledge to prove.

- 47. Upon perusal of the proceedings of the lower court, it is quite evident that the lawyer in personal conduct of the various criminal cases is Samuel Eyotre and also upon perusal of the affidavit of Advocate Akanyijuka Dennis the information therein, does not seem to be that he can prove of his own knowledge.
- Furthermore, regarding the affidavit of the 1st Applicant 48. purporting to be deponed on behalf of the rest of the Applicants, there is no authorisation as alleged by Counsel for the Applicants. The authorisation attached to the application is to the lawyers to represent the applicants in the said application and not to the 1st Applicant to represent the rest.
- Be that as it may, Article 28 (5) of the Constitution 49. provides that "Except with his or her consent, the trial of any person shall not take place in the absence of that person, unless the person so conducts him/ herself as to render the continuance of the proceedings in the presence of that person impracticable and the court makes an order for the person to be removed and trial proceed in the absence of that person.
- Further Section 54 of the Trial on Indictment Act 50. provides that an accused shall be entitled to be present in court during the whole of the trial so long as he/ she conducts himself properly.
- 51. Following from the above, besides absence of authorisation, there is nothing legal barring the rest of the Applicants to appear in court and as such the said affidavits purporting to represent them are incurably defective and cannot stand
- 52. This arm of the objection is also upheld.
- 53. Finally, with regard to the misjoinder of criminal cases in the instant application as the various criminal cases from which this instant application arises are different files, different accused persons, different complainants and handled by different courts.
- Upon perusal of the record of the lower court, it is clear 54. that the offences in the various cases are different, and the complainants are also different.
- It is also clear that despite some accused persons 55. appearing in the same cases, the offences are different.
- Despite the above, it is clear that the cases were being 56. heard almost concurrently and are all at the stage of judgement but the accused persons have all conducted themselves in similar manner in all the cases.
- This Court agrees with Counsel for the Respondent that 57. the said criminal cases should not have been joined in one omnibus application.
- In the final result, Court finds merit in the preliminary 58. points of law raised by Counsel for the respondent and the same are upheld.

- Criminal Revision No. 007 of 2022 is hereby dismissed 59. and the lower court files are hereby forwarded to the respective trial Magistrates for further management.

Dated at Mukono this 13th day of October, 2022.

David Matovu

Judge

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