

UGANDA / JUDGMENT

# Semakula v Attorney General & DPP (Civil Appeal 9 of 2012) [2015]

## UGCA 2021 (7 December 2015)

[2015] UGCA 2021

## COURT

Court of Appeal of Uganda

## BEFORE

Nshimye, JA, Aweri-Opio, JA, Tibatemwa, JA/ JCC

## CASE / FILE NUMBER

Civil Appeal 9 of 2012

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'5 THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT KAMPALA CIVIL APPEAL NO. Og OF 2012 Grising from HCMC 183/20LL)

10 IBRAHIM SEMAKUI-A APPELLANT

VS

1. ATTORNEY GENERAL 2. THE DPP RESPONDENTS

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CORAM: HON. JUSTICE A. S. NSHIMYE, JA HON. JUSTICE RUBBY AWERI OPIO, JA HON. JUSTICE PROF. LILLIAN EKIRIKUBINZA TIBATEMWA, JA.

<sup>20</sup> JUDGMENT OF THE COURT.

### Introduction

This is an appeal from the ruling of l/wangusya <sup>J</sup> tn High Court <sup>25</sup> wherein the Honourabte Judge dismissed the application for a writ of Habeas Corpus fited by the present appellant Miscellaneous Cause lrlol83 oL2011 detivered on 27th January 2012,

### Representation

At the hearing of the petition, the appe[[ant was represented by Mr. Rwakafuzi of tr//S Rwakafuzi & Co. Advocates. The Respondent counsel

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. 30 was absent in court. The court thus ordered the parties to file written submissions which this court has taken time to consider.

## Background

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The background to this appeal is that the appellant filed Ir/miscellaneous Application 183/2011 for an order of a writ of habeas corpus ad subjiciendum <sup>35</sup> to issue to the OC Luzira Prison, the Director of Public Prosecutions (DPP), the Commander of the Uganda Peoples Defence Forces (UPDF) and the Attorney General of Uganda to produce the body of his father Hasibu Kasiita to the High Court of Uganda to determine the legality of his detention and order for his release.

<sup>40</sup> The said Hasibu Kasiita had been arraigned before the General Court Martial in 2002 with the offences of murder and attempted murder c/s 188 and 189 of the Penal Code Act

Following the Constitutional Court decision in UGANDA LAW SOCIETY V AG

Constitutional Petition No.18 of 2005, that a court martial has no jurisdiction to try a civilian who is not subject to military law, the appellant applied for <sup>a</sup> writ of habeas corpus nisi in the High Court

Subsequently, the Attorney General made a return of the writ of habeas corpus on 19th of December 2011 in which it was indicated that the subject's charges were amended in 2008. The charge appellant's father together sheet of the

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so with several others that were on remand at the General Court Martial were amended to read as follows:

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"Kasita Hasibu... with malice aforethought caused the death of Semwezi Kaggwa by shooting using a firearm to wit: AK47 SMG 56-31003826, the said firearm being ordinarily the monopoly of the UPDF."

- <sup>55</sup> The High Court (Mwangusya J as he then was) dismissed the application for <sup>a</sup> writ of habeas corpus absolute on ground that the amended charge sheet showed that the subject though a civilian, had used a weapon in the monopoly of the UPDF and thus the subject was to be tried by the General Court Martial.
- 60 The appellant, being dissatisfied with the ruling of Mr/wangusya J appealed to this court on the following grounds of appeal.

- jurisdiction to try offences committed by civilians using a gun, the L. That the judge erred when he held that the General Court Martial has monopoly of the UPDF.
- 6s 2. That the subject of the application for habeas corpus, though a civilian, was unlawfully remanded and tried by the General Court Martial.

It is, in my view,

- 3. That the subject of the application for habeas corpus having been convicted by the court martial, the application for habeas corpus was not the right procedure to review the legality of the subject's detention.
- 70 The appellant prayed that this court finds that the subject is in illegal custody having been remanded, tried and convicted by a court without competent jurisdiction.

### Appellant's submission

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- 7s Mr/Rwakafuzi counsel for the appellant submitted that the law governing the matter was expressed in KIIZA BESIGYE & 22 OTHERS V ATTORNEY GENERAL: CONSTITUTIONAL PETITION NO.12 of 2006 wherein the Constitutional Court held as follows:
- "In our view that amendment does not address the real issue. 80 The real issue is not merely an amendment of the charge sheet before the General Court Martial. It is deeper than that. It is whether or not there was or there is a law that defines the offence of unlawful possession of firearms ordinarily the monopoly of the defence forces. That offence is not the one whose particulars appear in the charge sheet. The offence in the charge sheet is under S.3 (1) & (2) (b) of the Firearms Act. The offence does not fall under S.19 (1) (h) of the

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UPDF Act. The offence of unlawful possession of firearms ordinarily the monopoly of the UPDF is neither defined by any law in our statute books, nor has sentence for it prescribed. o The said amendment of the charge sheet is clearly not helpful Criminal proceedings for an undefined offence are undoubtedly <sup>a</sup> nullity as it offends against A. 28(12) of the Constitution."

- ss Mr/r. Rwakafuzi basing on the above authority submitted that a civilian is not brought within the jurisdiction of the General Court Martial by merely pleading that the civilian committed the offence with a weapon ordinarily the monopoly of the UPDF. The offence must first exist in law and the penalty thereof must be prescribed. In law, there is no such offence as committing murder with a weapon ordinarily the monopoly of the UPDF. That the words 'weapon ordinarily the monopoly of UPDF' create a nonexistent offence which is not prescribed under the Penal Code Act, under which the subject WAS

charged. Thus, Mr. Wangusya J erred by holding that the subject committed murder with a gun ordinarily the monopoly of the UPDF

- Subsequently, the trial, conviction and sentence of the subject WAS null and void.

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In regard to whether habeas corpus was a proper procedure, Mr. Rwakafuzi submitted that Article 44 k) of the Constitution enshrines a fair trial which is a non-derogable right. A fair trial as envisaged under Article 28(1) of the Constitution is one that is carried out by a court of competent jurisdiction. Mr. Rwakafuzi argued that since the Court [artial ittegetty created a nonexistent offence, the trial that ensued could not be termed as fair and the sentence that ensued was illegal. He thus prayed that this court condemns this ittegetty and restore the subject's liberty by awarding him a writ of habeas corpus as absolute.

## Respondents' submission

For the respondents, it was submitted that the facts and particulars of the charge sheet showed that the subject caused the death of Semwezi by using a weapon a monopoly of the UPDF forces, which subjected him to trial by a L20 military court. That the words 'weapons ordinarily the monopoly of the defence forces' in Section 119 (1) (h) of the UPDF Act do not create an offence but who bring themselves under the said Section while committing prescribed acts that constitute offences under the Uganda Statute books. only extend the jurisdiction of the General Court [r/artial in order to try civilians

In regard to the propriety of the procedure undertaken, the respondents argued that the procedure adopted by the appellant to challenge the competence of 1,25

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the General Court Martial was wrong. He argued that any challenge on whether the court can try civilians and or whether by so doing, it violates certain provisions of any Act of Parliament or the Constitution can only be brought or also filed in the Constitutional court but not by way of habeas corpus. He concluded by praying that this Court do find in favour of the respondents and dismisses the appeal with costs.

## Resolution of Court

In this matter we are of the view that there are only two issues for its determination:-

- 1. Whether the general Court Martial has jurisdiction to try offences committed by civilians using a gun the monopoly of the UPDF.

- 2. Whether an application for Habeas corpus was the right procedure for reviewing the legality of the subject's detention.

## <sup>140</sup> Issue No.1

The matter in contention between the parties have been deliberated upon both by the Supreme Court and the Constitutional Court; namely in the case of Namugenara Hadija VS DPP and the Attorney General, Civit Appeal No. 04 of 2012 Supreme Court from Appeal No. 10 of 2012, Court of B ),,, ;

il- Appeal (unreponed), and Uganda Law Society VS Attorney General, Constitutional Petition No. 18 of 2005.

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The dicta in att the above cases is that a court martial has no jurisdiction to try a civitian who is not subject to mititary [aw.

In the instant case, the appellant apptied for a writ of Habeas Corpus in <sup>150</sup> the High Court.

> The Attorney Genera[ made a return of the writ of Habeas Corpus on 19th December 2011 in which it was indicated that the subject's charges were amended in 2008. The charge sheet of the appe[[ant's father together with several others that were on remand at the General Court Martiat were amended to read as fot[ows:-

'Kasiita Hasibu and others on or about 24h June 2002, wile at Kitunzi Zone, Busega Village, Lungujia Parish, Rubaga Division in Kampala District, with malice aforethought caused the death of Semwezi Kaggwa by shooting using a firearm to wit AK 47. SMG 56-31003826, the said <sup>160</sup> firearm being ordinarily the on monopoly of the UPDF".

> Section 197 of the UPDF establishes the General Court Martiat giving it among other things, un[iimited origina[ jurisdiction to try offences under the Act.

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These offences inctude service offences under Section 179 of the Act committed by persons subject to lr/i[itary [aw:

1. "The following persons shall be subiect to military law;
  - a) b) c) d) e) f) p every peacon not otherwise military who aids and a bets <sup>a</sup>

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il every person found in unlawful possession of:-

offence and

- i. arms, ammunition or equipment ordinarily being the monopoly of the defence forces, or person subject to military law in the commission of a service
- ii. other classified stores as prescribed".

In the instant case, there is a link between the accused and Section 119 (i) (g) and (h) of the UPDF Act by the charge sheet stating that Kasiita

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Hasibu caused the death of Semwezi Kaggwa by shooting a firearm to wit AK SMG/NO 56.31003826, being the monopoly of the defence forces. The learned Judge was right to hold that the appellant subjected himself to military law. The above position was confirmed by the Supreme Court speaking through Justice Tumwesigye JSC in very authoritative words in the case of Namugerwa Had'rja VS DPP and Attorney General (supra):

'section 197 Of the Act establishes a General court Martial confers in it; among other things, unlimited original jurisdiction to try offences 'under this Act' offences under this Act include service offences under Section 179 of the Act committed by persons subject to the military law. These persons in my view, will include civilians subject to military law under Section <sup>119</sup> (g) and (h) of the UPDF Act. Section 2 of the Act defines a 'Service offence' as "an offence under this Act or any other Act for the time being in force committed by a person while subject to military law". Therefore, in my view, any civilian who is subject to military law can commit a service offence whether under the UPDF Act or any other Act.

From the above cited provision, it is clear to me that 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. I am unable to see any exception of civilians from the application of Section 179 of

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the Act once they become subject to the military law under Section 119 (1) (a) and (il of the Act"

From the above analysis, we find that Mr. Kasiita having subjected himself <sup>205</sup> to the military law was properly charged with service offence of murder under the Penal Code Act for shooting dead Semwezi Kaggwa using AK StMG/NO 56.31003826, being ordinarily the monopoly of the defence force.

As recognized by his lordship Tumwesigye, JSC in *Hadijja Namugerwa* <sup>210</sup> (supra) Section 197 and 119 of the UPDF Act are unusual. They are intended to instil strict discipline in the Military Officers to distinguish the UPDF from those of the past regimes who used to commit extra judicial killings of civilians using military gun.

In conclusion, it is our finding that the offence with which the subject of <sup>275</sup> the Habeas Corpus application was charged was properly defined in the Penal Code Act and punishment for the same was prescribed. The gun being ordinarily the monopoly of the UPDF would of course be subject of proof, before the trial court

We accordingly answer the 1<sup>st</sup> issue in the negative.

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## Issue No.2

Whether an application for Habeas Corpus was the right procedure for reviewing the legality of the subject's detention.

The matter was adequately dealt with by the trial Judge. The application for Habeas Corpus is intended to investigate whether the subject of the application is in lawful custody: see *Grace Stuart Ibingira VS Uganda* [1966] E. A 445.

Once it is established that the subject is in lawful custody, the application for habeas corpus fails: see *Hadijja Namugerwa VS DPP* and Attorney General (supra). In the instant case, the subject of habeas corpus was being tried before a General Court Martial which is a competent court to try service offences under Section 179 and 119 of the UPDF Act. We accordingly find that this was not a matter for an application for habeas corpus.

Further more, the General Court Martial went ahead, tried the subject of 235 the habeas corpus application.

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In the circumstances, we find that granting a writ of habeas corpus was not the appropriate remedy. The learned trial Judge in his judgment at page 4 treated the matter to its logical conclusion as follows:-

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-. ?+o "This brings me to another issue as to whether or not in a case like the present where a prisoner has been tried and convicted a writ of habeas corpus is the remedy.

According to Habburyb laws of England Jd Edition Volume at page 24 it is stated that the release on habeas corpus is not an acquittal nor may <sup>245</sup> the writ be used as a means of an appeal and to me where a prisoner is no longer a remand prisoner but a convict a writ of habeas corpus is not applicable.

The prisoner can only appeal against his conviction and even raise the tssue of the jurisdiction of the court that convicted him and if the <sup>250</sup> appellate court, after evaluating the circumstances under which he was tried find that the court had no iurisdiction to try him or for some other reason court was to find that his conviction was not sustainable he would be released after quashing his conviction and not a writ of Habeas Corpus Subjicieridum"

<sup>255</sup> With greatest respect, we agree with the tria[ Judge that, that is the correct position of the [aw. The Genera[ Court Martial is a court of competent jurisdiction established by an Act of Parliament. Its' decision and orders are lawful unless quashed by a superior court. Alternatively, anyone wishing to question whether the court can try civilians and or

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- . <sup>260</sup> whether by doing it; violates certain provisions of any Act of Parliament or the Constitution can for the Constitutional Court but not to proceed by way of habeas corpus.

> In the resutt, we find that this appeal has no merit and it is accordingly dismissed with costs he the court betow.

<sup>265</sup> Dated at Kampala this day of .. 015.

HON. JU CE A. S. NSHIMYE, <sup>270</sup> JUSTICE OF APPEAL

HON. JUSTICE RUBBY AWERI OPIO, JUSTICE OF APPEAL

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HON. JUSTICE PROF. LILLIAN EKIRIKUBINZA TIBATEMWA, JUSTICE OF APPEAL

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