

UGANDA / JUDGMENT

# Ssewanyana & Another v Uganda (Miscellaneous Application 19 of 2022) [2022] UGHCI CD 7 (28 September 2022) [2022] UGHCI CD 7

## COURT

HC: International Crimes Division (Uganda)

## BEFORE

Komuhangi, J

## CASE / FILE NUMBER

Miscellaneous Application 19 of 2022

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA  
(INTERNATIONAL CRIMES DIVISION KOLOLO) MISC. APPLICATION NO.19 OF 2022  
(ARISING FROM CRIMINAL CASE NO. 004 OF 2022)

1. HON. ALLAN SSEWANYANA ALOYSIOUS 2. HON. SSEGIRINYA  
MUHAMMED=====APPLICANTS

VERSUS

UGANDA=====RESPONDENT

BEFORE: HON. LADY JUSTICE ALICE KOMUHANGI KHAUKHA RULING

## Introduction

This ruling is in respect of an application brought by way of Notice of Motion under Article 28 of the Constitution of Uganda (as amended) and Section 17(2) and 33 of the Judicature Act Cap 13 for orders that:

- (a) Criminal Case No. 004 of 2022 Uganda Versus Sserwadda Mike and 6 others for terrorism, aiding and abetting terrorism, murder and attempted murder, pending trial at the High Court of Uganda at Kampala (International Crimes Division Kololo) and CR-AA-258/2021: Uganda Versus Hon. Allan Ssewanyana Aloysious, Hon. Ssegirinya Muhammed and Ssenyonga Wilson alias Nyonga Tonny for murder pending trial at the High Court of Uganda at Masaka be consolidated;
- (b) The costs of this application be provided for.

## Appearance and Representation

When the application came up for hearing, the applicants were represented by Hon. Erias Lukwago, Hon. Medard Ssegona Lubega and Hon. Shamim Malende while the respondent was represented by Mr. Richard Birivumbuka and Mr. Joseph Kyomuhendo, both Chief State Attorneys from the Office of the Director of Public Prosecutions.

## The application

The application is supported by the affidavit of Mr. Kabuye Lawrence, said to be an advocate and the applicants' lawyer while Mr. Thomas Jatiko, said to be an Assistant DPP in the office of the Director of Public Prosecutions and one of the prosecutors handling Masaka CRB 605/2021 (Criminal Case No. 004 of 2022) and Lwengo CRB 203/2021 (CR-AA-258-2021) filed an affidavit in reply on behalf of the respondent. Mr. Kabuye Lawrence filed an affidavit in rejoinder. Counsel for both parties made oral submissions citing authorities and the same have been considered in this ruling.

## Applicants' case

The applicants' case as deduced from the affidavit of Mr. Kabuye Lawrence are as follows: The applicants are Honorable Members of Parliament of Uganda. On 3rd September 2021, the applicants received summons through the speaker of parliament requiring them to appear at Masaka Police Station on 6th September 2021 on allegations of murder in greater Masaka during the months of July and August 2021 vide Masaka CRB 605/2021, 600/2021 and 619/2021. (A copy of the Summons was attached and marked "A1"). On the 6th of September 2021, the applicants went to Masaka Police Station, gave in their statements and were released on bond and the bond Form (Police Form 18) was attached and marked "A2". On 7th September 2021 when the applicants returned to Masaka, they were arraigned before the Chief Magistrates Court, Masaka on charges of Murder and Attempted Murder contrary to Sections 188 and 189 and 204 (a) of the Penal Code Act respectively. A copy of the Charge sheet was attached and marked "A". It also indicates Masaka CRB 605 of 2021 and the applicants appear thereon as A5 and A6 respectively.

The applicants were then remanded and applied for bail. However, before the bail application could be heard, when the matter came up for mention on 15th September 2021, the Resident Chief State Attorney Masaka, presented an amended Charge Sheet with two more counts of terrorism and abetting terrorism. A copy of the charge sheet was attached and marked "B". It indicates Masaka CRB 605 of 2021 and the applicants still appear as A5 and A6 respectively.

On 20th September 2021, the applicants were granted bail and their release from Kigo Prison was directed pending trial. A copy of the Ruling was attached and marked "C". The applicants were allowed to move out of the prison but immediately after, a Toyota Hiace commonly known as "drone" intercepted them, and over five military personnel covering their faces, jumped out, put them on gun point, pushed them in the vehicle and drove them to an unknown place where they were detained. They were later taken to Kireka Special Investigation's Unit of the Uganda Police

Force on 27th September 2021 to record statements.

On 29th September 2021, the applicants were arraigned in Masaka Chief Magistrates' Court on charges of Murder contrary to Sections 188 and 189 of the Penal Code Act and remanded to Kigo Prison. A copy of the charge sheet was attached and marked "D". The charge sheet indicates LWG CRB 203 of 2021 and the applicants appear thereon as A1 and A2 respectively.

The applicants have since been committed to High Court in both cases, the first one being committed to the High Court (International Crimes Division) \*vide Criminal Case No. 004 of 2022: Uganda Versus Sserwadda Mike and 6 others\* and the second one in the High Court of Uganda at Masaka vide \*CR-AA-258 of 2021: Uganda Versus Hon. Allan Ssewanyana Aloysious, Hon Ssegirinya Mohammed and Ssenyonga Wilson alias Nyonga Tonny.\* (A copy of the Indictment and Summary of the case was attached and marked "F").

The applicants seek for orders to consolidate the two criminal case files, one currently at the High Court (International Crimes Division), Kampala and another currently at Masaka High Court for reasons that the two criminal case files have a common theme, set of circumstances and common questions of law and fact which can be conclusively determined by this court.

### The Respondent's case

The respondent's case is contained in the affidavit in reply of Mr. Thomas Jatiko, Assistant Director of Public Prosecutions. He raised a preliminary point of law in paragraph 5 of his affidavit to the effect that consolidation of criminal cases is alien and does not exist in the criminal law and procedure of Uganda. He confirmed that the applicants are charged in both criminal cases and they have been committed in both of them as described above but vehemently objected to the consolidation of the two case files. He averred that the two criminal cases are totally different with different questions of law and fact and cannot be determined by this honorable court. He further stated that the two criminal cases are factually different and cannot be joined in the same charge sheet or indictment. His further reason for opposition is that the offences in the two case files were committed in different places, at different times, in different ways, with different parties (both accused and victims) and for different motives.

Mr. Jatiko further averred that the two criminal cases are before different courts with different trial procedures and joining the charges and parties would cause a miscarriage of justice.

For purposes of clarity and convenience, the two case files that are the subject of this application shall be referred to by their police reference numbers namely, **Masaka CRB 605 of 2021** and **Lwengo CRB 203 of 2021**.

### Issues

From the pleadings, the following issues have been raised for determination:

- \*1. Whether or not criminal cases can be consolidated under the existing criminal law and procedure in Uganda;\*
- \*2. Whether or not Masaka CRB 605 of 2021 and Lwengo CRB 203 of 2021 can be consolidated.\*

## Resolution of the issues

### Issue 1: \*Whether or not criminal cases can be consolidated under the existing criminal law and procedure in Uganda.\*

This issue arose from the preliminary point of law raised in paragraph 5 of the affidavit of Mr. Thomas Jatiko to the effect that consolidation of criminal cases is alien and does not exist in the criminal law and procedure of Uganda. At the beginning of the hearing of the application, counsel for the respondent sought to argue the preliminary point of law contending that it would dispose of the whole matter. However, this court guided that the matter should be handled substantively and the preliminary point of law would instead be framed as an issue.

Chief State Attorney, Kyomuhendo Joseph contended that consolidation of criminal cases is alien to criminal law and procedure and is a preserve of Civil Procedure because it is expressly provided for under Order 11 Rule 1 of the Civil Procedure Rules (CPR). He further argued that the procedure the applicants should have adopted was to apply for joinder of counts and persons as provided for under Sections 86 and 87 of the Magistrates Courts Act (MCA) and Sections 23 and 24 of the Trial on Indictments Act (TIA).

He further submitted that those are the provisions of the law that regulate procedure of the court in criminal matters where common questions of law, facts and transactions arise. He stated that with consolidation, the two or more files have to be put together and handled as one while with joinder of persons and counts, all the persons and counts have to appear in one charge sheet or indictment and they should have the same summary of the case. He further argued that the applicants ignored the right provisions of the law and relied on Section 17 (2) and Section 33 of the Judicature Act to bring this application.

While citing the case of \*Hon. Allan Ssewanyana and Hon. Ssegirinya Muhammed Versus Uganda Criminal Appeal No. 294 of 2021\* and \*Makumbi Moses Versus Uganda Criminal Appeal No. 068 of 2020\*, he submitted that an application based on any wrong law should be struck out. In the above two cited authorities, the appellants filed appeals in the Court of Appeal against the Orders of the High court denying bail and cancelling bail respectively. The Court of Appeal held that the right to appeal is a creation of statute and appeals from the High Court to the Court of Appeal do not arise from interlocutory orders but from the orders of conviction and sentence as per Section 132 (2) of the TIA. In both cases, the Court of Appeal struck out the appeals on a preliminary point of law.

Mr. Kyomuhendo finally submitted that the application is bad in law for being brought under wrong provisions of the law and should be struck out and the matter be disposed of.

In response to this, Hon. Erias Lukwago learned Counsel and the lord Mayor of Kampala City submitted that what the respondent called the preliminary point of law was actually a response to the applicants' submissions. He further argued that the application was brought under Section 17 (2) and Section 33 of the Judicature Act which give this Court inherent powers to prevent abuse of Court process. He further contended that consolidation and joinder mean one and the same thing and it is just a matter of semantics.

He further contended that consolidation of criminal matters was handled in the case of *\*Aliobe Joseph, Bada Alfred alias SINA Versus Uganda Miscellaneous Criminal Application Nos. 005,006 and 0017 of 2016\** where Hon. Justice Stephen Mubiru consolidated three Miscellaneous Applications for bail and handled them as one.

The principal legislation that governs criminal procedure in the High Court in Uganda is the Trial on Indictments Act Cap 23 (TIA) just as the principal legislation that governs civil procedure is the Civil Procedure Rules (CPR).

Consolidation of suits is specifically provided for under Order 11 Rule 1 of the Civil Procedure Rules which provides that:

*\*"where two or more suits are pending in the same court in which the same or similar questions of law or fact are involved, the court may, either upon the application of one of the parties or of its own motion, at its discretion, and upon such terms as may seem fit-\**

*\*(a) Order a consolidation of those suits; and\**

***\*(b) Direct that further proceedings in any of the suits be stayed until further order".\****

However, I find no provision in the TIA that allows consolidation of criminal cases. On the contrary, the TIA provides for joinder of counts and persons and not consolidation of criminal cases.

In an effort to support the application for the consolidation of the criminal cases, counsel for the applicants relied on *\*Constitutional Petition No. 30 of 2014 Kazinda Geoffrey versus Attorney General, Uganda Versus Ojwiya Santo and 4 others Criminal Appeal No. 12 of 2017 and Aliobe Joseph, Bada Alfred alias SINA Versus Uganda Miscellaneous Criminal Application Nos. 005,006 and 0017 of 2016.\** Upon perusal of the first two court authorities, I find that that the principle that was discussed was joinder of counts or offences and **not consolidation** of criminal cases.

In the *\*Aliobe Case\** (supra), the applicants were jointly indicted for the offence of Murder contrary to Sections 188 and 189 of the Penal Code Act. Each of them filed a separate application for the grant of bail and they were all before the same court and the same judge. The Learned Judge observed that the Trial on Indictments Act is silent about consolidation of criminal cases and criminal applications but consolidation is consistent with good case

management principles. He therefore found it proper and convenient to consolidate the applications and handle them as one.

I find that this case is distinguishable from the facts before this court. In the *\*Aliobe case\**, the three applications arose from one Criminal case and the applicants appeared on the same charge sheet while the application before this court seeks to consolidate two separate and distinct criminal cases. Besides, all the three applications were before the same court and could be easily and safely consolidated. This is different from the facts of this application where one case file is before one judge in Masaka and another is before another judge in Kampala at the International Crimes Division (ICD). Can I consolidate what is not before me? In my view, "cases before the same court" does not mean "same court level". As a judge at the International Crimes Division, can I by the ruling of the court order another judge of the High Court to produce a casefile before me for consolidation? I would answer this question in the negative.

At this point, I wish to observe that the applicants' case was mainly hinged on the infringement of the right to a fair hearing as enshrined in Article 28 of the Constitution as discussed in the *\*Kazinda Case\**. In the *\*Kazinda case\**, three justices of the Court of Appeal held that the offences with which Mr. Kazinda was charged fell within the definition of the offences of the same character and could adequately have been joined in one trial. The numerous trials for offences similar in character amounts to a deprivation of the right to a fair hearing and contravenes Articles 28(1) and (9) of the Constitution. That failure to adhere to the above provisions of the constitution would lead to duplicity of charges against an accused person which infringes on the right to a fair hearing. However, this court is unable to rely on any arguments referring to that case because on the 12th day of February 2021, the Supreme Court in *\*Constitutional Application No. 27 of 2020\**, *\*The Attorney General Versus Kazinda Geoffrey\** issued an order staying the execution of the judgement and Orders in Constitutional Petition No. 30 of 2014 pending the hearing and the determination of the intended appeal by the applicant.

Hon. Erias Lukwago invited this Court to find that joinder and consolidation are just semantics but they have one and the same meaning. I respectfully disagree because in practice they actually mean different things and cannot be performed in the same way. Whereas in consolidation, two or more distinctive casefiles are brought together and handled as one, joinder means having two or more persons or offences on one and the same charge sheet or indictment on the same summary of the case. It should also be noted that under Order 11 Rule 1 of the CPR, consolidation is permitted when two or more suits are before the same court.

In light of the above therefore, I agree with counsel for the respondent that consolidation of criminal cases is alien to criminal law and procedure because it is not provided for in the laws. This would have ordinarily disposed of this application at this stage. However, Hon. Medard Ssegona Lubega and Hon. Erias Lukwago invited this court to exercise its inherent powers under sections 17 (2) and 33 of the Judicature Act and order for the consolidation of Masaka CRB 605 of 2021 and Lwengo CRB 203 of 2021 in order to prevent abuse of court process.

Having listened to the submissions of counsel for the applicants and the court decisions they relied on, I formed the view that whereas the application seeks a consolidation of Masaka CRB 605 of 2021 and Lwengo CRB 203 of 2021, they actually intended to mean joinder of offences and persons on one indictment and not consolidation. This is because in their submissions when asked how consolidation would be done, Hon. Medard Ssegona Lubega explained that the count of murder in Lwengo CRB 203 of 2021 would be added on the Indictment in Masaka CRB 605 of 2021 and the two would be handled as one. This is clearly joinder of persons and offences and not consolidation of criminal matters.

In the spirit of administering substantive justice, this court will exercise its discretion and treat this application as if it was an application for joinder of offences and persons so as to conclude it on its own merits. This therefore takes me to the second issue which I will rephrase as follows:

**Issue 2: \*Whether the persons and offences in Lwengo CRB 203 of 2021 can be joined on the charge sheet or Indictment of Masaka CRB 605 of 2021 that is before this honourable court and be handled as one.\***

Hon. Erias Lukwago submitted that Masaka CRB 605 of 2021 and Lwengo CRB 203 of 2021 arise from a series of the same transaction and therefore should be handled together in order to avoid abuse of Court process. It was his contention that the two cases are inextricably intertwined so much that one cannot be divorced from the other.

He gave a chronology of the events and submitted that the charges in Lwengo CRB 203 of 2021 were as a result of a series of murders that happened in greater Masaka and it only came after the applicants had been granted bail by the High Court in Masaka in Masaka CRB 605 of 2021. He wondered why Lwengo CRB 203 of 2021 did not come first since it indicates that the offence was committed on 2nd August 2021 which is way before the other murders which are said to have happened on the 23rd August 2021. He argued that Lwengo is part of greater Masaka and the offence in Lwengo CRB 203 of 2021 is part of the series of murders that were happening in Masaka at the time and are acts of terrorism.

On the other hand, Chief State Attorney, Richard Birivumbuka while citing sections 23 and 24 of the TIA, which regulates framing of charges in criminal matters, vehemently opposed the joinder of offences and persons. He submitted that the offences and the persons in the two case files cannot be joined in the same Indictment otherwise there would be a misjoinder and resultantly, a miscarriage of justice. He contended that the parties in the two cases are completely different save for the applicants who appear in both. He also argued that the offences were committed at

different times, in different places with different facts and different motives. He further argued that whereas in Masaka CRB 605 of 2021, the motive of the murders was terrorism, in Lwengo CRB 203 of 2021, the murder was an isolated incident and the motive is unknown. He finally submitted that allowing joinder would mean charging all the people afresh and committing them for trial and letting them undergo a fresh pre-trial process which would cause more delay.

In order to resolve issue 2, this court will be expected to answer two questions, namely:

- (a) Can the offences in the two case files be joined and charged in one charge sheet or Indictment?
- (b) Can the persons in the two case files be joined in one charge sheet or Indictment?

The law governing joinder of counts in the High Court is provided for under sections 23 of Trial of Indictments Act and it provides as follows:

- \*1. "Any offences, whether felonies or misdemeanors, may be charged together in the same indictment if the offences charged are founded on the same facts or form or are a part of a series of offences of the same or a similar character.\*
- \*2. Whereas more than one offence is charged in an indictment, a description of each offence so charged shall be set out in a separate paragraph of the indictment called a count."\*

Applying the above law to the facts of this application, I find that the offence in the charge sheet of Lwengo CRB 203 of 2021 is murder and I believe that it is of the same or similar character with the offences in the charge sheet of Masaka CRB 605 of 2021 within the meaning of Section 23 (1) of the TIA. This would, therefore, mean that the offences may be joined together in the same charge sheet. The first question therefore is answered in the affirmative. (Emphasis is mine).

The other question is, \*can the persons in the two case files be joined in one charge sheet or Indictment?\*

Joinder of persons is provided for under section 24 of the TIA which provides that: \*"The following persons may be joined in one indictment and may be tried together-\*

- \*1. Persons accused of the same offence committed in the course of the same transaction;\*
- \*2. Persons accused of an offence and persons accused of abetment or of an attempt to commit that offence;\*
- \*3. Persons accused of more offences than one of the same kind (that is to say, offences punishable with the same amount of punishment under the same section of the Penal Code Act or of any other written law) committed by them jointly within a period of twelve months;\*
- \*4. Persons accused of different offences committed in the course of the same transaction;\*

- \*5. Persons accused of any offence under Chapters XXV to XXIX inclusive of the Penal Code Act and persons accused of receiving or retaining property, possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit either of the last-named offences;\*
- \*6. Persons accused of any offence relating to counterfeit coin under Chapter XXXV of the Penal Code Act, and persons accused of any other offence under that Chapter relating to the same coin, or of abetment of, or attempting to commit, any such offence."\*

Considering the facts in the instant case, the only provision that would be applicable is section 24 (3) of the TIA. If the applicants were the only accused persons appearing on the charge sheet of Lwengo CRB 203 of 2021, they would safely be added to the charge sheet of Masaka CRB 605 of 2021. This is because the applicants would be \*"persons accused of more offences than one of the same kind (that is to say, offences punishable with the same amount of punishment under the same section of the Penal Code Act or of any other written law) committed by them jointly within a period of twelve months."\* However, there is another accused person, namely, \*Ssenyonga Wilson alias Nyonga Tonny (A3)\* on the charge sheet of Lwengo CRB 203 of 2021 which makes the joinder of persons impracticable.

Besides, Masaka CRB 605 of 2021 also has five (5) other accused persons in addition to the applicants. Had it been that A3 also appears as one of the accused persons in Masaka CRB 605 of 2021, or there were no other accused persons on the charge sheet of Masaka CRB 605 of 2021, then the joinder of persons would be possible. However, A3 is a total stranger to the case that is currently before this Court. As such bringing A3 to the case before this court with the accused persons he is not connected to in any way and for charges he is unaware of, would be a misjoinder of persons.

In light of the above therefore, it is clear that the persons in the charge sheet of Lwengo CRB 203 of 2021 cannot be safely joined on the charge sheet of Masaka CRB 605 of 2021 thereby answering the second question in the negative. Having made that finding, I also find that failure by this court to order for a joinder of counts and persons in the two case files that are the subject of this application, does not in any way violate the applicants' rights to a fair hearing and is not prejudicial to them in any way. The two matters can be safely handled separately.

Counsel for the applicants emphasized that charging of the applicants in two separate files is an infringement of the right to a fair hearing as enshrined in Article 28 (1) and (9) of the Constitution which provide for the right to a fair and speedy trial and the right against double jeopardy. Though the Supreme Court has stayed the execution of the judgement of the \*Kazinda case\* on which Counsel for the applicants based their submissions for this argument, I believe this court has a duty to give its view on the right to a fair hearing as enshrined in Article 28 (1) and (9) of the constitution in light of the facts of the instant case. My view is that charging the applicants in two casefiles does not deny them their right to a fair and speedy trial because as this court was informed, in both casefiles, the accused persons have already been committed to the High Court for trial.

Counsel for the applicants also contended that charging the applicants in the two case files amounts to double jeopardy. Article 28(9) of the constitution provides that:

"\*A person who shows that he or she has been tried by a competent court for a criminal offence and convicted or acquitted of that offence shall not again be tried for the offence or for any other criminal offence of which he or she could have been convicted at the trial of that offence, except upon the order of a superior court in the course of appeal or review proceedings relating to conviction or acquittal" (Emphasis Mine).\*

Clearly, in the facts before this court, there has been no conviction or acquittal of anyone. Therefore, this leaves us with the aspect of, "\*or for any other criminal offence of which he or she could have been convicted at the trial of that offence\*..." It is my view that it cannot be said that the applicants could have been convicted of the murder in Lwengo CRB 203 of 2021 in the trial of Masaka CRB 605 of 2021 for it to amount to double jeopardy. This is because the offences and the persons in the two cases are different.

I also need to observe that Sections 23 and 24 of the TIA that regulate the joinder of offences and persons use the word "may" and not "shall" leaving it at the discretion of the Director of Public Prosecutions to determine which offences and persons to jointly charge. This discretion may only be interfered with upon satisfaction that there was abuse of the legal process. Counsel for the applicants vehemently argued that charging the applicants separately was in abuse of the legal process. However, no evidence was adduced to the satisfaction of this court to that effect. In conclusion, this application hereby fails and is accordingly dismissed with no Order to costs.

**Dated at Kampala this 28th day of September 2022.**

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Alice Komuhangi Khaukha JUDGE 28/09/2022

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