

UGANDA / JUDGMENT

Uganda v Mbaziira & 3 Others (Criminal Application 90 of 2023) [2024] UGHCCRD 40 (17 May 2024) [2024] UGHCCRD 40

COURT

HC: Criminal Division (Uganda)

BEFORE

Mutonyi, J

CASE / FILE NUMBER

Criminal Application 90 of 2023

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THE REPUBLIC OF UGANDA, IN THE HIGH COURT OF UGANDA, HOLDEN AT KAMPALA,
CRIMINAL DIVISION. HCT-00-CR-CN-0090-2023 UGANDA (PRIVATE PROSECUTION)

=====APPELLANT VERSUS MBAZIIRA BRYAN & 3

OTHERS=====RESPONDENT. BEFORE: HON. LADY JUSTICE MARGARET MUTONYI,
JHC.

RULING.

Introduction.

This ruling is in respect of an application by the office of the Director of Public Prosecutions to take over an appeal that was preferred against the decision of the Ag. Chief Magistrate, HW Nantege Christine where she struck out a case that was instituted through private prosecution by Male Mabirizi . K. Kiwanuka.

The reason for striking it out is that the mode the Appellant used was erroneous as he used a charge sheet instead of making a complaint on oath as provided under section 42(1) (c) and section 43(3) of the Magistrates Courts Act, CAP 16.

The application to take over was made orally by Mr. Muwaganya Jonathan, and Mr. Kyomuhendo Joseph both Chief State Attorneys in the office of the Director of **Public Prosecutions**.

Their application was premised under Article 120 (3) (c) of the Constitution of the Republic of Uganda, 1995 which provides that:

"The functions of the Director of Public Prosecutions are the following...

- (c) To take over and continue any criminal proceedings instituted by any other person or authority..."

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Submissions

In his submission, the learned Chief State Attorney, Kyomuhendo Joseph submitted to the effect that he acknowledges the case was on appeal.

However, the Constitution does not restrict the DPP from taking over an appeal. He submitted the import of Article 120 (3) is that, the office can take over a case at any stage and that an appeal of this nature falls within the meaning of criminal proceedings. He therefore prayed that this court grants them the permission to take over the appeal.

In reply, Mr. Male Mabirizi Kiwanuka objected to the application with the following submissions:

That the meaning of the proceeding under Article 120, sub article 3 of the Constitution was never intended to include an appeal. By the Constitution stating that at any stage of the proceeding, clearly the meaning was that at that stage of proceeding at the court of first instance because an appellate court does not have the powers an original court has. Therefore it cannot be said that a person who never participated in the lower court as a party can seek to join an appeal where he/she never participated. That will defeat the purpose of appeal by its nature.

Secondly he referred to Article 120(4) (a) of the Constitution which says that the functions conferred on the DPP under clause 3 of this article may in the case of functions under 3(a), (b) and (c) be exercised by him or her in person or by officers authorized by him or her in accordance with general or specific instructions. His emphasis was on the words "in accordance with general or specified instruction."

He further submitted that the current DPP Jane Frances Abodo issued a circular dated 2nd March 2021 addressed to all Prosecutors in handling private prosecutions. In paragraph 3 (f) of that circular, she makes it clear that a takeover can only happen after summons have been issued and charges confirmed by the Magistrate. In the matter before this court, no summons were issued in the lower court and the trial magistrate refused to act on the file. Therefore the power to take over in the lower court had not yet reached.

He submitted that Section 42(1) of the MCA specifies three avenues of instituting proceedings that is the police, DPP and a private person.

Section 43 of the same Act, says that the DPP can take over in the Magistrate's court. Upon failure to take over the proceedings at the Magistrates court's level,

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what stage.

The only issue before me is *whether the Director of Public Prosecutions can take* over a criminal case on appeal?

Decision of Court.

I have carefully considered the application, the law cited both statutory and case law, and the submissions from both sides.

I have also considered the appeal that is before me. It is not a case where there is a conviction or an acquittal. The criminal case was struck out on alleged procedural error by the Appellant (the Private Prosecutor).

Procedural errors and their occurrence in the criminal proceedings have a significant impact on the decision of courts as they may affect the outcome of the entire proceedings.

Without delving in the merits of the appeal before me, the trial proceedings in the lower court had hardly commenced and were struck out. There was an alleged failure to comply with the statutory provisions of sections 42(1)(c) and 42(3) of the Magistrates Courts Act Cap 16 hence this appeal.

Mr. Male Mabirizi Kiwanuka Submitted that Section 42 (1) of the MCA specifies three avenues of instituting proceedings. That is the police, the DPP and a private person.

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That section 43 of the MCA says that the DPP can take over in the Magistrates Court. His submission was that upon failure to take over the proceedings at the Magistrate's level, then the DPP cannot come on appeal and want to take over at the Apex level. He cited cases where appeals have been in this court where participants have strictly been private prosecutor and the accused.

He cited cases of Criminal Appeal No 8 of 2023 Private Prosecution by Male Mabirizi VS Hon. Nobert Mao & 2 others, and Criminal Revision no. 0024 of 2022, Vintage Measuring Fund 2 Vs Bitature & Another.

He made reference to the administrative circular by the DPP where State Attorneys were guided at what stage they should apply to take over which should be when the summons have been issued and the charges confirmed by the magistrate. That in this case, there were no summons issued and charges were not confirmed.

My understanding is that much as the circular is not law, it was intended to guide the prosecutorial process to avoid abuse of the legal process. It is akin to guidelines that are issued from time to time to guide in the process of criminal justice. The import of that circular was premised on the fact that the law has put in place the procedure to be followed by persons that intend to participate in the prosecutorial function of the Directorate of Public Prosecution.

The circular did not in any way intend to waive the constitutional/statutory function of the office of the Directorate of Public Prosecutions to take over criminal proceedings. It is after the summons have been issued and the charges confirmed by the magistrate that the office of the Directorate of Public Prosecutions can know that there is merit in the case and therefore apply to take over in the interest of justice.

A private prosecutor is therefore obliged to follow the law and the properly laid down procedures while pursuing the interest of private prosecution because whatever the private prosecutor does, is for and on behalf of the Director of Public prosecutions.

In my view which I know is right, private prosecutors are a backup or teammates in the prosecutorial function and as such should never operate in an adversarial manner like it was exhibited in this case. Private prosecutors fall under the direct supervision of the Office of the Director of Public Prosecutions and once the office

expresses interest in taking over, the private prosecutor should comply and work closely with the office in pursuit of justice.

Reverting to the cases the Appellant has referred to in his submissions, I agree with Mr. Male Mabirizi that this court has handled the above cases instituted through private prosecution.

The law however gives the Directorate of Public Prosecutions latitude to choose whether to take over private prosecutions or not in view of Article 120 (3) (c) supra and \$120(5)\$ which provides that:

"In exercising his or her powers under this article, the Director of public prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process".

If the above provisions of the Supreme law is read together with Section 43(1) (a) and (3) of the Magistrates Courts Act as amended by the Magistrates Courts (Amendment) Act, Act no. 7 of 2007 which provides that:

43(1) "Where criminal proceedings have been instituted by a person other than a public prosecutor or a police officer under Section 42, the Director of Public **Prosecutions may-**

- a) "Take over and continue the conduct of those proceedings at any stage before the conclusion of the proceedings...."

43(3) "For the purposes of this section, Criminal Proceedings means proceedings before a magistrate's court and before any court by which an appeal may be heard or a power of revision exercised and criminal proceedings shall not be deemed to be concluded until no further appeal or petition for revision can be made in the course of the proceedings." (emphasis mine).

The above section of the law was enacted after the Constitution was promulgated in 1995 like many other laws to put into effect the provisions of the Constitution as amended in 1995.

The finding of this court is that Mr. Male Mabirizi therefore submitted out of context on the legal provisions of section 43 (1) (a) and (3) of the MCA which actually put into effect Article 120 (3) (c) of the 1995 Constitution of the Republic of Uganda.

Once the DPP expresses its interest in executing its constitutional mandate and statutory duty of taking over any criminal proceedings instituted by a private person, the law allows him or her to do so at any time until no further appeal or petition for revision can be made in the course of the proceedings.

In view of the above provisions of the law, the application is allowed and it is directed that the Directorate of Public Prosecutions take over this appeal and the private Prosecutor Male Mabirizi directed to hand over any relevant document that can enable successful prosecution of the Appeal.

I so direct.

Dated at Kampala this 17th day of May 2024.

Margaret Mutonyi JCH. **Criminal Division.**

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