

UGANDA / JUDGMENT

Uganda v Mbaziira & 3 Others (HCT-00-CR-CN 90 of 2023) [2024] UGHCCRD 57 (14 October 2024) [2024] UGHCCRD 57

COURT

HC: Criminal Division (Uganda)

BEFORE

Mutonyi, J

CASE / FILE NUMBER

HCT-00-CR-CN 90 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT KAMPALA

CRIMINAL DIVISION.

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HCT-00-CR-CN-0090-2023

UGANDA ===== (PRIVATE PROSECUTION)

VERSUS

MBAZIIRA BRYAN & 3 OTHERS=====ACCUSED

BEFORE HON. LADY JUSTICE MARGARET MUTONYI, JHC.

RULING

1. Introduction:

The appeal before me was filed by Mr. Male Mabirizi Kiwanuka who initiated the criminal proceedings in the lower court as a private prosecutor. The lower court at the Chief Magistrates Court of Nakawa faulted the procedure adopted by him, which according to Her worship Nantege Christine the Ag Chief Magistrate, was not in accordance with section 42 (3) of the Magistrates Courts Act Cap 16 then, which provides that:

"The complaint will be made to a magistrate who has jurisdiction to try or inquire into the alleged offence, or within the local limits of whose jurisdiction the accused person is alleged to reside or be. Every such complaint may be made orally or in writing signed by the complainant, but if made orally shall be reduced into writing by the magistrate and when so reduced shall be signed by the complainant "

She went ahead and held in her ruling dated 14/8/2023 that:

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"The complainant in this case, Male Mabirizi filed a document in court on 10/7/2023 which appears like a charge sheet with 24 counts. The charge sheet is supported by an affidavit in support deponed by Male . H. Mabirizi Kiwanuka.

I find that the mode of procedure used by the complainant in this case Male Mabirizi, to institute the private prosecution is erroneous as the criminal proceedings instituted by him who is not a public prosecutor or police officer should be by a complaint on oath as provided under section 42(1) (c) and S.42 (3) of The Magistrates Courts Act Cap 16 and reechoed in the case of Uganda (Private Prosecution by Male H. Mabirizi Kiwanuka) Vs Hon. Mao Norbert and 2 others.

Based on the above reasons, the criminal proceedings instituted under criminal case No. 15 of 2023 through private prosecution by the complainant Male Mabirizi are struck out.

The Criminal proceedings should be instituted by way of a complaint on oath"

Following the above decision of the lower court, the appellant Male Mabirizi as private prosecutor appealed to this court against the ruling.

The Director of Public Prosecutions that has the constitutional mandate to prosecute cases in Uganda applied to take over the prosecution of the appeal which application was granted.

When the appeal came up for hearing on 9/8/2024, the learned Chief State Attorney Kyomuhendo Joseph sought to withdraw the appeal.

2. Submissions in support of withdrawal of the appeal.

The learned Chief State Attorney submitted inter alia that they had studied the record and were of the opinion that it has no merit as the

charge sheet which is the basis of this prosecution was incurably defective for duplicity.

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That according to the rules of framing charges, one person or the victim should appear in the particulars of the offence. Having more than one person appearing in the particulars of the offence would cause a miscarriage of justice to an accused person.

I will however ignore this issue as it was not the basis of the appeal in question and go straight to the second ground where he submitted that the private prosecutor flouted the known procedure of filing or registering a private prosecution case.

That he filed a charge sheet and yet he should have filed a complaint on oath and sought the intervention of court to draft a charge sheet.

He submitted that the framers of this law were alive to the fact that an ordinary man like Male Mabirizi, the private prosecutor does not possess the technical knowledge of drafting a proper charge sheet just as indicated in his earlier submission.

He went ahead to rely on the case of Uganda (Private Prosecution) by Male Hassan Mabirizi Kiwanuka vs Hon. Mao Nobert & 2 others, HCCA No 008/2023, where Hon. Justice Paul Gadenya held that "Anybody who sufficiently believes an offence has been committed, may institute private prosecutions against the alleged offenders by making a complaint on oath either orally or in written form to a magistrate court with jurisdiction to handle the matter"

He submitted in this case Mabirizi filed a charge sheet and an affidavit and yet the charge sheet is supposed to be drafted by court.

That he assumed the powers of a public prosecutor which he does not have.

That based on the above, the office of the DPP cannot prosecute illegalities because we are enjoined under Article 120 of the Constitution to prevent abuse of the court process.

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He sought guidance of court on whether it could move on its own motion and dismiss the appeal or there is need for a formal withdrawal of the appeal from the Director of the Public Prosecutions.

3. The issue for my determination is whether this appeal stands withdrawn or there is need for a formal withdrawal from the Director of Public Prosecutions.

A case in law involves a trial or other legal inquiry and in this particular case, this court was to investigate whether the learned chief magistrate erred in law and fact in striking out the private prosecution on the ground that its format did not amount to a complaint on oath.

Before hearing of the appeal could proceed, the office of the Director of Public Prosecutions applied to take over the appeal through the learned Chief State Attorneys Muwaganya Jonathan and Kyomuhendo Joseph.

This court following Article 120 (3) (c) of the constitution of the Republic of Uganda as amended in 1995 which specifically provides for the Director of Public Prosecutions "to take over and continue any criminal proceedings instituted by any other person or authority..." allowed the office of the DPP to take over the appeal.

Taking over and continuing any criminal proceeding including the appeal ideally should be within the context of the provisions of Article 120 (5) of the constitution 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 legal process". (emphasis is mine).

The provision has three main elements.

- **1. Public interest which covers a wide range of values and principles** relating to the public good or what is in the best interest of society. Considering the genesis of the case, society here refers to the Ugandan citizens and all people living within the Ugandan boundaries whether in their homes or authorized places of custody or incarceration including prisons and police cells. Whatever decision is made must be in the best interest of the people affected by the alleged offence.
- **2. Interest of administration of justice** which involves the systems and processes through which laws are enforced and disputes resolved within the society. Needless to say, it is a phrase that is very subjective as its interpretation may vary based upon the facts and circumstances of each case and the people involved. It must however mean in the best interest of justice for the society as any decision made involving alleged criminal conduct has a bearing on society.
- **3. Need to prevent abuse of legal process** which is intended to prevent the prosecutor from manipulating or misusing the rules of procedure or statutory discretion to pervert the course of justice which would in the end obstruct the course of justice for the complainant or lead to malicious prosecution.

With the above three elements in mind, the people of Uganda through the Constituent Assembly as indicated in the Preamble to our Constitution, deemed it important to guard against any possible abuse of power by the officers who execute work for and on behalf of the office of the Director of Public Prosecutions under Article 120(3) (a) (b) and(c) by restricting the function relating to

the discontinuation or withdrawal of criminal proceedings under Article 120(3) (d) of the Constitution which provides that:

"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" (Emphasis is mine).

Under Article 120(4) it is clearly stated that:

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"The functions conferred on the Director of Public Prosecutions under clause (3) of this article:

- a) May in the case of the functions under clause (3)(a)(b)and (c) of this article, be exercised by him or her in person or by officers authorized by him or her in accordance with general or specified instructions; and
- b) Shall in the case of functions under paragraph (d) of that clause, be exercised by him or her exclusively".

Thus withdrawal of any criminal matter at whatever level is the exclusive function of the Director of Public prosecutions in person which mandate is in mandatory terms.

It gives him or her the statutory discretion to withdraw criminal proceedings at any stage before judgment based on the belief that the holder of that office is possessed with judicious sobriety since the holder of that office has the qualification of a judge of the High court.

This noble function cannot be delegated to any of her or his subordinate staff however senior they may be as any withdrawal of criminal proceeding must have regard to public interest, the interest of the

administration of justice and the need to prevent abuse of the legal process.

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However when it comes to cases of private prosecution like the one under consideration, the Director of Public prosecutions does not have the discretion to withdraw based on his or her own judgment but must do so with the consent of court as provided under article 120 (3)(d) supra and it is in mandatory terms to wit; 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"(Emphasis is mine).

Why does the law provide for exceptions with private prosecutions?

A private prosecution is a criminal prosecution initiated by a private individual or body who is not acting on behalf of the police or any other prosecuting authority. This kind of prosecution offers victims of crimes, where police have shown little or no interest or where police have no sufficient resources to investigate or have simply ignored, an alternative avenue to justice.

The exception under Article 120 (3) is therefore intended to prevent arbitrary withdrawal of cases where a private person (prosecutor) or any other authority sufficiently believes an offence has been committed but the police is not interested in its investigation and that even if it is reported, the police is likely not to be interested.

The private prosecutor or any other authority if allowed to prosecute the criminal complaint which is sanctioned by the court after following the well laid out procedures does so on behalf of the office of the Director of Public Prosecutions who has the constitutional prosecutorial mandate.

The same constitution allows the DPP to withdraw or discontinue such proceedings if he or she is satisfied that there is no sufficient evidence to support the charge or it does not pass the test of public interest or interest of the administration of justice.

For the DPP to withdraw, he or she must seek the consent of Court and has to do so in person not through the subordinate staff.

It is her or his exclusive authority that cannot be delegated.

The issue is how is this exclusive mandate executed?

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Is it by way of a Nolle Prosequere or the DPP must appear before court and give sufficient reasons why the court should not withhold its consent to withdraw or by a formal letter?

In criminal cases initiated by the police and sanctioned by the office of the DPP or officers acting under her instructions and or supervision, a written Nolle Prosequere signed by the DPP is sufficient and the court cannot question it.

The law is however silent on the procedure to be followed where consent of court is to be sought.

Further under Article 120(6), it is provided that in the exercise of the functions conferred on him or her by this article, the Director of Public Prosecutions shall not be subject to the direction or control of any person or authority.

In any case, it is within his or her mandate to discontinue any criminal proceedings.

However with private prosecutions and or any other authority, the court must be convinced that the private prosecutor or any other authority is neither acting in Public interest, nor in the interest of administration of

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justice and that the private prosecution is not intended to prevent abuse of the legal process but rather vexatious.

Any withdrawal must therefore be in writing by the DPP giving reasonable grounds and justification for the withdrawal.

In view of the above, the learned Chief State Attorney Kyomuhendo Joseph is not possessed with the statutory mandate to address this court on the issue concerning withdrawal of the criminal proceedings before this court that were commenced by a private prosecutor.

He can only prosecute it or refer the case to the Director of Public Prosecutions for further guidance and action on the matter if he is of the opinion that the private prosecution is flawed and not in the interest of justice.

Consequently this court cannot withdraw the case on its own motion as prayed by the learned Chief State Attorney neither act on his submissions in support of withdrawal for lack of statutory mandate by the Chief State Attorney.

Dated at Kampala this day 14th of October 2024.

Hon lady Justice Margaret Mutonyi, JHC.

Criminal Division.

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Prepared on 13 October 2026 · Esheria