

UGANDA / JUDGMENT

Uganda v Mugisha

(HCT-00-CR-SC 43 of 2008) [2025]

UGHCCRD 11 (14 February 2025)

[2025] UGHCCRD 11

COURT

HC: Criminal Division (Uganda)

BEFORE

Elubu, J

CASE / FILE NUMBER

HCT-00-CR-SC 43 of 2008

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA HCT – 00 – CR – SC – 0043 – 2008 CRIMINAL DIVISION

UGANDA ::::::::::::::: PROSECUTOR

Versus

MUGISHA WILSON ::::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE MICHAEL ELUBU

RULING

The accused (applicant) in this matter is Mugisha Wilson. He brings this application seeking an order that his retrial be stayed pending the determination of an appeal he has filed in the Court of Appeal, against a decision of this Court rendered on the 16th of January 2025.

Background

The applicant is the accused in this retrial. On the 20th of November 2024 he filed an application under the **Human Rights Enforcement Act (HREA)** where he prayed for orders that his retrial be stayed, declared a nullity or he be acquitted and set free from custody. This prayer was premised on the fact that the commencement of the retrial had delayed by 4 years, from the 16th of November 2020 when the Court of Appeal ordered for a retrial, up to the 4th of November 2024, when he took plea. He stated that the delay amounted to a violation of his fundamental non violable right to a fair, speedy and impartial trial, which right is preserved under Article 28 of the **Constitution of the Republic of Uganda**.

In its ruling, this Court disagreed, stating that in the unique circumstances of his case, the delay did not amount to the alleged violation and dismissed the application. It is against that order that the applicant lodged an appeal to The Court of Appeal. The instant application seeks a stay of the trial in the High Court pending

determination of the Appeal by the Court of Appeal.

Submissions

Counsel for the applicant submitted that the applicant was aggrieved by the decision of this court and had filed an appeal with the Court of Appeal. That a Notice of Appeal dated the 28th of January 2025 was lodged that same day with this court. For that reason, the applicant seeks a stay of the retrial pending the final determination of his Appeal by the Court of Appeal.

The applicant states that the Ruling appealed against, is by its nature, a final order and therefore appealable as of right. It was argued however, that there was no procedure laid out in the law, regarding the manner in which such appeal may be filed. For that reason, this court was implored to invoke its powers under Section 14 of **the Judicature Act**, to adopt such procedure as is in conformity with the law. Additionally, that pursuant to Section 33 of **The Judicature Act**, the court has powers to offer the claimants remedies in respect of any legal claims as would resolve all matters in controversy and avoid a multiplicity of proceedings.

To succeed therefore, it was contended that the applicant should show that:

- a. A valid Notice of Appeal was on record. In this case applicant submitted that he had filed such Notice.
- b. There is a real danger of prejudice if the application is not granted. He argued that his appeal would be rendered nugatory if the application was not granted.
- c. The application was filed without delay. It was stated that the ruling was rendered on the 16th of January 2025 and the appeal filed on the 28th of January 2025.
- d. That the appeal is not vexatious and enjoys a real likelihood of success. That the period of 4 years between the order for a retrial and the commencement of proceedings did amount to a violation and infringement of his rights and demonstrates that the appeal is not frivolous.

The prosecution opposed this application. It was argued that appeals are creatures of statute and arise only from final orders of the Court. In this case the court made a ruling directing that the trial proceed. That the same court cannot therefore order a stay. In any event, granting the application occasions a delay which would be to the prejudice of the accused.

The prosecution also stated that there is no right of appeal against an interlocutory order and the order the applicant has appealed against is interlocutory in nature. In sum, that the applicant does not enjoy a right of appeal in this case.

In rejoinder, the applicant stated that Section 16 of the **HREA** creates a right of appeal against orders.

It is also argued that proceedings under **HREA** are **sui generis** and not directly part of the trial. Orders made are not therefore interim, but by their very nature final.

Determination

By the applicant praying for a stay of proceedings, he is in effect seeking the postponement of the hearing of his criminal trial which is before this court, pending the outcome, or the decision of the Court of Appeal in his appeal.

The 9th Edition of **Black's Law Dictionary** defines a stay as the postponement or halting of a proceeding or an order to suspend all or part of a judicial proceeding.

Webster's Law Dictionary states that a stay is a judicial order forbidding or holding in abeyance some action until some particular event occurs, or until the court lifts the stay.

The first question is whether a right of appeal exists where the court trying an accused person has made a finding pursuant to an application brought under the **HREA**.

It should be noted that ordinarily, the applicant would not have a right of appeal in what is essentially an interlocutory matter. He has argued however, that this is not an interlocutory application. That an application of this nature is **sui generis** and cannot be treated as an interlocutory application.

The 9th Edition of **Black's Law Dictionary** defines interlocutory as,

'(Of an order, judgment, appeal, etc.) interim or temporary; not constituting a final resolution of the whole controversy'.

Section 11 (2) (a) of the **HREA** stipulates inter alia that whenever, in any criminal proceeding it appears to the judge presiding over a trial, that any of the accused person's non derogable rights and freedoms have been infringed upon, the judge or magistrate presiding over the trial shall declare the trial a nullity and acquit the accused person.

The situation is analogous to a courts finding on a 'No case to answer' submission following the closure of the prosecution case. Where the court acquits the accused person, then that is considered a final order. However, should the court put the accused to his defence, then it is deemed to be an interlocutory order, as it does not finally determine the guilt or liberty of the accused. In my view therefore, where the court makes an order under Section 11 (2) of the **HREA** and finds that the fundamental rights of the applicant have not been infringed, then the trial of the accused will proceed in the ordinary way. In that sense, the order does make a final resolution regarding the guilt or liberty of the accused and is therefore interlocutory.

In **Twagira v Uganda** [2003] 2 EA 689 it is held that Section 216 (now Section 204) of the **Magistrates' Court Act** does not confer a right of appeal in respect of interlocutory orders made by a trial Magistrate such as on a finding of a case to answer. The practice to be followed in such a case is to appeal at the conclusion of the trial and include any complaints about the finding that there was or was not a case to answer.

In the same way, the decision of this court in its order of the 16th of January 2025, where it has found that the applicant's fundamental rights had not been infringed, was interim for the reasons demonstrated above. Therefore, an appeal from such an order is incompetent.

Nevertheless, appeals from orders issued under **The Human Rights (Enforcement) Act, 2019** are governed by Section 16 and 17 of the Act. Section 16 (3) states that the law governing civil appeals shall, with necessary modifications, apply to appeals under the Act. This provision is reinforced by Section 17 which provides that **The Civil Procedure Act** and **The Rules** made thereunder may, with the necessary modifications, apply to the enforcement of rights and freedoms under this Act.

The applicant stated that applications under this law are **sui generis**. This would mean if an independent application had been filed in the proper court under the Act, then the dissatisfied party would enjoy a right of appeal which is preserved under the above provisions.

All the same, and notwithstanding the foregoing, the court will consider the merits of the application. Ordinarily, the following considerations may be used to assess whether the grant of a stay serves justice in the instant case:

- i. Would substantial loss result if the order was not granted
- ii. Has the application been made without unreasonable delay?
- iii. Where does the balance of convenience lie?
- iv. The Applicant must show that he lodged a notice of appeal
- v. The appeal has a likelihood of success
- vi. Whether if the application is not granted, the appeal would be rendered nugatory
- vii. That refusal to grant the stay would inflict more hardship than it would avoid.

(***Kyambogo University Vs Prof. Isaiah Omolo Ndiege C. A. No 341 of 2013; Lawrence Musiitwa Kyazze Vs Eunice Businge, Supreme Court Civil Application No 18 of 1990***)

The applicant filed a Notice of Appeal on the 28th of January 2025. Clearly he has properly started on the process of appeal. The main thrust of his argument appears to be that because he had waited four years for his trial, then that delay amounted to an infringement of his right to a speedy trial, which is preserved under Article 28 of the **Constitution**.

In my view, although the appellant has filed an appeal, he does not have that right. This court does not therefore hold the opinion that the appeal enjoys a likelihood of success.

The applicant has argued that if this trial is not stayed then it would render the appeal nugatory. It should be noted that the Court of Appeal is superior to the High Court and has powers to reverse, vary or confirm certain decisions of the High Court. There is no danger of the appeal being rendered nugatory. Should the Court find that the appeal is meritorious, then the applicants prayer for acquittal shall be granted. If however the application is dismissed, then this already delayed trial would have been delayed even farther.

It therefore serves the ends of justice for the trial to proceed as the parties await the outcome of the Appeal. This is an extremely old criminal case where every delay compromises the ability to produce evidence, particularly witnesses, who testified more than fifteen years ago. The longer the delay the greater the danger of irreparable damage or harm that would arise from loss of evidence or witnesses on either side. The balance is therefore in favour of hearing the case as factors in favour of continuing the hearing outweigh reasons for a stay of proceedings.

Lastly, there is a public policy consideration. Granting such an application sets a dangerous precedent, where if any person who is facing trial filed an application under HREA, and that application was dismissed, then an appeal would be filed. The court could thereafter be moved to stay proceedings in the prosecution pending the outcome of the appeal. That would compromise the expeditious hearing of criminal cases which would not serve the ends of justice.

In the result, and in view of the forgoing reasons, this application is without merit and is accordingly dismissed.

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Michael Elubu Judge 14.2.25

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