

UGANDA / JUDGMENT

Zhang and Another v Uganda (Miscellaneous Criminal Application 39 of 2023) [2024] UGHCCRD 17 (10 January 2024) [2024] UGHCCRD 17

COURT

HC: Criminal Division (Uganda)

BEFORE

Rosette Comfort Kania, J

CASE / FILE NUMBER

Miscellaneous Criminal Application 39 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

(CRIMINAL DIVISION)

MISCELLANEOUS CRIMINAL APPLICATION NO. 039 OF 2023

(ARISING FROM MISC. CAUSE NO. 167 OF 2022)

1. ZHANG JUN APPLICANTS

2. HU ZHEHENG

VERSUS

UGANDA RESPONDENT

BEFORE LADY JUSTICE ROSETTE COMFORT KANIA

RULING

Background

Zhang Jun and Hu Zheheng hereinafter referred to as the applicants, brought the application by way of Notice of Motion under Sections 17(1) and 33 of the Judicature Act and Sections 48 and 50 of the Criminal Procedure Code Act, against the Respondent seeking orders that;

- a) . The orders of the trial magistrate in Miscellaneous cause 167/2022 at the City Hall Magistrates Court be revised and set aside.
- b) . The 2nd applicant's mobile Phone Huawei DUM0220120003900 that was subject to the order in Miscellaneous Application NO. 167/2022 be immediately released back to him by the Uganda Police Force.
- c) . Costs be provided for.

The application is supported by an affidavit sworn by the applicant, there is no merit in reproducing it, but the gist of the application is that;

- 1) . The applicants were the respondents in Misc. App 167/2022 at the City Hall Magistrates Court
- 2) . The applicants are the subject of investigations in CID HQ. TR GEF 313/2022 wherein they are suspected to have committed the offences of fraud and embezzlement.

- 3) . That the respondent, applied to and was granted an order by court under the Computer Misuse Act 2011, authorizing them to inspect, examine, analyse, extract or retrieve information from the 2nd Respondent's device ^a Huawei mobile phone DUM0220120003900 vide Miscellaneous Cause NO. 167/2022.
- 4) . The applicants are dissatisfied with the orders of the trial Magistrate on in as far as the law enabling the granting of the order does not cover the offences that the applicants are suspected of having committed.
- 5. The application was heard and determined without serving or hearing the applicants in total disregard of their constitutional non- derogable right to be heard.
- 6. The applicants contend that the order made in Miscellaneous Cause 167/2022 at City Hall Magistrates Court is irregular, improper and illegal because the provisions of the law under which it was granted, limits the powers to instances where investigations regard offences under the Computer Misuse Act 2011.
- 7. The application, Miscellaneous Cause 167/2022 did not, neither in the motion or affidavit, make mention of ^a single offence that had been or was about to be committed and as such did not meet the evidential burden necessary for it to be granted.
- 8. That it is in the interest of justice that the application be granted.

Brief facts

In 2017, Zhang Jun, Huang You, Chen Chau, Hu Zheheng, Chen Ziping, Xue Zhigang hereinafter referred to as complainants (victims) started ^a business of manufacturing concrete electricity poles under ENTEC Electrical Equipment Company Limited whose factory is based at Tororo.

It is alleged that, in the year 2022, the applicants chased away the workers who included Xiedong the plant manager, Ms. Ang Zifang the company manager, Chen Aijin the procurement manager, Ms. Mengchuaqin the assets manager and deployed new security guards who subsequently blocked the complainants from accessing the factory .

Representation

The applicants are represented by Counsel Twinomugisha Daniel and Senior State Attorney Wanamama Mies Isaiah represented the respondent.

Submissions

Counsel for the applicants submitted that the respondent did not file an affidavit in reply and prayed that the application be proceeded with as it is unopposed. Counsel for the respondent

says it is true that the state didn't file an affidavit in reply because the respondent has conceded to this application. He added that, the order for seizure of the gadgets in issue was brought under section 28 (1) (2) and (3) of the Computer Misuse Act. The order was issued to detective Walubembe Paul on 29th August 2022 who executed it on the same day, to date the gadgets have not been returned to the owner. This is in contravention of Section 28 (8) which provides that such gadgets must be returned within 72 hours. 72 hours from the date of seizure- 29 August-2022. This application was filed on 17th November 2023. Clearly the 72 hours had long expired. Counsel for the respondent informed court that he tried in vain to reach Mr. Walubembe Paul, because no offence had been disclosed in the affidavit.

Counsel for applicants submitted that, the order was made without jurisdiction because section 28 (1) of the Computer Misuse Act, vests jurisdiction in a magistrate where the offence being investigated falls under the under that Act. The offences which the applicants are suspected to have committed are fraud and embezzlement with do not fall under the Computer Misuse Act, 2011.

Counsel further submitted sections 12 to 27 of the Computer Misuse Act provide for offences under that Act and that embezzlement and fraud are not part of them the magistrate did not have the jurisdiction to issue that order as the same is illegal for lack of jurisdiction. He prayed that the orders of the lower court be set aside for being irregular, improper and illegal.

Determination of Court

The Law

Section 17(1) of the Judicature Act provides that the High Court shall exercise general powers of supervision over the Magistrate's Courts.

Section 33 of the Judicature Act provides that; "The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to ^a cause or matter is entitled to, in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided."

Section 48 of the Criminal Procedure Code Act provides that;

"The High Court may call for and examine the record of any criminal proceedings before any magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the magistrate's court."

Section 50 (1) of the Criminal Procedure Code Act provides for powers of the High Court on revision and states as follows; "In the case of any proceedings in ^a magistrate's court, the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, when it appears that in those proceedings, an error material to the merits of any case or involving a miscarriage of justice has occurred, the High Court may;

(b) in the case of any other order, other than an order of acquittal, alter or reverse the order.

Section 50 (5) of the same Act provides that; "Any person aggrieved by any finding, sentence or order made or imposed by ^a magistrate's court may petition the High Court to exercise its power of revision under this section; but no such petition shall be entertained where the petitioner could have appealed against the finding, sentence or order and has not appealed.

Section 28 (1) of the Computer Misuse Act, 2011 provides that, " where ^a Magistrate is satisfied by information given by ^a police officer that there are reasonable ground for believing that an offence under this Act has been or is about to be committed in any premises and that evidence that such offence has been or is about to be committed in those premises, the Magistrate may issue ^a warrant authorizing a police officer to enter and search the premises, using such reasonable force as is necessary.

Section 28 (2) of the Computer Misuse Act, 2011 provides that an authorised officer may seize any computer system or take any samples of applications or data that is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, within Uganda or elsewhere; that may afford evidence of the commission or suspected commission of an offence, whether within Uganda or elsewhere, or that is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.

Section 28 (3) of the Computer Misuse Act, 2011 provides that ^a computer system referred to in subsection (2) may be seized or samples or copies of applications or data may be taken, only by virtue of a search warrant

^I have carefully considered the application, the oral submissions made at the hearing of the application, and ¹ have also read the order of the Trial magistrate. ^I will now address the issues raised by the facts.

Issues

1. Whether the orders of the trial magistrate in Miscellaneous cause 167/ 2022 at The City Hall Magistrates Court be revised and set aside.
2. Whether the applicant's mobile phone HUWAWEI DUM0220120003900 that was subject to the order in Miscellaneous Application 167/ 2022 be returned to him by the Uganda Police Force.
3. Whether there are any remedies available to the applicants.

Resolution

Whether the orders of the Trial Magistrate in Miscellaneous cause 167/2022 at The City Hall Magistrates Court were properly made.

Counsel for the applicants contended that the offences of fraud and embezzlement which the applicants are suspected to have committed are not included among the computer misuse offences" provided for in the Computer Misuse Act. Therefore, that, the orders were illegally made and that this Honourable Court sets them aside.

Section 17(1) of the Judicature Act provides that the High Court shall exercise general powers of supervision over the Magistrate's Courts. The purpose of this power is to correct errors of law and fact in decisions of magistrate's court. In the case of Simba Properties Investment Co. Ltd and Others -vs- Vantage Mezzanine Fund II Partnership and Others, Miscellaneous Application NO. 0414 of 2022, Hon Justice Stephen Mubiru stated that, " Ordinarily this supervisory power is exercised only in those manifestly plain and obvious cases, where there are patent errors of law on the face of the record, which errors either go to jurisdiction or as so plain as to make the impugned decision ^a complete nullity. It stands to reason then that the error (s) of law alleged must be fundamental, substantial, material, grave or so serious as to go to the root of

the matter. The error of law must be one on which the decision depends. A minor, trifling, inconsequential or unimportant error, or for that matter an error which does not go to the core or root of the decision complained of, or stated differently, on which the decision does not turn, would not attract the court's supervisory intervention."

The Learned Trial Magistrate found that the offences of fraud and embezzlement with which the applicants are charged fall under the Computer Misuse Act of 2011 and consequently made orders pursuant to Section 28 (1) (2) and (3).

Section 28 (1) of the Computer Misuse Act 2011, provides that;

1). Where ^a magistrate is satisfied by information given by ^a police officer that there are reasonable grounds for believing-

- a) that an offence under this Act has been or is about to be committed in any premises ; (emphasis is mine) and
- b) that evidence that such an offence has been or is about to be committed is in those premises, the magistrate may issue ^a warrant authorizing ^a Police officer to enter and search the premises, using such reasonable force as is necessary.

Sections 12 to 27 of the Computer Misuse Act, 2011 provide for " Computer Misuse Offences", not of which are either fraud or embezzlement. The learned Trial Magistrate ought to have properly addressed his mind to the question of whether the offences of fraud and embezzlement are provided for under the Computer Misuse Act, 2011. Had the learned Trial Magistrate done so, he would have arrived at the conclusion that the offences in respect of which Miscellaneous Application NO. 167 of 2022 do not fall under the Computer Misuse Act and he would not have issued the orders that he did.

Consequently, having found that the offences of fraud and embezzlement are not provided for under the Computer Misuse Act, 2022, ^I find that the orders of the Learned Trial Magistrate issued under Section 28 (1) (2) and (3) were illegally made.

Issue 2

Whether the mobile phone HUWAWEI DUM0220120003900 that was the subject of the order in Miscellaneous Application NO. 167 of 2022 be returned to the applicant.

Having found that the order pursuant to which the phone was seized was illegally issued, ^I find that the same should immediately be returned to the applicant. Moreover, even if the order had been legally issued, Section 28 (8) of the Computer Misuse Act 2011, provides that a computer system seized or samples or copies of applications or data taken by the authorised officer shall be returned within seventy two hours unless the authorised officer has applied for and obtained an order in an inter party application for extension of the time. Keeping the gadget for almost two years without seeking extension of time as provided in the law would still be illegal.

Issue 3

Whether there are any remedies available to the applicants?

Section 33 of the Judicature Act provides that; "The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to ^a cause or matter is entitled to, in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided."

Therefore, ^I order that;

- (1) The orders of the Learned Trial Magistrate in Miscellaneous Cause NO. 167 of 2022 be set aside.
- (2) The mobile phone HUWAWEI DUM0220120003900 that was the subject of the order in Miscellaneous Application NO. 167 of 2022 be released to the applicant by the Uganda Police Force.

^I make no orders as to costs.

ROSETTE COMFORT KANIA JUDGE 10th JANUARY 2024.

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