

REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
ANTI CORRUPTION DIVISION
HOLDEN AT KOLOLO

MISC APPLICATION NO 16 OF 2021

NICHOLAS OPIYOAPPLICANT

VRS

UGANDARESPONDENT

BEFORE GIDUDU, J

RULING

The applicant is an accused in criminal case number 106 of 2020 wherein he is charged with offences of **Money Laundering C/S 3(c), 116 and 136(1)(a) of the AMLA, 2013.**

15 He appeared in court for plea in December 2020. He has since been on bail. He brings this application seeking dismissal of the case for want of prosecution and return of his property that was confiscated upon arrest.

20 The major ground is that the **DPP** has failed to commence the prosecution of the applicant thereby causing a delay in the trial. The applicant contends that this delay has infringed on his right to a fair and speedy trial provided in **Article 28(1) of the Constitution**. This is said to have put him to great expense and suffering in his reputation and image as a Human Rights Lawyer.

25 The Motion is supported by the affidavit of the applicant which details the rough manner in which he was arrested on 22nd December, 2020 and his property such as **ID, ATM** cards,

M/Vehicle, computer, money and phones were seized and confiscated.

He was charged and eventually released on bail on 31st December 2020. After that the case has been adjourned several times up to 5 31st May 2021 at the request of the State on grounds that investigations were on going.

The applicant decided to file an application to have the charges dismissed because it appeared to him that the police was not demonstrating progress in concluding investigations. It was his view 10 that the charges were malicious, unjust and unfair. He contends that the continued pendency of these charges is an infringement upon his rights.

The **DPP** opposed the application. Through the affidavit of Mr. Baine Stanley Moses the respondent contends that the applicant's 15 property was returned to him but what is retained are exhibits in the case. Mr. Baine, deponed that the delay in prosecuting the applicant is partly caused by the applicant's travel abroad whilst the adjournments complained of were justified.

Further, that the delay to conclude investigations was also 20 attributed to the Covid-19 pandemic which caused Government to place the Country in lockdown. It was his view that this slowed the movement of investigators in gathering vital evidence. The delay was further attributed to the closure of operations of this Court in June 2021 when some staff members tested positive for Corona Virus.

25 Mr. Baine stated that the applicant has as far back as December, 2020 been asking the lower Court to dismiss that charges referring to this request as "the Court descending into the arena of investigations"

30 Finally, it was stated that inquiries are now concluded and that the summary of evidence is being made.

Mr. David Mpanga appeared for the applicant whilst Mr. Ariong Stephen appeared for the **DPP**.

Mr. Mpanga submitted that the applicant is a Human Rights Lawyer whose right to a speedy trial under **Article 28(1)** of the Constitution has been violated by the inordinate delay of his trial. He contended that the State arrested the applicant and then started investigating the case instead of the other way round.

He asked Court to consider that the continued adjournment of the case since the applicant's arrest in December 2020 is a violation his right to a speedy trial and unless Court intervenes by dismissing the charges, the State will continue abusing his rights.

He referred to a number of Kenyan cases such as **Daniel Kipkemoi Sawe Vrs Rep Criminal Case no.1 of 2018** for the proposition that in determining delay, the court makes a judicial consideration and not by a mathematical or administrative formula and that inordinate delay should be raised at the earliest opportunity. The right is to trial without undue delay and not to trial after undue delay. The trial in **Daniel Kipkemoi Sawe's case** had taken five years to conclude. On appeal after his conviction, he argued that there was an inordinate delay in his trial and sought to have the charges dismissed. The appellate court found that the charges were serious and could not release the convict back to society.

Another case cited is **Omar Kahindi and ors Vrs DPP and AG Misc Criminal application 22 of 2021** where the court released the applicants on anticipatory bail because they had been arrested before commencing investigations. Mr. Mpanga submitted that the applicant in this case was arrested before investigations commenced because the State kept asking for adjournments to complete investigations. The scenario in **Omar kahindi's** case would be relevant if the applicant was seeking bail.

I was also referred to **Julius Kamau Mbugua Vrs Rep Criminal Appeal 50 of 2008** where the Court applied the Canadian case of **R. Vrs Morin (1992) 1 SCR 771** which laid down factors to consider if there is unreasonable delay in trial. Those factors are (i)
5 Length of delay (ii) Waiver of time periods (iii) The reasons for delay including inherent time requirements of the case, actions of the accused, actions of the Crown, limits on Institutional resources (iv) Prejudice to the accused.

Finally, learned counsel cited the Ugandan case of **Kanyamunyu Mathew Muyogoma Vrs Uganda Misc criminal Application 151 of 2020** where an accused sought an adjournment to explore
10 traditional methods of settling the crime. A kind of plea bargain anchored in Traditional Justice. The Court declined to grant the application for adjournment emphasizing that **Article 28(1)** of the
15 Constitution demands that not only should the trial commence without delay but it should be concluded with reasonable speed.

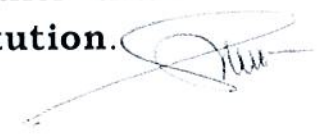
In reply Mr. Stephen Ariong State Attorney asked court to dismiss the application for lack of merit.

He submitted that the application cited section 36 of the Judicature
20 Act yet it seek remedies under section 33 of the Judicature Act.

Further, he submitted that the applicant has appeared in court only five times which to him is within a reasonable time. He contended that investigations are over and the State should be given opportunity to prosecute the case.

25 He stated that he was given authorities relied upon by the applicant while in court so he could not respond to their applicability to the facts.

In reply Mr. Mpanga apologized for citing wrong provisions of the law and invited court to apply substantive justice rather than
30 technicalities as provided in **Article 126(1) of the Constitution.**



On the issue of the Corona Virus pandemic and the attendant lockdowns imposed by the State he submitted that Police and banks continued working. Since this offence relates to money in the bank, the police had access to the records during lockdown.

5 There were submissions from both sides relating to access by the applicant to his passport which has enabled him to travel as he wishes. I did not find them relevant to the issue of **whether there is an unreasonable delay in the trial of the applicant so as to merit the intervention of court.**

10 I have addressed my mind to the motion, affidavit in support and in opposition. These kinds of applications are rear in this court. The fundamental issue is whether in the circumstances of this case, there has been inordinate delay to commit the applicant to trial by the High Court so as to merit the intervention of terminating the
15 case and discharging the applicant.

I should point out from the outset that where Human Rights issues are the subject of adjudication, the court will invoke the provisions of **Article 126(2)(e) of the Constitution** and **section 17(2)(c) of the Judicature Act Cap 13** to apply substantive Justice to the
20 dispute.

Delay is the opposite of speed. **Article 28(1)** of the Constitution requires Courts to determine criminal charges speedily. Speed is a function of distance over time. It follows that to determine if there is delay or indeed inordinate delay, the court should establish if the
25 facts of the case reveal that from the time the case was filed to the time of the complaint, nothing has been done by the prosecution to cause the trial to commence. It must be established that the prosecution is doing nothing to advance the prosecution of the accused.

30 The court record shows that on 28th December, 2020, the prosecution informed court that "inquiries are still in progress".

On 11th January 2021, the prosecution informed court that “investigations are not complete”. Mr. Mpanga complained that inquiries were taking long. The prosecution replied that “we are at (sic) the verge of concluding investigations”.


5 On 28th January 2021, the prosecution sought another adjournment contending it would finish investigations in a month’s time. Mr. Mpanga complained that the accused had been arrested before the case was investigated.

10 On 2nd March 2021, the prosecution oblivious of what it had informed court on 28th January 2021, informed court that “investigations were in progress”. Mr. Mpanga complained about the repetitive message from the State that investigations were in progress. The court opined that the State needed time to conclude investigations and gave what it called a long adjournment to 30th
15 April 2021.

On 30th April 2021, the prosecution stated that inquiries continue. The defence objected and asked the Magistrate to dismiss the charges under section 119 of the MCA. The Magistrate rightly declined to do so for lack of jurisdiction.

20 On 31st May 2021, the prosecution again was on song that “inquiries are incomplete” The defence asked that the matter be referred to the High Court which has jurisdiction to intervene due to endless inquiries. I directed that a formal application be filed. That is why we are here.

25 We are in September 2021. There is no summary of the case to commit the applicant to the High Court. Mr. Ariong asked for opportunity to prosecute the applicant on grounds that the State is now ready to commit the accused. He attributed the delay to the corona virus pandemic which caused lockdowns country wide.



Mr. Mpanga protested this request contending that the lockdown did not affect banks where the crime was committed and the police which is mandated to investigate the case was not locked down.

Once a case is filed in court, the matter is placed on the court's conveyor belt which takes it through processes such as taking plea, considering bail, taking evidence and making a decision. From registration of the case to conclusion, the progress of the case is controlled by court. Case management good practices require that the court monitors events happening or not happening to the case from initiation to disposal.

It is with respect; erroneous for Mr. Baine, (CSA) to state in his affidavit opposing this application that the court before which the applicant was appearing was being asked to descend into the arena of investigations.

Courts are clothed with Constitutional and statutory powers to control delayed prosecutions through the enforcement of the provisions of **Article 28(1) of the Constitution, section 119 of the MCA and section 17 of the Judicature Act**. It is not open to the prosecution to literally deposit its case in court and go to sleep. The court has power to demand that action be taken on any case filed to ensure that allegations made against an accused are substantiated through a trial and a decision made on the matter.

It is my view that delay is not legally defined but is measured according to the circumstances of each case. Simple cases should be prosecuted straight away. Complicated cases require time to assemble evidence to present to court. The time the State is permitted by court to get ready to prosecute depends on the reasons it demonstrates regarding the progress of investigations.

Ideally, investigations should precede arrest and charging. But in situations where there is sufficient suspicion but with a high risk of the disappearance of either the accused or evidence or both if

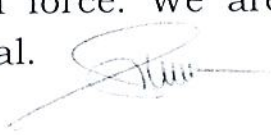
investigations commence before arrest, it may be sensible to arrest before concluding investigations.

The charges against the applicant are that on 8th October, 2020, he received USD 340,000 on the account of Chapter Four Uganda in
5 ABSA Bank at Garden City. This money is said to be proceeds of a crime. The applicant was arrested violently in December, 2020 which is 3 months after this money was received. After charging the applicant, the prosecution has on six occasions informed court that investigations are incomplete or continue. This song of
10 "investigations are incomplete" is not itself sufficient cause to warrant an adjournment. The prosecution is obligated to inform court of vital steps taken to complete investigations before the court can decide if an adjournment is merited or not.

We are in September, 2021. Now the State says it is ready. Mr.
15 Mpanga for the applicant submitted that the charges be terminated because trial should not be permitted to start after a delay. The Kenyan cases cited in support were not on similar facts as this matter and in any case the courts there did not grant the remedies sought such as terminating the trials.

I would have been inclined to find that between December, 2020
20 and September 2021 is inordinate delay to put the applicant to trial for offences committed on digital platforms and not in the bush where it may be difficult to reconstruct the scene. The bank must have disclosed where the money came from before the State
25 concluded that it was a criminal source. You don't need a year to put that evidence together unless you are not serious.

But I take Judicial Notice of the fact that in June, 2021 this court was under quarantine by the Judiciary due to some members of staff who tested positive for Corona Virus. Later in July 2021, the
30 Ministry of Health imposed a National lockdown which is substantially still in force. We are operating under what is now called the new normal.



Operations of Government were restricted to 10% of the work force for essential workers and later lifted to only 20% up to date. It is therefore, reasonable to suppose that the prosecution preparedness was compromised. Now that the prosecution is ready, it would be
5 pointless to immediately terminate the trial when such a decision would not prevent future prosecution of the applicant on the same charges.

The court is mandated to balance the right of the State to prosecute offenders to punish crime in society with the right of an accused to
10 have a fair, speedy and public trial before an impartial court.

Consequently, I make the following orders to dispose of this application.

1. The prosecution is given seven days from the date hereof to
15 commit the applicant for trial before the High Court and disclose its case to the accused. For avoidance of doubt this is before closure of business on 15th September, 2021.
2. If after 15th September, 2021 the applicant has not been
20 committed for trial to the High Court, then the prosecution of the applicant in criminal case 106 of 2020 shall stand terminated under section 17(2)(a) of the Judicature Act, Cap 13 to prevent Abuse of the process of the court by curtailing delays in prosecuting the applicant.
3. There are no orders as to costs

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30 Gidudu Lawrence
JUDGE

8TH SEPTEMBER, 2021

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