REPUBLIC OF UGANDA

IN THE HIHG COURT OF UGANDA

ANTI CORRUPTION DIVISION

HOLDEN AT KOLOLO.

CRIMINAL CASE 88 OF 2019

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

VRS

MICHAEL ONONO :::::::::::::::::::::: ACCUSED

10 **REVISIONAL ORDER**

BEFORE GIDUDU, J

On 20th July 2022, the Chief Magistrate referred this matter to me by memo. The gist of which is that on 25th June, 2019 Criminal Case 88 of 2019 was dismissed for want of prosecution. On July 10th, 2019, the same case was re-instated.

The prosecution led evidence and closed. When the defence was put on the stand, the Chief Magistrate who had taken over the file from
20 another Chief Magistrate realised what she considered errors on the record.

She realised that a fresh plea had not been taken before the prosecution led evidence. Besides, a plea on the dismissed charge did not include the alternate charge of embezzlement. She stopped the trial and referred the file to the High Court for an opinion.

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Madam Grace, extract notes. Received

The Chief Magistrate has power to refer a question of law for the opinion of the High Court pursuant to **section 206 of the MCA, Cap 16**. I sought the opinion of the director legal affairs in the Inspectorate of Government which is the prosecuting agency on the issue raised by the Chief Magistrate. This was pursuant to **section 50(2) of the Criminal Procedure Code Act, cap 116.**

In her written opinion of 12th October, 2022, the director legal affairs conceded that indeed there was no fresh plea taken when the case was re-instated. She also conceded that there was no plea taken originally on the alternate count. No fresh charges were filed. The dismissed charges and proceedings were the ones revived to sustain the trial.

However, she opined that these shortcomings notwithstanding, the trial should proceed. She held the view that the case that was dismissed was re-instated which, according to her, meant that there was no need to take another plea because the original case was lifted back on course. Further, that failure to take a plea on the Alternate count is curable if the accused at this stage is asked to plead to it and proceed with his defence.

The director also cited **section 145 of the MCA** which, in her opinion, permits a Court to convict on a cognate offence. She also proposed that the accused can ask for recall of some witnesses for cross examination on the Alternate count.

The prosecution further contended that there was no order of the Chief Magistrate which the High Court can revise **under Section 50 of the Criminal Procedure Code Act, Cap 116**. Finally, it was opined that the re-instatement was a mere technicality that was curable under **Article 126(2)(e) of the Constitution** meaning the trial should proceed.

It is a fact that **Criminal Case 88 of 2019** was dismissed by Court on 25th June, 2019. The dismissal was made **under section 119(1) of the MCA, Cap 16** which provides as follows:

119. Nonappearance of complainant at hearing.

(1) If, in any case which a magistrate's court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him or her at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, if the prosecutor, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall dismiss the charge, unless for some reason it shall think it proper to adjourn the hearing of the case until some other date, upon such terms as it shall think fit, in which event it may, pending such adjourned hearing, either admit the accused to bail or remand the accused to prison, or take such security for his or her appearance as the court shall think fit.

(2) The dismissal of a charge under this section shall not operate as a bar to subsequent proceedings against the accused person on account of the same facts.

The dismissal of a charge under **section 119 of the MCA** is a ***judicial decision***. The accused is discharged. The sureties are discharged and any bail security is also returned to an accused. This act closes the file. These consequential orders were supposed to be made on 25th June, 2019. The trial Magistrate became *functus Officio* on 25th June 2019 in regard to **criminal case 88 of 2019**.

The dismissal of a charge under **section 119(1) of the MCA** does not bar the prosecution from instituting subsequent proceedings against the accused person on account of the same facts. This is done by the prosecution filing fresh charges in the same Court against the same accused. When the accused appears, he/she

takes plea afresh to the new charges, although similar to the dismissed charges. The process starts afresh with new bail procedures.

It would appear to me that both the trial Chief Magistrate and the prosecutor treated the decision of 25th June 2019 as an administrative one. Criminal Law is structured. It follows a clear path. Dismissed charges cannot be re-instated like a civil suit by way of application or request by letter as was the case here.

On July 2nd, 2019, the prosecution sent a letter to the trial Chief Magistrate asking for the re-instatement of the charges because the prosecution was now ready with witnesses. The trial Chief Magistrate endorsed the letter thus *"matter re-instated and any delay in the case will not be tolerated"*

Respectfully, the trial Chief Magistrate had no Jurisdiction to resurrect a dismissed charge under the Magistrates' Courts Act. She was *functus officio*. She should have advised the prosecution to file fresh charges because the accused had by operation of law been **discharged** once the charges were **dismissed** on 25th June 2019 **under section 119(1) of the MCA**.

Jurisdiction is a creature of statute. The mandate of a Judicial Officer is clothed in Jurisdiction. It is the foundation of Judicial Authority. It is a substantive matter which, if absent, cannot be cured by **Article 126(6)(e) of the Constitution** which deals with technicalities. Jurisdiction is not a technicality. It is the foundation of Judicial Authority.

It is well established that a judgment of a Court without Jurisdiction is a nullity. Where a Court takes it upon itself to exercise a Jurisdiction it does not possess, its decision amounts to nothing. **See Desai V Warsama (1967) E A 351**.

It follows, therefore, that there was no re-instatement of the charges in law. Charges should have been filed afresh and a fresh plea

taken. Since there was no plea taken on the charges on which evidence was adduced, there cannot be a defence to non-existent charges. The purported trial is a nullity.

The proceedings cannot be saved by asking the accused to take a fresh plea and recall witnesses for cross examination as suggested in the opinion of the learned director legal affairs of the Inspectorate of Government. The power to recall witnesses is a discretionary power of Court and no party is entitled to recall witnesses except where charges are amended under **section 132 of the MCA**. In this case there was no amendment to entitle the accused to ask to recall witnesses.

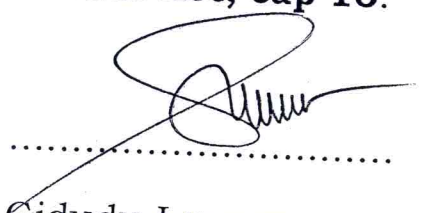
Secondly, the proceedings are based on an order re-instating dismissed charges by a Magistrate who was *functus officio*. It means that there are no proceedings in law to be saved.

There was another argument that there was no order to be revised under **section 50 of the Criminal Procedure Code Act, Cap 116**. With respect, a request was made to Court on 2nd July, 2019 to have a dismissed case re-instated. On 10th July, 2019 the trial Magistrate made an order purporting to re-instate dismissed charges. It is that order that is the subject of this Revision Order.

I am aware that this order will bring distress to the case which arose in June 2015. There could be fatigue in getting witnesses back to court. I take great exception about this. On 16th August, 2019, counsel for the accused raised objections to the procedure adopted by Court in trying to re-instate dismissed charges instead of the prosecution filing fresh charges. That was an opportunity for the trial Court to re-examine if it had Jurisdiction to do so but the Court and the prosecutor treated the earlier dismissal casually as if it was an administrative registry issue. If fresh charges had been filed at that point we would not be in this situation

With all the sympathies I have regarding the implications of this order on the prosecution with regard to adducing evidence afresh, I am unable to find any excuse to sustain a nullity. The Court can try this case in a session at Mbale Court which is the nearest Court to Amudat District where the charges spring from at the earliest.

In conclusion, the proceedings before the Chief Magistrate in **Criminal Case 88 of 2019** are a nullity because the charges were effectively dismissed on 25th June, 2019. The accused was by law discharged. He could only return to plead to fresh charges filed in Court. Only fresh charges on same facts can be re-instate charges that are dismissed under section **119(1) of the Magistrates' Courts Act, cap 16**.



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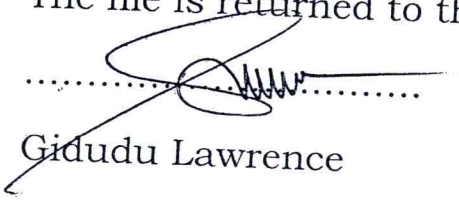
Gidudu Lawrence

JUDGE

14th October, 2022.

The file is returned to the Chief Magistrate to effect this order.



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Gidudu Lawrence

JUDGE

14th October, 2022.