

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(CRIMINAL DIVISION)

CRIMINAL APPLICATION No. 140 OF 2023

*(Arising from Bugannda Road Chief Magistrates Court Criminal Case No. 659 of
2023 formerly City Hall Court Case No 4530 of 2022)*

UGANDA (Private Prosecutor

Male H. Mabirizi)

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APPLICANT

VERSUS

- 1. MUHOOZI KAINERUGABA**
- 2. MAWANDA MICHAEL MARANGA**
- 3. ANDREW MUJUNI MWENDA**
- 4. BARUGAHARE BALAM ATENYI**
- 5. KABANDA DAVID**
- 6. NUWAGIRA MICHAEL KAGUTA**
A.K.A TOYOTA
- 7. LILLIAN ABER**
- 8. KATUNGI MICHAEL**

.....

RESPONDENTS

*Received by
Mawanda
Male Mabirizi
29-08-23.*

*Received by
W. K. K. K.
LEA DPP
29/8/23*

*Received by
Oada Kope
for the Respon
29/8/23*

AND

CRIMINAL REVISION No. 23 of 2023

(Arising from Bugannda Road Chief Magistrates Court Criminal Case No. 659 of 2023 formerly City Hall Court Case No 4530 of 2022)

UGANDA

.....

APPLICANT

VERSUS

MUHOOZI

KAINERUGABA

.....

RESPONDENT

**BEFORE: THE HON MR JUSTICE MICHAEL ELUBU
JUDGMENT**

These are two separate and distinct applications.

The first was a Revision Cause lodged by the State of the Republic of Uganda, under Sections 48, 50 and 51 of **The Criminal Procedure Code Act**; and Sections 14, 16, 17 and 33 of **The Judicature Act**.

A second application was filed by **Male H. Mabirizi K. Kiwanuka** under Article 28 (1) and 44 (c) of **The Constitution of The Republic Of Uganda** and Section 17 (2) of **The Judicature Act**.

Background

On the 11th of November 2022, **Male H. Mabirizi K. Kiwanuka**, instituted a complaint on oath at the City Hall Court, against the 1st Respondent, **Muhoozi Kainerugaba**.

The matter had two counts: 1. The Disobedience of Lawful Orders c/s 116 of **The Penal Code Act** and 2. Common Nuisance c/s 160 (1) of **The Penal Code Act**.

Subsequently, by a letter dated the 14th of November 2022, the Office of the Director of Public Prosecutions, acting under powers conferred on it by Article 120 (3) of **The Constitution of The Republic Of Uganda**, took over the case. The court at City Hall made an order for the private prosecutor to be served or notified of this action.

On the 13th of July 2023 **Male H. Mabirizi K. Kiwanuka** filed an amended charge sheet adding another seven (7) accused persons and increasing the counts from 2 to 6.

On the same 13th of July 2023, Mbidde and Co Advocates wrote to the Chief Magistrates' Court of Kampala at Buganda Road, seeking a transfer of the matter to the Chief Magistrates Court. The Chief Magistrate called for and received the file on the 14th of July 2023.

On the same day, the 14th of May 2023, the Chief Magistrate notified the parties that he had taken over the file. Since the City Hall Court had originally fixed the case for hearing on the 17th of July 2023 at 9.00 am, the Chief Magistrate maintained the same date and notified all parties, including **Male H. Mabirizi K. Kiwanuka** to appear before him on that date.

At the hearing on the 17th of July 2023, Joan Keko - Chief State Attorney, submitted that the amended charge sheet had been filed by the private prosecutor after the Director of Public Prosecutions had taken over the matter. The State Attorney prayed for time to file an application for Revision in High Court to strike out the amended charge sheet.

The Court held that indeed the record showed the amended charge sheet was erroneously received by The City Hall court. The Chief Magistrate took note of the error but observed that he did not have the powers to correct it. That he would have ordinarily invoked his powers under Section 221 of **The Magistrates' Courts Act (MCA)** to send the file to the High Court for Revision but since the DPP intended

to commence a substantive application for Revision, the court granted the prayer for time to file that application.

After the Orders of the Chief Magistrate at Buganda Road Court, **Male H. Mabirizi K. Kiwanuka**, filed an application in the High Court, under Article 28 (1) and 44 (c) of **The Constitution of The Republic Of Uganda** and Section 17 (2) of **The Judicature Act**. He sought orders that the transfer of the file from City Hall to Buganda Road be set aside and nullified. He also prayed for the nullification of the proceedings and orders of the court sitting at Buganda Road, on the 17th of July 2023, because it was not based on any law beside being malicious and intended to defeat justice.

On the 21st of July 2023 the State filed Revision Application No. 23 of 2023 seeking a declaration that the decision of the Court at City Hall to receive an amended charge sheet from the private prosecutor in Criminal Case No 4530 of 2022, after the Director of Public Prosecutions had taken over the conduct of the case was irregular and illegal.

It was also prayed that the amended charge sheet be struck out; and that an order that the original matter with a single accused person be allowed to proceed to its logical conclusion.

Determination

The parties were directed to file written submissions which I will not reproduce here. I have nevertheless had the benefit of studying them and they will be utilised in resolving this matter.

Additionally, the two applications made by the different parties in this matter all arise out of City Hall Criminal Case No. 4530 of 2022. This is the case, which after take over by the Chief Magistrate Court at Buganda Road was designated No. 659 of 2023.

The matter in contention is the filing of an amended charge sheet by the Private Prosecutor. The other complaint is the manner in which the case was transferred and taken over by the Chief magistrate at Buganda Road. In view of these common questions of law and fact, this court has opted to consolidate the matters and write this one ruling. It will dispose of all the issues here.

1. Whether this matter is amenable to Revision?

The application for Revision challenges the decision of the Court at City Hall which received an amended charge sheet from the private prosecutor in Criminal Case No. 4530 of 2022, after the Director of Public Prosecutions had taken over the conduct of the case.

It was commenced under Section 50 of the **Criminal Procedure Code Act (CPCA)** which lays down what orders the court may make in Revision. It 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—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 34 and 41 and may enhance the sentence;

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

A look at the entirety of Section 50 of the **CPCA** clearly shows that the court's mandate when exercising its powers of Revision is limited to the examination of the record of proceedings where final orders have been made. It may reverse a conviction or acquittal or other order of that nature.

That is orders that are final and not amenable to the alteration by the court of first instance; orders that definitively determine the rights or obligations of the parties. (This is the definition for final orders that is given in **First Rand Bank Limited vs Modingwa Harry Makaleng [034/16] ZASCA 169** and the 8th Edition of **Black's Law Dictionary**).

The sum of it is that a Revision is only meant for the examination (and possible alteration) of final orders. That position of the law is properly laid out in a **Guide To Criminal Procedure In Uganda** by *B. J. Odoki* 3rd Edition *Law Africa* pg 270 which states,

Like appeals, revision can only be founded on a final order or judgement of the court. It cannot be made against a preliminary or interlocutory order or ruling which does not determine the case.

The Courts in Uganda have long followed this precedent (See **Kizza Besigye vs Ug Crim M.A. 18 of 2022**; '**Criminal Procedure and Law in Uganda**' by *Francis Ayume* Longman pg 223).

In this case the decision to allow the filing of an amended charge sheet was not a final order by any stretch of meaning. It did not determine the final outcome of the matter or the rights of the parties. It was merely a step taken to inform the Court which additional persons were accused, and what charges had been preferred against them.

The decision of the court to allow the amendment of charges in this case cannot properly be the subject of a Revision.

It is vital to point here that if interlocutory orders, not determining the final outcome of criminal proceedings, were amenable to Revision, the Courts may well be faced with a situation where there would be no end to criminal proceedings. Each decision of the Magistrates Court would be open to applications for alteration by The High Court. Because that would defeat the aim of ensuring that the criminal trial process in each case is swiftly brought to an end Courts have steadfastly closed this avenue.

In **Uganda v Dalal** [1970] 1 EA 355

It is obvious, as Jones, J., remarked in Cr. Rev. 81/63, *Geresomu Musoke v. Uganda* (unreported), on reading ss. 339 to 341 of the Criminal Procedure Code only a final order can be the subject of a revisional order of this court. At the moment no such order is on the lower court's record. If this were not the case all sorts of magistrates' rulings would be finding their way to this court and I can well imagine a clever accused who likes to avoid a prosecution to conviction delaying such prosecution by making a series of objections, on which a trial magistrate would be compelled to rule and thereafter appeal to this court time and again.

This decision properly sums up the position on applications for the Revision interlocutory orders.

2. Whether the transfer and takeover of the City Hall Court file No 4530 of 2022 was lawful.

The Private Prosecutor in this matter challenged the transfer and takeover of City Hall Court File No 4530 of 2022 by the Chief magistrate at Buganda Road Court.

Male H. Mabirizi K. Kiwanuka argued that the transfer must be nullified because the matter had been fixed for hearing on the 17th of July 2023. Two days before the hearing, the Chief magistrate called for and transferred the file to Buganda Road. That no law empowers the Chief Magistrate to transfer a matter to himself. That his actions were therefore irregular and unlawful.

It is also argued that the actions set out above infringed on his Constitutional right enshrined in Article 28 which gives him the non-derogable right to be heard.

In its reply, the Office of The Director of Public Prosecutions, argued that pursuant to Section 221 of **The Magistrates Courts' Act**, the Chief Magistrate at Buganda Road has supervisory powers over the City Hall Court. For that reason, he can call

for and examine the record of any file to satisfy him/herself as to the propriety of the proceedings. That he acted well within his mandate to call for the file.

Determination

Supervisory powers of Courts stem from their jurisdiction. It is trite that jurisdiction is not inferred but specifically conferred by statute. It is what defines the broad outlines of the courts mandate.

In the case of Magistrates' Courts, Section 3 of the **Magistrates Courts Act** provides for the jurisdiction, including territorial jurisdiction of the Magistrates Court. The Chief magistrate is in charge of, and has jurisdiction over an area, designated a magisterial area, and defined by a statutory instrument issued by the Minister of Justice.

It is true as submitted by Counsel for the State that **The Magistrates' Courts (Magisterial Areas) Instrument, 2017 S.I. No. 11 of 2017** defines the Buganda Road Court Chief Magisterial Area. Clause 7 of the Schedule indicates that the City Hall Court falls under the Buganda Road Chief Magisterial area.

That means that the Chief Magistrate sitting at Buganda Road Court has supervisory control over the City Hall Court.

It was argued by the Private Prosecutor that the Chief Magistrate has no powers to transfer cases to himself. This particular area of the Chief Magistrates' authority is regulated by Section 171 of **the Magistrates Courts Act**. It states,

A chief magistrate may—

(a) transfer any case of which he or she has taken cognisance for trial to another magistrate holding a court empowered to try the case within the magisterial area of the jurisdiction of the chief magistrate; and

(b) **direct or empower any magistrate who has taken cognisance of any case**, and whether evidence has been taken in such case or not, **to transfer**

the case to himself or herself or to any other specified magistrate within the magisterial area of the chief magistrate's jurisdiction, who is competent to try the accused person, **and any such case shall be disposed of accordingly.**

The argument that the Chief Magistrate cannot transfer a file to himself is untenable in light of the unequivocal provisions of this section. In the result, the Chief Magistrate of Buganda Road acted well within his powers to transfer file No. 4530 of 2022 from the City Hall Court to Buganda Road and takeover the proceedings.

This power is part of the arsenal that enables the Chief Magistrate to execute his mandate in Section 221 of the **MCA** which stipulates,

(1) A chief magistrate shall exercise general powers of supervision over all magistrates courts within the area of his or her jurisdiction.

(2) Without prejudice to the generality of subsection (1), a chief magistrate may call for and examine the record of any proceedings before a magistrate's court inferior to the court which he or she is empowered to hold and situate within the local limits of his or her jurisdiction for the purpose of satisfying himself or herself as to the correctness, legality or propriety of any finding, sentence, decision, judgment or order recorded or passed, and as to the regularity of any proceedings of that magistrate's court.

This is a discretionary statutory mandate that enables the chief magistrate as administrative head to effectively oversee the judicial machinery in his jurisdiction. Needlessly to stress here is that such a discretion must not be exercised capriciously but judicially. With the transfer of files, the chief magistrate can quickly evaluate whether any decision taken by lower courts in his jurisdiction was proper or the proceedings were conducted in conformity with the law. In this case, he had received a complaint the manner in which the trial was handled at City Hall was illegal.

It is true, the right to a fair hearing is sacrosanct and the cornerstone of due process. It is for this reason that by whatever way the matter is brought to the attention of the High Court, and before any decision is taken regarding the propriety of the

proceedings, the High Court will hear all the proper parties. Later in this ruling, I will say more on who, in view of the circumstances of this matter, the proper parties would be.

Even then, the chief magistrate cannot be faulted in any way for legitimately exercising a statutory prerogative to call for, transfer and take over the hearing of the file.

3. Whether the Private Prosecutor could properly file an amended charge sheet in a matter that had been taken over by the DPP.

The contention by **Mabirizi** is that the matter had been fixed for him to make a submission on whether summons should be issued in regard to the amended charge sheet he filed on the 13th of July 2023. He also argued that the matter was taken over by the DPP without notice to him as Private Prosecutor. That the charge sheet had only been received by court clerks who are not the court envisaged in Section 5 of the MCA.

That there were therefore no proceedings involving Mabirizi for the chief magistrate to take over.

The gist of the Applicants submission is that the Office of the DPP took over the matter on the 14th of November 2022. That notwithstanding, the former Private Prosecutor filed an amended charge sheet on the 13th of July 2023. That Mabirizi also argued that the matter was fixed by the magistrate, for the 17th of July 2023, to hear him on the whether the summons should be issued. That the court file does not have a record of that fixture.

That in any event, Mabirizi did not have the locus standi to file additional documents in a matter that had been taken over by the DPP. It was prayed that the charge sheet be struck out.

Determination

It should be noted from the outset that by virtue of the mandate stipulated in Article 120 of the **Constitution of the Republic of Uganda**, the Director of Public Prosecutions has complete control over all prosecutions, except those instituted in the court martial.

The proceedings in this case were initiated by Male H. Mabirizi K. Hassan, who on the 11th of November 2021, filed a signed complaint on oath with a charge sheet attached, just as is required in Section 42 (1) (c) and 42 (3) of the **MCA**. The attached charge sheet named the 1st Respondent, Muhoozi Kainerugaba, as the sole accused person.

Criminal proceedings commenced when the charge sheet was filed with a court case number assigned by the City Hall Court vide 4530 of 2022. There was a lot of stock placed on the fact that the number was issued by a clerk. That clerk is an integral constituent part of what makes up a court and is delegated to issue court case numbers.

On the 14th of November 2022 the Director of Public Prosecutions, acting under the constitutional mandate in Article 120 (3) (c) took over the matter. That Article stipulates that the Director of Public Prosecutions may take over and continue any criminal proceedings instituted by any other person or authority.

The named provisions of the constitution are operationalised by Section 43 (1) (a) of the **MCA** which states that where criminal proceedings have been instituted by a person other than a public prosecutor or a police officer under section 42, the Director of Public Prosecutions may take over and continue the conduct of those proceedings at any stage before the conclusion of the proceedings.

It is certainly expected that DPP will act in the public interest and the need to prevent abuse of legal process when exercising this prerogative. It is partly because of this expectation, that the DPP is not required to inform anyone, not least the person the matter is taken over from, of the reason for his action.

It is also the position that a takeover may be done at any stage. In this instant case it was argued for the Mafirizi that he had just filed the case and summons had not been issued. That was certainly not a bar as shown above.

After the take over the DPP became the only proper party in the matter and assumed prosecution control. At that stage the private prosecutor ceased to be a party and ceded all prosecution decisions to the DPP. He would at best be referred to as a complainant. If indeed he had any information he deemed relevant for the proper management of the case, then he was obliged to furnish such information to the DPP (See Section 43 [1] [c]) MCA.

In sum, the private prosecutor could not file an amended charge sheet as he did not have the *locus standi* to do so. The 8th Edition of Black's Law Dictionary defines *Locus standi* as the right to bring an action or to be heard. In this case, Mafirizi neither had a right to bring a fresh action or to be heard on an amended charge sheet.

It is submitted farther by Mafirizi, that the matter had been fixed by the City Hall Court for the hearing of his application for summons. I have perused the court file. There is no such record but if indeed there had been one, then it would clearly be improper and unlawful.

Again, because he had no locus, there was no requirement to serve the private prosecutor with hearing notices. His complaint that his right to be heard was flouted is therefore unfounded.

In his ruling of the 17th of July 2023 the chief magistrate stated that he had intended to forward this matter to the High Court for an evaluation of the proceedings. That would have been the correct course of action to take. This file is now before this court and no court can sanction any illegality that comes to its notice.

In the result, it is directed that the amended charge sheet filed on the 13th of July 2023 was received in error and is accordingly struck out.

The prosecution, under the DPP, shall proceed with the matter originally filed on the 11th November 2022.

Dated at Kampala this 28th day of August 2023



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Michael Elubu

Judge