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**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**[INTERNATIONAL CRIMES DIVISION]**

**HCT – 00 –ICD – SC – 001 – 2022’**

**UGANDA ===== PROSECUTOR**

10

**VERSUS**

**YOWERI WAKWAYA ===== ACCUSED**

**BEFORE: HON JUSTICE MR. BASHAIJA K. ANDREW.**

**RULING.**

15 This is a ruling pursuant to the confirmation of charges, under Article  
61 (5) the Rome Statute of the International Criminal Court (ICC) which  
provides as follows;

20 ***“At the hearing, the Prosecutor shall support each charge  
with sufficient evidence to establish substantial grounds to  
believe that the person committed the crime charged. The  
Prosecutor may rely on documentary or summary evidence  
and need not call the witnesses expected to testify at the  
trial.***

***At the hearing, the person may:***

***(a) Object to the charges;***

25 ***(b) Challenge the evidence presented by the Prosecutor; and***

***(c) Present evidence.”*** [underlined for emphasis].

Just like in all other criminal trials, the burden of adducing sufficient  
evidence to prove substantial ground to believe that the person

5 committed the crime charged, is on the prosecution. Article 61(7) goes on to provide as follows;

***“The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:***

***(a)Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;***

***(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;***

***(c)Adjourn the hearing and request the Prosecutor to consider:***

***(i)Providing further evidence or conducting further investigation with respect to a particular charge; or***

***(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.”*** [underlined for emphasis].

25 Thus, instead of the usual standard of proof “beyond reasonable doubts” which the prosecution is required to discharge in ordinary criminal trials, in a pre-trial before confirmation of charges the standard of proof is “sufficient evidence to establish substantial grounds to believe” that the person committed each of the crimes charged. The

30 prosecution may rely on documentary or summary evidence and needs

5 not to call witnesses who are expected to testify at the trial. These principles were applied in a number of cases including; ***Uganda v. Maria Rwigambwa, HTC – 00 – ICD – SC – 0006 - 2021; Uganda v. Nsungwa Rose Karamagi HTC – 00 – ICD – SC – 0007–2021; Prosecutor v. Katanga and Ngudjolo Case No. ICC.01/04.04/07/717 (decision, 26 November 2008)***. In the latter case, the ICC pre-trial chamber confirmed charges after finding that there was sufficient evidence to establish substantial grounds to believe that the accused jointly committed the crime of using children under the age of 15 years to take part in hostilities as combatants during attacks on villages in 15 2003, and using them as personal bodyguards.

The expression “*substantial grounds to believe*”, was defined in the case of ***Mamatklov and Askariv v. Turkey of 4<sup>th</sup> February 2005 (Applications Nos.46827/99 & 46951/99)***. The ICC Judges; Nicholas Bratza, G. Bonello, and J. Hedigan, held that “substantial grounds to 20 believe” means “strong grounds for believing”. In so holding, the judges relied on an earlier case of ***Soering v. United Kingdom, Application No.14038/88***, which adopted the same definition. A similar definition was subsequently used in the case of ***The Prosecutor v. Tomas Lubanga Dyilo, ICC – 01/04/06 – TEN 14 – 05 – 2007 1/157***. Thus, 25 for the evidential burden and standard of proof required at the pre-trial stage to be discharged so as to lead to confirmation of the charges, there must exist strong grounds for believing the specific allegations against the accused. See also: ***The Prosecutor v. Bosco Ntaganda ICC – 01/04 02 /06, at page 5.***

### 30 ***Background.***

The *Summary of the Case* and the evidence disclosed by the prosecution reveal that sometime in December 2012, one Aisha Nambozo *alias* Namugisu (*hereinafter referred to as the “complainant”*) sent her two

5 sons, Abduratif Isma and Abdul Mudebu Ismail, aged 13 and 9 years  
old respectively, to their paternal grandmother, one Mbulanyina Loyce  
Namusale Kekulima in Bunyoole in the Butalejja District. The two were  
sent to attend the burial of their great grandmother and to stay for their  
third -term holidays. About late January and early February 2013, the  
10 complainant decided to call Mbulanyina Loyce Namusale Kekulima to  
check on the children. She then learnt with shocked that Yoweri  
Wakwaya (*hereinafter referred to as the “accused”*) who was her family  
friend and Mbulanyina Loyce Namusale Kekulima, had picked the  
children from their paternal grandmother’s place. He had claimed that  
15 the complainant sent him to get them and take them back to her in  
Mbale. The complainant immediately joined Mbulanyina Loyce  
Namusale Kekulima in Bunyoole and mounted a search for the children  
and the accused. However, the accused had disappeared with the  
children from the village and from all his known places.

20 Prior to the incident, the complainant had full custody of the children  
after she had separated with their father, one Police Constable  
Wagabaza Ismail. He too had disappeared from the village after  
deserting work as a police officer in the Uganda Police Force, and no  
one knew his whereabouts. The matter was reported to the Local  
25 authorities (LCs) and later to police.

On 23<sup>rd</sup> January, 2016, the *Daily Monitor* newspaper published an  
article with names of Ugandans who had been arrested and detained in  
a military prison in the Democratic Republic Congo (DRC). The accused  
person was among them. His brother confirmed to the complainant that  
30 he had got information from the Red Cross that the accused was in  
detention in the DRC.

Later in September, 2017, the complainant found out that the accused  
had returned to Uganda and was back in the village in Mugulu Hisilo in

5 Butalejja. She reported the matter to police, and the accused was arrested. In their investigations, police found out that the accused took the children for military training in one of the Allied Democratic Forces (ADF) camps in the DRC where he too was trained as an ADF member. While in the DRC, the accused was wounded and captured in one of the  
10 battles with the DRC Army (FARDC). He was charged and detained in prison in Beni in the DRC. Then, the Maimai, a militia fighting group in the DRC, attacked the prison where the accused was detained and set free all the prisoners. Upon being freed, the accused returned to Uganda through Bwera in the Kasese District, but he was intercepted and  
15 transferred to Chieftaincy of Military Intelligence (CMI) in Kampala and handed over to the police.

Upon interrogation by the police, the accused admitted having taken the children to the ADF camp in the DRC. Up to now the children have never been found. The accused applied for amnesty from the Amnesty  
20 Commission, and it was granted. He was returned by the authorities to his village. It was then in September 2017 when the complainant found out that the accused had returned to Uganda when she informed the police and the accused was arrested and charged in court.

### ***The indictment.***

25 The accused is charged with two counts of *Aggravated trafficking in children*, contrary to Sections 3(1) (a) and 5 (a) of the Prevention of Trafficking in Persons Act, 2009; and two alternative counts of *Aggravated trafficking in children*, contrary to Sections 3(1) (a) and 5(b) and 5(d) of the Prevention of Trafficking in Persons Act (supra) for each  
30 count. He is also charged with one count of *Belonging or professing to belong to a terrorist organisation* contrary to Section 11 (1) (a) and (3) of the Anti-Terrorism Act, 2002.

5 In Count 1, particulars of the offence are that accused and others still  
at large, between January and February 2013, in the districts of  
Butalejja, Kampala, Kasese, and the DRC, recruited, and transported  
and or transferred and or received and or harboured Abduratif Ismail,  
a child, by means of fraud and or deception, for the purpose of use of  
10 the child in armed conflict and or use of the child in illegal activities.

In Alternative Count 1 of Count 1, it is alleged that the accused and  
others still at large, between January and February 2013, in the  
Districts of Butalejja, Kampala, Kasese and the DRC recruited, and or  
transported and or transferred and or received and or harboured  
15 Abduratif Ismail, a child, by means of fraud and or deception for the  
purpose of exploitation by using the child in armed conflict.

In Alternative Count 2 of Count 1, it is alleged that the accused and  
others still at large, between January and February 2013, in the  
Districts of Butalejja, Kampala, Kasese and the DRC recruited, and or  
20 transported and or transferred and or received and or haboured  
Abduratif Ismail, a child, by means of fraud and or deception for the  
purpose of exploitation by using the child in the commission of a crime.  
In Count 2, the particulars of the offence are that the accused, and  
others still at large, between January and February 2013, in the  
25 Districts of Butalejja, Kampala, Kasese and the DRC recruited, and or  
transported and or transferred and or received and or harboured Abdu  
Mudebu Ismail, a child by means of fraud and or deception for the  
purpose of use of the child in armed conflict and or use of the child in  
illegal activities.

30 In Alternative Count 1 of Count 2, it is alleged that the accused and  
others still at large, between January and February 2013, in the  
Districts of Butalejja, Kampala, Kasese and the DRC recruited and or  
transported and or transferred and or received and or harboured Abdu

5 Mudebu Ismail, a child, by means of fraud and or deception for the purpose of exploitation by using the child in armed conflict.

In Alternative Count 2 of Count 2, it is alleged that Yoweria Wakwaya alias Ibrahim Abdallah and others still at large, between January and February 2013, in the Districts of Butalejja, Kampala, Kasese and the  
10 Democratic Republic of Congo (DRC) recruited, and or transported and or transferred and or received and or harboured Abdu Mudebu Ismail, a child, by means of fraud and or deception for the purpose of exploitation by using the child in the commission of a crime.

In Count 3, the accused is charged with *Belonging or professing to  
15 belong to a terrorist organisation*, contrary to Section 11 (1) (a) and (3) of the Anti-Terrorism Act, 2002. The particulars of the offence are that between 2013 and 2017 in the districts of Butalejja, Mbale, Kampala, Kasese and the DRC, the accused and others still at large, belonged or professed to belong to the Allied Democratic Forces (ADF) a terrorist  
20 organisation.

### ***Submissions.***

*M/s Moogi Brian & Co. Advocates*, represented the accused, and raised an objection on a preliminary point of law. Counsel submitted that the charges in the instant case cannot be confirmed against the accused in  
25 so far as they do not exist at law as the said charges have been extinguished by operation of the law. In so submitting, counsel relied on a Certificate of Amnesty dated 13<sup>th</sup> May 2022, issued to the accused by the Amnesty Commission, and a letter dated 16<sup>th</sup> August 2017, also issued by the said Commission to the accused. The latter contains  
30 details of the accused's Amnesty Certificate number and also served as his identification since at that time he had no other form of identification documents

5 Citing Section 3 (1) of the Amnesty Act, 2002, counsel submitted that a person who benefited from the amnesty obtained a pardon and could not be charged and prosecuted for the same crimes he was pardoned of. Further, that Article 29 (10) of the Constitution of the Republic of Uganda 1995 is to the effect that no person shall be tried for a criminal  
10 offence if the person shows that he or she has been pardoned in respect of that offence. Counsel argued that it is a violation of the accused's right to a fair trial to be tried of the offences for which he was granted a pardon. That since the accused obtained a pardon under the Amnesty Act 2000, it would be illegal and unconstitutional to try him for the  
15 same offences, and that a court of law cannot sanction an illegality. That for that reason, the accused should be set free henceforth.

The prosecution did not make any submissions in reply to the particular objection on a point of law, even when they had the opportunity to do so. The presumption was that they choose not to exercise that option.

20 ***Opinion.***

The disclosures by the prosecution reveal that the accused was arrested sometime in December 2017. He was charged in court on 22<sup>nd</sup> January 2018, with multiple offences of *aggravated trafficking in persons* under the Prevention of trafficking in Persons Act, 2009; and *Belonging or*  
25 *professing to belong to a terrorist organisation*, under the Anti-Terrorism Act, 2002. It was further disclosed that prior to his arrest and being charged, the accused had, in August 2017, returned from the DRC where he was engaged in ADF terrorist activities. He reported to the CMI; a security organ of the state of Uganda at Kampala. The accused  
30 was then handed over to the Amnesty Commission who processed him and issued him a letter as a beneficiary of the amnesty process. The said letter also served as his identification since he had no identification



5 documents. He was then returned to his village by police and handed over to the local authorities in Butalejja District and was resettled.

To appreciate the basis of counsel's objection, it is necessary to examine the content of the letter of the Amnesty Commission by which the accused was released back to his village in August 2017. It states as follows;

***"Ref: AC/MISC***

***16<sup>th</sup> August 2017***

***TO WHOM IT MAY CONCERN***

***RE: YOWERI WAKWAYA IBRAHIM ABDALLAH***

15 ***The bearer of this letter Mr Yoweri Wakwaya Ibrahim Abdallah is a beneficiary of the Amnesty process. His Amnesty Certificate is schedule for No.19851. This document is meanwhile therefore to serve as his identification.***

***Any assistance extended to him will be highly appreciated.***

20 ***Moses Draku.***

***PRINCIPAL PUBLICRELATIONS OFFICER, AMNESTY COMMISSSION."***

The major inference drawn from the letter is that by the time of his arrest in December 2017 and being charged in court in January 2018, the accused had benefited from the amnesty and obtained a pardon in accordance with the Amnesty Act, 2000, and the due process by the Amnesty Commission had been completed. This had the overall effect on whether the accused could be subsequently charged with the crimes for which he had obtained amnesty; which raises issues of law that the basis of the objection by counsel for the accused.

30 It was duly brought to the attention of this court by the accused that he was pardoned for the crimes in the indictment. He placed on court

5 record a copy of the *Certificate of Amnesty*, and court had the occasion  
to examine the original copy. It is indicated as *Certificate No.019851* in  
the name of the accused; *IBRAHIM ABDALLAH YOWERI WAKWAYA*. The  
Certificate shows that it was issued pursuant to Section 4 of the  
Amnesty Act, 2000, and Statutory Instrument No.9. It was duly signed  
10 by the Chairperson of the Amnesty Commission. It also bears the  
photograph of the accused person and further shows that he is  
ordinarily a resident of Mugulu Mupandi village, Northern Division Sub  
County, Mbale Municipal Council of Mbale District. It is dated 13<sup>th</sup>May,  
2022. The certificate also bears the same schedule for No.19851, to  
15 which the letter issued earlier on 16<sup>th</sup>August 2017, made reference.

The fact of an amnesty granted to the accused was duly brought to the  
attention of court. It was not denied or controverted by the prosecution  
in any way whatsoever. Against those facts, any confirmation of charges  
against the accused and his subsequent trial would be illegal and  
20 unconstitutional. It is settled that a court of law cannot sanction what  
is illegal, and an illegality once brought to the attention of court  
overrides all questions of pleadings, including any admission made  
thereon. See: ***Makula International Ltd vs. His Eminence Cardinal  
Nsubuga & A’nor. (1982) HCB 11***.

25 Most importantly, it is a constitutional imperative, under Article 29 (10)  
(supra) which provides as follows;

***“No person shall be tried for a criminal offence if the person  
shows that he or she has been pardoned in respect of that  
offence.”*** [Emphasis added].

30 It is unconstitutional to charge and try the accused for crimes for which  
he had obtained a pardon under the operation of the cited law. It  
amounts to a violation of the accused’s right to a fair hearing and of his  
non-derogable right; which is prohibited under Article 44 of the

5 Constitution. This particular constitutional imperative is duly operationalised under Section 11 of the Human Rights Enforcement Act 2011, which makes it an offence to derogate from a non-derogable right and freedom guaranteed under the Constitution. For ease of reference, it is quoted below.

10 ***“Derogation from non-derogable rights and freedoms.***

***(1) It is an offence for a person to derogate from a non-derogable right and freedom guaranteed under the Constitution.***

***(2) Whenever, in any criminal proceedings;***

15 ***(a) it appears to the judge or magistrate presiding over a trial,***

***(b) it is brought to the attention of the competent court; or***

20 ***(c) the competent court makes a finding, 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.”*** [Emphasis added].

It is further observed that under Section 3 (1) of the Amnesty Act, 2002, an amnesty was declared in respect of any Ugandan who has at any  
25 time since 26<sup>th</sup> January, 1986, engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda. The categories of persons covered under the Act include those in actual participation in combat; collaborating with the perpetrators of the war or armed rebellion; committing any other crime in the furtherance of  
30 the war or armed rebellion; or assisting or aiding the conduct or prosecution of the war or armed rebellion.

Subsection (2) of Section 3 (supra) specifies parameters of crimes for which amnesty would be granted, as follows;

5           ***“A person referred to under subsection (1) shall not be prosecution or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the cause of the war or armed rebellion.”***

[underlined for emphasis].

10   It would appear that even when an amnesty was declared in accordance with provisions of Section 3 (supra) it was not a blanket amnesty for all crimes. It covered only such crimes as were or are committed within the participation in the war or rebellion, or for any crime committed in the cause of the war or armed rebellion. Given that position, it would be  
15   paramount to determine whether all or any of the charges in the instant indictment fall within the legal exceptions in so far as the accused is said to have committed the particular crimes.

In Count 3 of the indictment, the accused is charged with *belonging or professing to belong to a terrorist organisation*, contrary to Section 11 (1)  
20   (a) and (3) of the Anti-Terrorism Act, 2002. It is alleged in the particulars of the offence that between 2013 and 2017, in the districts of Butalejja, Mbale, Kampala, Kasese and the DRC, the accused and others still at large, belonged or professed to belong to the ADF, a terrorist organisation.

25   The disclosures by prosecution show that the accused was arrested sometime in December, 2017, and was charged in court in January, 2018. It is quite evident that the crime of belonging or professing to belong to a terrorist organisation, and aggravated trafficking in children and all the alternative counts emanate from the same transaction or a  
30   series of transactions committed by the accused in participation in the war or rebellion and or in the cause of the war or armed rebellion against the Government by the ADF. This finding is premised on, and reinforced

5 by the particulars of the offence for aggravated trafficking in children,  
which clearly state that;

10 ***“... the accused and others still at large between January  
and February 2013 in the Districts of Butalejja, Kampala,  
Kasese and the DRC recruited, and/ or transported and/or  
transferred and/or received and/or harboured Abduratif  
Ismail, a child, by means of fraud and or deception for the  
purpose of exploitation by using the child in armed conflict.”***

15 “Armed conflict” as proffered by prosecution in the indictment is duly  
constituted by, inter alia, the acts of recruitment, transportation,  
transferring, receiving and or harbouring of the children for the purpose  
of exploitation by using the children in armed conflict with Government.  
The offence of trafficking in persons is aggravated by the fact of the age  
of the children trafficked. Clearly, all the charges in the indictment  
20 relate to the same crimes for which the accused had, as of 16<sup>th</sup> August  
2017, been pardoned and obtained an amnesty under the Amnesty Act.  
Ultimately, the charges would be unsustainable as against the accused  
having been extinguished by the operation of the law. Any attempt to  
charge and prosecute the accused for such crimes would be in violation  
of his constitutional rights and out rightly illegal.

25 Whether an amnesty is a pardon, and what effect it has on prosecutions,  
are settled issues. The Supreme Court, in ***Uganda vs. Thomas  
Kwoyelo, SC Const. App. No. 01 of 2012***, held, *inter alia*, that;

30 ***The 9<sup>th</sup> Edition of Black’s Law Dictionary has defined the  
word amnesty, using the term ‘pardon’ but more or less  
restating the earlier definition. It defines “amnesty” as “a  
pardon extended by the government to a group of class of  
persons, usually for a political offense; the act of a sovereign  
power officially forgiving certain classes of person who are***

5        ***subject to trial but have not yet been convicted.... Unlike an  
ordinary pardon, amnesty is addressed to crimes against  
state sovereign- that is, political offenses with respect to  
which forgiveness is deemed more expedient for the public  
welfare than prosecution and punishment. Amnesty is  
10        general, addressed to classes or even communities... Also  
termed general pardon.***” [ underlining mine for emphasis].

The learned Justices further found that the amnesty as defined both in  
the Act and by the learned authors, cited above, is targeted at political  
crimes and those incidental to such acts or crimes. The Court  
15        emphasised that definitions, and indeed the purpose of the Act, or in its  
implementation, would not include granting amnesty for grave crimes  
committed by an individual or group for purposes other than in  
furtherance or in the cause of the war or rebellion. To that end the Court  
held that;

20        ***“...The legislature could easily have stated without any  
qualification that any crimes committed during the war are  
granted amnesty. But, in my view, words were carefully  
used. The crime must be shown to have been “in furtherance  
of war or rebellion” or “in the cause of war of rebellion.” For  
25        it to qualify for grant of amnesty. This implies that someone  
had to examine the offences attributed to any person seeking  
amnesty and determine whether those crimes were in  
furtherance or in the cause of the war.”*** [Emphasis added].

Applying the above test to facts of the instant case, aggravated  
30        trafficking in children was committed for the purpose of exploitation  
and using the children in armed conflict with Government. The armed  
conflict has been raging on between the Government and the ADF. The  
ADF which the accused is charged of belonging or professing to belong

5 to, and for which he recruited, transported, transferred, received and or  
harboured the children, is a listed terrorist organisation under the 2<sup>nd</sup>  
Schedule of Anti- Terrorism Act,2002. Aggravated trafficking in children  
and belonging or professing to belong to a terrorist organisation; all have  
an irresistibly strong connection with the accused's commission of the  
10 said crimes in furtherance of ADF war or rebellion or in the cause of war  
or rebellion against Government. Therefore, the crimes for which the  
accused is charged squarely fall within the ambit of crimes an amnesty  
would be; and was properly granted.

15 It was thus satisfactorily demonstrated to court by the accused that he  
was pardoned in respect of the same crimes of which he is now being  
charged. There are no new or other crimes besides those in the  
indictment that were already covered under the amnesty, and thus  
extinguished by the operation of the law. The net effect is that the  
accused cannot be prosecuted or tried of crimes for which he was  
20 pardoned. In the circumstances, no confirmation of charges would be  
legally sustained against the accused. The indictment is wholly struck  
out and the accused person set free.

***BASHAIJA K. ANDREW***

***JUDGE***

***13/04/2023.***

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