

**THE REPUBLIC OF UGANDA,
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO 031 of 2016**

PTE MUHUMUZA ZEPHA}APPELLANT (S)

VERSUS

UGANDA}RESPONDENT

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE FREDERICK EGONDA NTENDE, JA

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF COURT

The facts of this appeal are not in controversy and are as accepted by the Court Martial Appeal Court. The facts as set out are that:

The appellant was part of an escort team of the Vice President of Uganda and on 5th April 2006 went to Nandudu Bar along Naboa Road in Mbale Municipality wherein he developed quarrel with a certain lady, went back to his defensive position and stealthily escaped with his gun and returned to the bar where he shot and killed two people. He was charged before the Division Court Martial with three counts of murder contrary to sections 188 and 189 of the Penal Code Act Cap 120 and convicted by the 3rd Division Court Martial on all counts and sentenced to death. He appealed to the General Court-Martial against sentence only and the sentence of death was set aside and substituted with a sentence of 40 years imprisonment. The appellant being dissatisfied with the sentence further appealed against conviction and sentence to the Court Martial Appeal Court. The appeal was



partially allowed and the appellant's sentence was reduced to a term of 30 years imprisonment.

The appellant was still aggrieved by the decision of the Court Martial Appeal Court and the General Court-Martial Court and appealed to this court on four grounds:

1. The Court Martial Appeal Court and General Court-Martial erred in law when they omitted and/or failed to remit the appellant's matter for mitigation on sentence as ordered by the Supreme Court, thereby tainting all subsequent proceedings with incurable illegality and rendering them a nullity.
2. The trial of the appellant by the military courts were illegal, null and void to the extent that they all lacked the jurisdiction to try the appellant of the offences with which he was charged and are not impartial and independent tribunals.
3. The Court-Martial Appeal Court erred in law and fact in failing to critically analyse the respective defences raised by the appellant and wrongly confirmed the conviction of murder.
4. The sentence handed down by the CMAC to the appellant is illegal, manifestly harsh and excessive taking into account law and circumstances of the case.

At the hearing of the appeal, the appellant was represented by learned counsel Mr Andreas Lutalo while the respondent was represented by learned Senior State Attorney Ms Fatimah Nakafeero.



We requested the advocates to address the court on whether the Court of Appeal has jurisdiction to hear the appeal. Learned counsel for the appellant conceded that the Court of Appeal has no jurisdiction in the matter but can deal with an illegality brought to the attention of the court in light of the decision of this court in **Lt Ambrose Ogwang v Uganda; Court of Appeal Criminal Appeal No 107 of 2013**. The gist of the holding in Lt Ambrose Ogwang was that the military courts had no jurisdiction to try the appellant with the offence of aggravated robbery contrary to sections 285 and 286 of the Penal Code Act as well as the offence of murder contrary to sections 188 and 189 of the Penal Code Act.

In reply the respondent's counsel Ms Nakafeero submitted that the Court of Appeal has no jurisdiction to hear the appeal. She submitted that jurisdiction is a creature of statute and under regulation 20 of Uganda People's Defence Forces (Court-Martial Appeal Court) Regulations, S. I. 307 – 7 the decision of the Court-Martial Appeal Court was final. Secondly, the regulation only empowered the Court of Appeal to hear appeals where the sentence was a sentence of death which it is not in the appellant's case in this appeal. The appellant was sentenced to 30 years imprisonment and regulation 20 (2) did not apply to him.

Ruling on preliminary point of law

We have carefully considered the preliminary point of law as to whether the Court of Appeal is seized with the jurisdiction to hear appeals from the Court-Martial Appeal Court.

The proposition that appellate jurisdiction is a creature of statute can be found in the holding of the then East African Court of Appeal in **Attorney General v Shah (No. 4) [1971] EA, 50**. The appeal arose from a decision of the High Court. The facts are that the High Court of Uganda issued an order of mandamus against officers of government and the Attorney General



being aggrieved appealed against the order. The Respondent to the appeal objected to the hearing of the appeal by the East African Court of Appeal on the ground of lack of jurisdiction in the matter. Spry Ag P held that:

It has long been established and we think there is ample authority for saying that appellate jurisdiction springs only from statute. There is no such thing as inherent appellate jurisdiction.

Mostly significantly, Spry Ag P held that appellate jurisdiction of the East African Court of Appeal was now regulated by Article 89 of the Constitution of the Republic of Uganda 1967 (since repealed) and the Judicature Act 1967 (since repealed) which provided that the East African Court of Appeal had only such jurisdiction as conferred on it by Parliament.

From the holding, one needs to only establish the statutory law which confers appellant jurisdiction on the Court of Appeal from decisions and orders of the Court Martial Appeal Court.

Starting with the general appellate jurisdiction of the Court of Appeal, the statutory law on appellate jurisdiction is firstly Article 134 (2) of the Constitution of the Republic of Uganda which provides that:

(2) An appeal shall lie to the Court of Appeal from such decisions of the High Court as may be prescribed by law.

The laws, if any, conferring appellate jurisdiction on the Court of Appeal is supposed to be enacted by Parliament. From those premises, section 10 of the Judicature Act Cap 13 laws of Uganda 2000 confers on the Court of Appeal the general appellate jurisdiction to hear appeals emanating from decisions of the High Court. Further, section 10 of the Judicature Act provides that:



10. An appeal shall lie to the Court of Appeal from decisions of the High Court prescribed by the Constitution, this Act or any other law.

Generally article 134 of the Constitution of the Republic of Uganda confers jurisdiction on the Court of Appeal to hear appeals emanating from decisions of the High Court and does not expressly cater for appeals from decisions of any other court. Further, section 10 of the Judicature Act confers jurisdiction to hear appeals from decisions of the High Court prescribed by the Constitution, the Judicature Act or any other law. It would therefore be necessary to establish the specific law which confers appellate jurisdiction on the Court of Appeal to hear appeals from decisions of any other tribunal or court established by law which law confers special jurisdiction on the Court of Appeal.

In the strict sense of the words under Article 134 (2) of the Constitution do not confer jurisdiction on the Court of Appeal to hear appeals emanating from any other decisions other than decisions of the High Court. Similarly, section 10 of the Judicature Act does not confer jurisdiction on the Court of Appeal to hear appeals from any other decisions other than decisions of the High Court. This cannot stop Parliament from prescribing any other law conferring jurisdiction on the Court of Appeal to hear appeals emanating from any adjudicatory body.

The question therefore is whether there are any other laws, which confer appellate jurisdiction on the Court of Appeal to hear and determine appeals from decisions of other courts of tribunals.

From that perspective, we have examined the Regulation 20 of the Uganda People's Defence Forces (Court-Martial Appeal Court) Regulations; Statutory Instrument 307 – 7 which provides that:

20. Appeals to be final.



(1) Except as provided in some regulation (2) of this regulation, any determination by the court of any appeal or other matter which the court has power to determine under the provisions of the act or of these Regulations shall be final, and no appeal shall lie from the court to any other court.

(2) In the case of an appeal against the conviction involving the sentence of death or life imprisonment that has been upheld by the court, the appellant shall have the right to further appeal to the Court of Appeal.

The appellant's appeal purported to proceed under regulation 20 (supra). Regulation 20 does not confer any right of appeal from a sentence of imprisonment for a term of years such as the appellant's 30 years imprisonment. It only confers jurisdiction to hear appeals where there is a sentence of death or a sentence of life imprisonment. It cannot be said from the wording of the appellant's sentence that there was a sentence of life imprisonment on the face of it.

There was therefore no right of appeal from the decision of the Court-Martial Appeal Court under the only law which confers or purports to confer jurisdiction on the Court of Appeal to hear appeals from decisions of the Court-Martial Appeal Court.

That conclusion would have been sufficient to have the appeal struck out for want of jurisdiction. However, the question of jurisdiction does not only have to be raised by the parties before the court considers it. Jurisdiction is a matter of law and we have considered the bigger question of whether the Court of Appeal has any jurisdiction as conferred by regulation 20 of the Court-Martial Appeal Court Regulations (supra).

Regulation 20 of the Uganda People's Defence Forces (Court-Martial Appeal Court) Regulations is subsidiary legislation and clearly indicates that

it was made under section 105 (2) (a) of the Act. The regulation was made under the repealed Uganda People's Defence Forces Act Cap 307 laws of Uganda 2000 (the UPDF Act, Cap 307). Section 105 (2) (a) of the UPDF Act provides that:

(2) Without prejudice to the generality of subsection (1), the Minister, after consultation with the Uganda People's Defence Forces Council, may make regulations in respect of the following matters –

(a) such matters as required under this Act to be prescribed or are authorised or required under this Act to be made by regulations;

The UPDF Act does not require jurisdiction of any appellant court in addition to the appellate court prescribed by it to be prescribed by regulation. In any case, section 105 (2) (a) of the repealed UPDF Act was not the specific section that authorised the Minister to make the requisite regulations governing courts. Instead it is section 105 (2) (t) which prescribed the power of the minister in relation to courts and it provides that the minister may make regulations prescribing:

(t) the procedure to be observed in proceedings before a military court, the summons and examination of witnesses other than the persons subject to military law, the production of documents by such witnesses and the payment of remuneration to those witnesses; and

It is to be appreciated that section 105 (2) (t) dealt with powers to make regulations for the established military courts under the Act. On the other hand section 105 (2) (a) cited by the Minister only conferred power to make by regulation what is prescribed by the Parent Act to be the matter to be prescribed by regulation. It follows that none of the cited regulations confers on the Minister any jurisdiction or authority to confer appellate jurisdiction let alone any jurisdiction on any court. Moreover, the Court of Appeal is not any of the courts envisaged or prescribed by Parliament

under Part IV of the repealed UPDF Act, Cap 307. The Minister had no jurisdiction or power to make regulations conferring jurisdiction on another court not provided for under the parent Act.

Article 134 (2) of the Constitution of the Republic of Uganda provides that appellate jurisdiction may be prescribed by law. Similarly, section 10 of the Judicature Act envisages that the appellate jurisdiction of the Court of Appeal to hear appeals from decisions of the High Court shall be prescribed by law.

Section 81 of the UPDF Act Cap 307 confers on the General Court-Martial some appellate jurisdiction under the Act but no further provision is made to appeal to the Court of Appeal of Uganda. Secondly, section 85 of the UPDF Act Cap 307 conferred jurisdiction on the Court-Martial Appeal Court in the following words:

85. Jurisdiction of court-martial appeal court.

A person who has been tried and found guilty by the general court-martial shall have a right of appeal to the court-martial appeal court, in such form, manner and within such time as may be prescribed on either or both of the following matters –

(a) the legality of any or all of the findings;

(b) the legality of the whole or any part of the sentence.

All the provisions that deal with jurisdiction do not confer any further right of appeal to the Court of Appeal of Uganda. It is therefore no wonder that the Minister purporting to exercise his rights under section 105 (2) (a) of the enabling Act to make regulations provided that the decision of the Court-Martial Appeal Court shall be final except where there is a sentence of death or life imprisonment.



The above notwithstanding, the Minister had no powers to confer jurisdiction on the Court of Appeal to hear any appeals from decisions of the court-martial appeal court however desirable that maybe. To the extent that the Minister purported to confer jurisdiction on the Court of Appeal in regulation 20 of the Uganda People's Defence Forces (Court-Martial Appeal Court) Regulations, the Minister acted *ultra vires* the Uganda People's Defence Forces Act cap 307 which Act was replaced and superseded by the Uganda People's Defence Forces Act 2005. To that extend regulation 20 is a nullity in law.

The authority to confer jurisdiction to regulate the Uganda People's Defence Forces resides in Parliament and is *inter alia* conferred by Article 210 (b) of the Constitution of the Republic of Uganda which Parliament authority to make law on the recruitment, appointment, promotion, discipline and removal of members of the Uganda People's Defence Forces among other things. In the same vein the jurisdiction of the Court of Appeal cannot be conferred by the Minister who ought to have referred the issue to Parliament for amendment of the enabling Act.

Last but not least, article 22 of the Constitution of the Republic of Uganda requires any conviction and sentence of death to be confirmed by the highest appellate court. The expression "highest appellate court" does not necessarily mean the Supreme Court of Uganda or the Court of Appeal of Uganda but the highest appellate court prescribed by Parliament. For purposes of the Uganda People's Defence Forces Act, the highest appellate court is the Court-Martial Appeal Court unless otherwise prescribed by Parliament in future.

We were referred to the decision of this court in **Lieutenant Ambrose Ogwang v Uganda; Court of Appeal Criminal Appeal No 107 of 2013**. We have carefully read through that decision and note that in that decision this court relied on the decision of the Supreme Court **Sgt Kalemba Frank**



v Uganda Criminal Appeal No. 18 of 1994 (unreported) in which it was held that appeals from the court martial appeals court had to go to the Court of Appeal. The Supreme Court was considering appeals from the Court Martial Appeal as provided for under Regulation 17 (2) of the National Resistance Army (Court Martial Appeal Court) Regulations and section 14 of the Judicature Statute which have since been repealed. To that extent **Lt. Ambrose Ogwang v Uganda** (supra) is distinguishable from the current appeal as the law applicable is different from the law that applied in **Sgt Kalemera Frank v Uganda** (supra).

The contention in **Lt. Ambrose Ogwang v Uganda** (supra), *inter alia*, was that, the trial was not before an impartial tribunal. Among other considerations, one of the members of the trial court had participated in arresting and trying the appellant. This court held that the Court Martial Appeal court should have scrutinised the record and if it did, would have realised that the court was not properly constituted and when the trial court realised it, it adjourned but there is no record of who replaced the incompetent member. Further, substitution of members halfway in the trial was a fatal irregularity. The court quashed the conviction and set aside the sentence.

However, in considering whether to order a retrial the court was confronted with the issue of jurisdiction of the trial court under the UPDF Act 2005 and made some remarks on the grounds for not sending the appellant back to the trial court for retrial. These remarks relate to the question of whether the Military Courts established for trial of persons under the UPDF Act 2005 were independent and impartial courts in terms of Articles 28 (1) and 128 (1) of the Constitution to try such offences as the appellant had been charged with (i.e. aggravated robbery and murder). The court held that the military courts have limited jurisdiction for purposes of service offences prescribed under the Uganda People's Defence Forces Act, 2005 and the



trial of persons for offences under any other law such as the Penal Code Act, was required to be done by independent and impartial courts not subject to the direction or control of any person or authority.

As we have found that this court has no jurisdiction under current law to entertain the current appeal, it follows that much as the facts of the current appeal are quite similar to the facts of **Lt. Ambrose Ogwang v Uganda**, we are unable to intervene in this matter. However, all is not lost for the appellant. He may consider other options he has under the law including a habeas corpus application before the High Court in light of the absence of jurisdiction of the courts that have handled the case against him. He also could consider an article 50 (of the Constitution) action to enforce his non-derogable fundamental rights under article 28 (1) and 44 of the Constitution. Lastly, he may also consider seeking declarations before the Constitutional Court in relation to his trial and subsequent detention. In the premises, the appellants appeal is incompetent and is accordingly struck out.

Dated at Kampala the 12th day of February 2020



Kenneth Kakuru,

Justice of Appeal



Frederick Egonda Ntende,

Justice of Appeal



Christopher Madrama Izama

Justice of Appeal

