

5 THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA
CORAM: OWINY - DOLLO DCJ, MUSOKE AND CHEBORION JJA.

CRIMINAL APPEAL NO. 250 OF 2017

10 *(Arising from the Court Martial Appeal Court Holden at Makindye vide Criminal Appeal
No. 007 Of 2016, and General Court Martial No. 007 Of 2013)*

1. RA/1946843 L/CPL NASASIRA GRACE
2. RA/182084 LCM KARUGABA GEOFFREY
3. RA/161188 PTE NINSIIMA FRANK
4. NAYEBARE JAMES KARUHANGA
5. NUWAGABA MOSES KAKARUGAHI
6. TWINAMATSIKO ABEL

APPELLANTS

UGANDARESPONDENT

JUDGMENT

20 **Background**

The 1st and 2nd appellants were convicted for the offence of treachery contrary to section 129 (D) of the UPDF Act while the 3rd, 4th, 5th, and 6th Appellants were convicted for aiding and abetting the 1st and 2nd in the commission of Treachery contrary to Section 184 (1) (b) (c) of the UPDF Act.

25 The facts of the offence are that between the months of March and May 2013, while in the areas of Mityana and Kampala Districts, the 1st and 2nd consciously failed to disclose to proper authorities, vital information about recruitment of people to engage in activities that were prejudicial to security of Uganda, which constituted an offence of Treachery contrary to Section 129 (b) of the UPDF Act. In the second Court, the 3rd, 4th, 5th and 6th Appellants, in the amended charge sheet, were alleged to have aided and abetted the 1st and 2nd Appellants in the

5 commission of treachery, contrary to Sec 184 (1) (b) and (c) of the UPDF Act.

The General court martial convicted the Appellants for the crimes charged and sentenced each one of them to 15 years imprisonment for each count to be served concurrently.

10 **Representation**

The Appellants were represented by Counsel David Gulume Mushabe while the Respondent was represented by Counsel Florence Okello Owinji (Principal State Attorney) in the Office of the Director of Public Prosecutions.

15 **Grounds of appeal**

1. The Court Martial Appeal Court erred in law and fact when it ignored to address the fact that since the accused were alleged agents, they could not be charged and convicted when their alleged agents' principals were never arrested and tried.
- 20 2. The Court Martial Appeal Court (CMAC) erred in law and fact when it upheld and ruled that the General Court Martial (GCM) was correct when the said GCM ruled that RA/1946843 L/CPL NASASIRA GRACE (A1) and RA/182084 L/CPL KARUHANGA GEOFFREY (A2) knowingly withheld vital information from their
25 superiors, notwithstanding the GCMs ruling of the within a trial, that there was nothing subversive discussed at Sekanyonyi, the only meeting attended by A1 and A2
3. The Court Martial Appeal Court erred in law and fact when it failed to realize that since A1 and A2 never involved themselves in
30 subversive activities and never withheld any information from

- 5 authorities, in the Trial within a Trial, A3, A4, A5 and A6 could not
be tried by the GCM and / or subject to military law under the
UPDF Act.
4. The Court Martial Appeal Court (CMAC) erred in law and fact when
it held that the General Court Martial (GCM) erred in law and fact
10 to have held that it is not necessary common practice or
requirement to rely on written reports, photographs, videos,
and/or documentary evidence in the military courts, but the same
CMAC contradicted its position by holding that “lack of
corroborative documentary evidence didn’t occasion injustice to
15 the appellants”.
5. The Court Martial Appeal Court (CMAC) erred in law and fact when
it upheld and ruled that the General Court Martial(GCM) was
correct when the said GCM ruled that telephone report print outs
were not necessary to prove state witnesses allegations of
20 telephone conversations with the appellants.
6. The Court Martial Appeal Court (CMAC) erred in law and fact when
it upheld and ruled that the General Court Martial (GMC) was
correct in its ruling that the appellants had a case to answer
whereas not.
- 25 7. The Court Martial Appeal Court erred in law and fact when it
upheld and ruled that the General Court Martial judiciously
evaluated inconsistencies, contradictions, lies , uncorroborated
and perjured evidence, whereas not.
8. The Court Martial Appeal Court erred in law and fact when it
30 upheld and ruled that the General Court Martial was correct in its
ruling that Ninsima Frank (A3), Nayebare James Karuhanga (A4),
Nuwagaba Moses Kakarugahi (A5) and Twinamtsiko Abel (A6)

- 5 knowingly withheld vital information from their superiors,
whereas not.
9. The Court Martial Appeal Court (CMAC) erred in law and fact when
it upheld and ruled that the General Court Martial was correct
when it ruled that RA/1946843 L/CPL Nasasira Grace (A1) and
10 RA/182084 L/CPL Karuhanga Geoffrey (A2) counseled and
procured people to overthrow the Government of Uganda.
10. The Court Martial Appeal Court erred in law and fact when it
upheld and ruled that the General Court Martial was correct when
it ruled that GCM didn't fail to judiciously evaluate whether all the
15 accused formed a corporate common intent vis-à-vis individual
mens rea.
11. The Court Martial Appeal Court erred in law and fact when it
upheld and ruled that the General Court Martial was correct when
the said GCM allowed the prosecution to amend the charge sheet
20 after both prosecution and defense had already submitted their
final written submissions and closed their case.
12. The Court Martial Appeal Court erred in law and fact when it
upheld and ruled that the General Court Martial was correct when
the said GMC convicted and sentenced the appellants basing on
25 evidence and written submissions that did not address the new
and amended charge sheet which was proffered after the trial
and/or closing written submissions of both sides.
13. The Court Martial Appeal Court erred in law and fact when it
upheld and ruled that the General Court Martial was correct when
30 the said GCM convicted the appellants notwithstanding
prosecutions failure to prove their case beyond reasonable doubt.

5 14. The Court Martial Appeal Court erred in law and fact by
 confirming a harsh and manifestly excessive sentence in the
 obtaining circumstances.

Case for the Appellants.

Ground 1

10 Counsel for the Appellants argued that GCM and CMAC erred in law
 when they upheld the conviction and sentence against A1, A2, A3,A4
 and A6 who allegedly worked as agents for Gen. David Sejjusa, Gen.
 Mugisha Muntu, Gen. Benon Biraro and Brig.Wasswa Balikalege as
 principal sponsors of alleged crime without any evidence linking the
15 alleged with the Appellants Agents.

Grounds 2, 3, 6 and 6

Counsel for the Appellants contend that the General court Martial did
not have jurisdiction to try the Appellants because;

1. It is not legally mandated to try capital offences under civil law.
- 20 2. It was not properly constituted to hear the matter at the time.

Grounds 4, 5, 7 and 10

Counsel for the Appellants contends that the evidence presented in
Court did not prove the case beyond reasonable doubt when Court
discounted the essence of documentary corroborative evidence, and
25 upheld a conviction and sentence, which were based solely on
 contradictory hearsay uncorroborated oral evidence.

Ground 11

Counsel for the Appellants argued that the Court Martial Appeals Court
erred in Law when it upheld General Court Martial's decision to amend

5 a charge sheet for the third time after the parties had filed their closing
written submissions. Counsel submitted that the General Court Martial
preferred new charges, which required the Appellant to take plea for
the second time, it implied that new charges, different from those on
which closing written submissions had been filed in Court, it implied
10 the prosecution had to prefer new evidence to prove their new charges,
which it did not do.

In that regard, Counsel argued that the GCM could not have delivered
judgment on a new charge sheet where no evidence had been adduced
therefore.

15 **Ground 13 and 14**

Counsel for the Appellant submitted that much as the ruling of a no
case to answer was by nature interlocutory, GCM was obliged not to
enter a ruling of a case to answer since the prosecution evidence had
been severely contradictory and discredited.

20 **Case for the Respondent**

Counsel for the Respondent conceded to only 13 grounds of appeal on
grounds that;

- a. The General Court Martial did not engaged the persons in the
discussion to do with subversive activities.
- 25 b. the General court martial changing 4 times without maintaining
the members at the Coram and further the 4th General Court
Martial Coram trying the Appellant was not fully constituted as
there was no non-commissioned officer contrary to Section 197
(1) (e) of the UPDF Act.

- 5 c. The prosecution did not present documentary, corroborative
evidence or any form of exhibits in a grave case.

Court's Consideration

10 This is a second appeal and the duty of a second appellate court was or
has been long settled in a host of cases and it is to decide whether the
first appellate Court failed in its duty to re-evaluate the evidence
presented before the trial Court to reach its own conclusion. See *Pandya
V Republic (1957) EA 336, Kifamunte Henry V Uganda Criminal Appeal No. 10 of
1997*.

15 Both parties filed written submissions which Court is taking into
account for purposes of the matter before us.

It is important to note that the Respondent concede to the 13 grounds
of Appeal out of 14 raised by the Appellant. In any case we shall proceed
to discuss the 13 grounds together.

20 Section 179 of the UPDF Act provides for jurisdiction of the General
Court Martial as far as service offences are concerned; that a person
who does or omits to do an act in Uganda (or outside Uganda) which
constitutes an offence under the Penal Code Act or any other
enactment, commits a service offence.

25 Section 197 of the Act establishes a General Court Martial and confers
on it, among other things, unlimited original jurisdiction to try offences
“under this Act”. Offences under this Act include service offences under
Section 179 of the Act committed by persons subject to military law.
Section 2 of the Act defines a “*service offence*” as “*an offence under this
30 Act or any other Act for the time being in force committed by a person
while subject to military law*”.

5 In the case of *Lt. Ambrose Ogwang V Uganda Court of Appeal Criminal Appeal No. 107 of 2013* the learned Justices held; “*In our view, that only an independent court has jurisdiction under Article 28 of the Constitution to try any criminal offence under civil law. A military court, a court with limited jurisdiction can only try service offences, which in our view have*
10 *been amply set out in section 120-178 of the UPDF Act*”.

In light of the above authorities, I agree with Counsel for the Appellant that Section 184 of the UPDF Act is outside the ambit of the contemplated service offences from Section 120 to 178 of the UPDF Act. Accordingly, since A3, A4, A5 and A6 were not serving soldiers with
15 UPDF they should not have been charged with a service offences as though they were soldiers whereas not.

Further still, Article 28 of the Constitution, A person is entitled to a fair, speedy and public hearing before an independent and impartial court
20 or a tribunal established by law.

It is also important to note that under Article 44 (c) of the Constitution of the Republic of Uganda, a right to a fair hearing is non-derogable. Under Section 198 (c) of the UPDF Act it is stated that when a court is trying an accused person for a capital offence, all members of the court
25 shall be present and in any case, all quorum shall be five members.

In the case of *Mohammed Mohammed Hamid V Roko Construction SCCA No. 1 of 2013*, it was held that “*In our opinion it is improper and contrary to natural justice for a stranger to the hearing to decide and sign a purported judgment or ruling. Under our legal system, and this is*
30 *reflected in Article 28 (1) of the Constitution, a person is entitled to a public hearing before an independent and impartial court.*”

- 5 In the instant case the General Court Martial changing its composition four times without maintaining the members of the Coram, (as seen from pages 422-552) and further the 4th dictates of Section 198 of the UPDF Act and that there was no noncommissioned officer as per Section 197 of the UPDF Act.
- 10 It is our view that Appellants were tried, convicted and sentenced by a court that was not duly constituted; and the Court Martial Appeal Court erred in law to uphold the conviction and sentence.

15 In our view the General Court Martial did not have jurisdiction to entertain this matter; and the procedure adopted was irregular. In the circumstances it would be a waste of Court's time to proceed and examine the other grounds of Appeal.

This Appeal is, therefore, allowed and the conviction of the Appellants by the Court Martial Appeals Court is hereby set aside and the sentences
20 quashed. The Appellants must be set free forthwith.

Dated at Kampala this 26th day of February 2020



Alfonse C. Owiny - Dollo

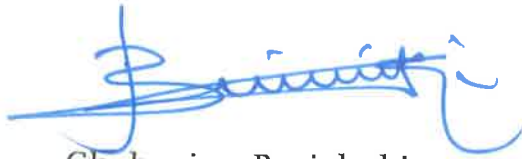
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Deputy Chief Justice



Elizabeth Musoke

Justice of Appeal



Cheborion Barishaki

Justice of Appeal