THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

CRIMINAL APPEAL NO 0294 OF 2021

(CORAM: CHEBORION, MADRAMA, LUSWATA JJA)

1. HON. ALLAN SSEWANYANA ALOYSIUS}
2. HON. SSEGIRINYA MOHAMMED} ..... APPELLANTS

VERSUS

UGANDA} .....RESPONDENT

(Appeal from ruling of Hon Justice Lawrence Tweyanze at the High Court in Masaka in Criminal Miscellaneous Application No 018 of 2021 (Arising from Criminal Case No MSK AA.0258 of 2021 of the Chief Magistrates Court of Masaka at Masaka)

RULING OF COURT

Brief introduction and background

The appellants applied for bail in the High Court at Masaka. The learned trial Judge of the High Court declined their application for reasons that he was not satisfied that the applicant would not interfere with investigations and witnesses of the state or that they would not abscond from bail.

The appellants had been charged jointly with the offence of murder contrary to sections 188 & 189 of the Penal Code Act.

The appellants were dissatisfied with the decision of the trial Judge declining to grant them bail and appealed to this court on seven grounds namely that:

1. The learned trial Judge erred in law and fact when he failed to judiciously exercise discretion to grant bail to the appellants.

2. The learned trial Judge erred in law and fact when he held that the appellants were not suffering from grave illnesses as envisaged under section 15 (3) of the Trial on Indictment Act.

3. The learned trial Judge erred in law and fact when he held that the charge of murder and attempted murder contrary to sections 188, 189 and 2004 (a) of the Penal Code Act and terrorism and aiding and abetting terrorism vide Criminal Case No MSK 00 – 2074 of 2021: Uganda versus Serwadda Mike, Muwonge Jude, Wamala Bulo, Mugera John, Hon. Allan Ssewanyana Aloysius and Hon. Ssegirinya Muhammad stands alone from the charge of murder contrary to sections 188 and 189 of the Penal Code Act vide Criminal Case No MSK AA 0258 OF 2021: Uganda versus Hon. Allan Aloysius and Hon. Ssegirinya Muhammad.

4. The learned trial Judge erred in law and fact when he held that the appellants were at flight risk because they were charged with an offence.

5. The learned trial Judge erred in law and fact when he held that the appellants being members of Parliament are so influential as to affect investigations and or state witnesses.

6. The learned trial Judge erred in law and fact when he held that there is a likelihood of the appellant's absconding from bail because of a multiplicity of charges.

7. The learned trial Judge erred in law and fact when he failed to evaluate the evidence on record thereby causing a miscarriage of justice to the appellants.

When the matter came for hearing on 22nd June 2022, the appellants were represented by learned counsel Mr. Ladislaus Rwakafuuzi who appeared jointly with learned Counsel and Lord Mayor Kampala City Mr. Erias Lukwago assisted by Learned Counsel Ms Shamim Malende. On the other hand, learned counsel Mr Joseph Kyomuhendo, Chief State Attorney and learned counsel Mr Richard Birivumbuka, Chief State Attorney appeared for

the respondents.

Before the matter could proceed on the merits, learned counsel Mr Birivumbuka objected to the appeal on the ground that it is incompetent because it is not grounded in law. He submitted that under Article 134 (2) of the Constitution, an appeal against a decision concerning bail does not lie to the Court of Appeal because an appeal is a creature of statute. He contended that under section 132 (2) of the Trial on Indictment Act, an appeal can only lie to the Court of Appeal from the High Court where there has been a conviction and sentence. In the premises he contended that the Court of Appeal has no jurisdiction to hear an appeal from a decision in a bail application. He relied on **Shah v Attorney General (1971) EA 50** for the proposition that an appeal is a creature of statute. He submitted that the decision declining bail application was an interlocutory decision as there was no conviction or sentence and therefore no right of appeal under section 132 of the Trial on Indictment Act. He emphasised that the appellants were not convicted nor had they been sentenced. In the premises he submitted that the appellants had no right of appeal to the Court of Appeal and the remedy was to reapply for bail. He relied on the decision of the Supreme Court in **Charles Harry Twagira v Uganda; Criminal Appeal No 027 of 2005**. It was held in that appeal that no appeal can lie from an interlocutory order unless the order is a conviction or sentence. Counsel also relied on **Makumbi Moses v Uganda; Criminal Appeal No 202 of 2020 arising from Criminal Application CP 177 of 2020** where the Court of Appeal held that the right of appeal arises in respect of conviction and sentence. No appeal arises from a decision made in an application for bail and the appeal was dismissed.

In reply, Mr. Rwakafuuzi contested the submission that a bail application is of an interlocutory nature. In his view, it is a substantive right that is recognised in the Constitution. He contended that the 1967 Constitution is different from the 1995 Constitution and the problem is that this new Constitution of 1995 is being interpreted using jurisprudence from the old Constitution of 1967. He submitted that the right to bail is enforceable under

Article 50 of the Constitution of the Republic of Uganda 1995 by a competent court which is the High Court. Further that under section 16 (1) (c) of the Human Rights (Enforcement) Act, 2019 there is a right of appeal from the decision of the High Court in the enforcement of fundamental rights and freedoms. He considered the judgment in **Makumbi Moses v Uganda** (supra) to be one that was decided per incuriam in light of the cited provisions of the law. He submitted that the appellants were rightly before the Court of Appeal because they had been denied bail. In the alternative, the appellants had been granted bail by another Judge of coordinate jurisdiction and had the learned trial Judge perused the decision of his sister Judge, he would have granted bail.

Mr. Rwakafuuzi contended that the appellants had been kidnapped or abducted immediately after they had been released on bail by security forces and taken back to prison whereupon they were brought and charged before another Judge where they were denied bail.

In further reply to the preliminary objection, learned counsel Lord Mayor Mr Erias Lukwago submitted that the Court of Appeal has jurisdiction to entertain this appeal. He cited Article 134 (2) of the Constitution of the Republic of Uganda and submitted that it created the right of appeal. That this Article provides that an appeal lies from decisions of the High Court as are prescribed by law. The relevant law includes the Criminal Procedure Code Act and section 35 and 36 thereof which confer a right of appeal. He contended that section 35 of the Criminal Procedure Code Act deals with appeals from sentences and convictions or acquittals while section 36 deals with appeals from other orders. Further he castigated the respondents counsel for not having read section 133 of the Trial on Indictment Act which he contends allows an appeal from a special finding. In other words, he contended that an appeal does not only arise from a sentence, conviction or acquittal, but also arises from special findings.

Further, Mr Lukwago submitted that proceedings with regard to bail are a special proceeding which are instituted for enforcement of fundamental rights. He contended that the appellants bail application was a pre-trial

stage proceeding, and as such, a decision by the judge could be subject to appeal. He submitted that the appellants who had earlier on been released by the High Court were immediately rearrested. That apart from the present decision on appeal, the appellants had filed other fresh applications for bail which the High Court declined to entertain. Counsel Lukwago then beseeched this court not to lock the door to the cause of justice. He in addition sought our guidance on several matters including where a judge of the High Court had granted bail, another judge of coordinate jurisdiction overturned the decision on bail to the same persons. He took exception to the fact that the appellants fulfilled the bail terms by paying Uganda shillings 20,000,000/= each after which the State amended the charge sheet to add the charge of terrorism, and had them remanded.

In rejoinder learned counsel Mr Joseph Kyomuhendo submitted that the appellants were detained on two different charges. The first charge involved murder and terrorism. The second charge involved a charge of murder only with respect to different accused persons and the places for commission of the offences were different. Mr. Kyomuhendo further submitted that the learned trial judge exercised his discretion judicially. According to him, the appellants remedy under the Human Rights (Enforcement) Act, 2019 under which they can petition the High Court under Article 50 of the Constitution was on succeeding to have the charges nullified. The appellants instead circumvented that procedure and instead appealed to the Court of Appeal.

Counsel further drew our attention to the fact that this matter was the subject of a multiplicity of proceedings since it is also before the Constitutional Court,

Further the respondent's counsel submitted that the Court of Appeal has no jurisdiction because it lacks the legal basis. Section 133 of the Trial on Indictment Act does not apply because section 132 (2) of the Trial on Indictment Act prevails over the Criminal Procedure Act which was an older statute. Further sections 35 and 36 of the Criminal Procedure Code Act are not in harmony with section 132 and 133 of the Trial on Indictment Act. Mr. Kyomuhendo further submitted that in the applicant's matter, there was no

special finding and therefore section 133 of the TIA was inapplicable. He contended that the grounds to be considered before bail is granted are provided for under section 15 and 16 of the TIA. He clarified that the applicants were not abducted but were rearrested in respect of another offence and were therefore in lawful custody.

Upon hearing submissions of counsel, we reserved our ruling for Wednesday 29th of June 2022.

Decision of Court.

We have carefully considered the submissions of counsel, the precedents they have cited, the relevant statutory law and the Constitution. The gist of the preliminary objections is that this court has no jurisdiction to hear the appeal. Conversely, the appellants contend that this court has jurisdiction to entertain an appeal from a decision declining to grant bail by the High Court, pending trial for a capital offence.

The facts upon which the preliminary objection is based are not in dispute. The applicant's application for bail in the High Court was declined by the learned trial Judge in a ruling dated 25th of October 2021. The appellants had applied for bail by notice of motion in the High Court at Masaka where they had been jointly charged with the offence of murder contrary to sections 188 & 189 of the Penal Code Act. We do not need to give the particulars of the charge as the matter before the court is for consideration of a point of law as to whether this court has appellate jurisdiction from the decision of the High Court refusing to grant bail in the circumstances of this appeal.

The thrust of the respondent's objection to the appeal is that no appeal lies from an interlocutory order of the High Court, made pending or during the trial of the accused. The contention is that under section 132 of the Trial on Indictment Act, an appeal only lies from a final order of a conviction, acquittal or sentence of the High Court to the Court of Appeal. On the other hand, the appellant's counsel contended that bail is a special proceeding which stands alone and an appeal lies from it. Further, a decision on bail

may as well be founded on sections 133 of the Trial on Indictment Act or 36 of the Criminal Procedure Code Act. The appellants counsel further contended that section 35 of the Criminal Procedure Code Act does not preclude or exclude an appeal from any other order other than a conviction, sentence, or acquittal. Further, that the decision in an application for bail is a decision made pursuant to Article 50 of the Constitution of the Republic of Uganda for the enforcement of fundamental rights and freedoms which decision is appealable under section 16 of the Human Rights Enforcement Act, 2019.

The proposition that appellate jurisdiction only springs from statute was considered by the East African Court of Appeal in **Attorney General v Shah (No. 4) [1971] EA, 50**. In that judgment, there was an appeal from a decision of the High Court where the High Court of Uganda issued an order of mandamus against officers of government. The Attorney General was aggrieved and appealed against the order of mandamus. When the appeal was called for hearing, the respondent objected to hearing it on the ground that the East African Court of Appeal had no jurisdiction to hear the appeal. The East African Court of Appeal in a decision delivered by Spry Ag P held *inter alia* 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.*

In establishing what jurisdiction the court had, the court considered the fact that the appellate jurisdiction of the East African Court of Appeal was derived from Article 89 of the Constitution of the Republic of Uganda 1967 (repealed) and the Judicature Act 1967 (repealed) which provided that the East African Court of Appeal had only such jurisdiction as had been conferred on it by Parliament. Despite the repeal of the 1967 Constitution of the Republic of Uganda, there is a similar provision under Article 134 (2) of the Constitution 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.*

It is clear from Article 134 (2) of the Constitution that an appeal lies to the

Court of Appeal from such decisions of the High Court as are prescribed by law. The question then is which laws prescribe appeals from decisions of the High Court in criminal proceedings? The provisions of Article 134 (2) of the Constitution is repeated under section 10 of the Judicature Act Cap 13 laws of Uganda which provides that:

> *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 confers jurisdiction on the Court of Appeal to hear appeals from decisions of the High Court prescribed by Parliament by law. Section 10 of the Judicature Act does not exactly prescribe which laws prescribe the appellate jurisdiction but incorporates the provisions of Article 134 (2) of the Constitution that Parliament shall prescribe which decisions are appealable. It would therefore be necessary to establish the specific law which confers appellate jurisdiction on the Court of Appeal from decisions of the High Court in criminal proceedings. We were referred to sections 35 and 36 of the Criminal Code Procedure Act cap 116. We have also considered section 34 of the Criminal Procedure Code Act. Suffice it to note that section 34 of the Criminal Procedure Code Act provides for powers of the appellate court from convictions. This is followed by section 35 of the Criminal Procedure Code Act which deals with powers on appeal from acquittals and provides that:

> ***35. Powers of appellate court on appeals from acquittals.***
>
> *The appellate court may, on an appeal from an acquittal or dismissal, enter such decision or judgment on the matter as may be authorised by law and make such order or orders as may be necessary.*

Clearly the powers of the Court of Appeal under sections 34 and 35 of the Criminal Procedure Code Act only arise where there has been a conviction or acquittal respectively. The headnote of section 35 clearly suggests that it deals with powers of the appellate court in an appeal from an acquittal. Under that section the words acquittal is used conjunctively with the order of dismissal suggesting that it only deals with an appeal arising from the acquittal of the accused or the dismissal of the prosecution proceedings.

Prosecution proceedings may be dismissed for want of prosecution. It follows that a conviction, acquittal or dismissal are final orders terminating proceedings in the trial court. Thus, the powers of the court pursuant to the final orders of conviction, acquittal or dismissal are corollary powers based on the right of appeal following the conviction, acquittal or dismissal. The sections under review give the powers of this court on appeal from a conviction, acquittal or dismissal to make such decision or issue such Judgement and make such orders as may be necessary as authorised by law. Further, section 36 of the Criminal Procedure Code Act provides that:

> *36. Powers of appellate court on appeals from other orders.*
>
> *The appellate court may on any appeal from any order other than a conviction, acquittal or dismissal alter or reverse the order.*

Again, section 36 of the Criminal Procedure Code Act, makes it clear that the preceding sections dealt with appeals from conviction, acquittal or dismissal. It provides for the powers of the appellate court on any appeal from any order other than a conviction, acquittal or dismissal. What other orders are envisaged? This is not stated in the section itself. Are they orders made in the course of the proceedings which resulted in a conviction, acquittal or dismissal? The question is therefore whether a decision declining bail is such other order. We shall revert to this question presently after considering the provisions of the Trial on Indictment Act and particularly sections 132 and 133 thereof which provide in respect of section 132 that:

> *132. Appeals to the Court of Appeal from the High Court.*
>
> *(1) Subject to this section—*
>
> *(a) an accused person may appeal to the Court of Appeal from a conviction and sentence by the High Court in the exercise of its original jurisdiction, as of right on a matter of law, fact or mixed law and fact;*
>
> *(b) an accused person may, with leave of the Court of Appeal, appeal to the Court of Appeal against the sentence alone imposed by the High Court, other than a sentence fixed by law;*

(c) where the High Court has, in the exercise of its original jurisdiction, acquitted an accused person, the Director of Public Prosecutions may appeal to the Court of Appeal as of right on a matter of law, fact or mixed law and fact, and the Court of Appeal may—

(d) confirm, vary or reverse the conviction and sentence;

(e) in the case of an appeal against the sentence alone, confirm or vary the sentence; or

(f) confirm or reverse the acquittal of the accused person.

(2) Where the Court of Appeal reverses an acquittal under subsection (1), it shall order the accused person to be convicted and sentenced according to law.

(3) No appeal shall be allowed in the case of any person who has pleaded guilty in his or her trial by the chief magistrate or magistrate grade I or on appeal to the High Court and has been convicted on the plea, except as to the legality of the plea or to the extent or legality of the sentence.

(4) Except in a case where the appellant has been sentenced to death, a Judge of the High Court or the Court of Appeal may, in his or its discretion, in any case in which an appeal to the Court of Appeal is lodged under this section, grant bail, pending the hearing and determination of the appeal.

(5) Section 40 of the Criminal Procedure Code Act other than subsection (2) of that section shall apply to a convicted appellant appealing under this section.

We have carefully considered section 132 of the Trial on Indictment Act. It clearly provides for appeals against conviction, sentence or acquittals and is not in conflict with section 34 and 35 of the Criminal Procedure Act. The submissions of the appellants' counsel conceded this fact as this section is clear. The question then arises from section 36 of the Criminal Procedure Code Act which provides for appeals from other orders as well as section 133 of the Trial on Indictment Act. We have carefully considered section 133 of the Trial on Indictment Act and find that it deals with appeals against special findings. It further defines a special finding. It means a finding in relation to diminished responsibility on account of insanity under section

194 (1) of the Penal Code Act and section 48 (1) of the TIA. For emphasis section 133 of the Trial on Indictment Act provides that:

> *133. Appeal against special finding.*
>
> *(1) A person in whose case a special finding has been made may appeal against the finding to the Court of Appeal on a question of law or of fact or of mixed law and fact, and the Court of Appeal shall allow the appeal if it thinks that the special finding should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that it should be set aside on the ground of a wrong decision on any question of law if the decision has in fact caused a miscarriage of justice, or on any other ground if the court is satisfied that there has been a miscarriage of justice, and in any other case shall dismiss the appeal; but the Court of Appeal shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred.*
>
> *(2) Where, apart from the provisions of this subsection—*
>
> *(a) an appeal against a special finding would fall to be allowed; and*
>
> *(b) none of the grounds for allowing it relates to the question of the insanity of the appellant, the Court of Appeal may dismiss the appeal if it is of the opinion that, but for the insanity of the appellant, the proper verdict would have been that he or she was guilty of an offence other than the offence for which he or she was indicted.*
>
> *(3) Where, in accordance with the provisions of this section, an appeal against a special finding is allowed—*
>
> *(a) if the ground, or one of the grounds, for allowing the appeal is that the finding of the High Court as to the insanity of the appellant ought not to stand and the Court of Appeal is of opinion that the proper verdict would have been that he or she was guilty of an offence (whether the offence for which he or she was indicted or any other offence of which the High Court could have found him or her guilty), the Court of Appeal shall substitute for the special finding a verdict of guilty of that offence, and shall have the like powers of punishing or otherwise dealing with the appellant, and other powers, as the High*

Court would have had if it had come to the substituted verdict;

(b) in any other case, the Court of Appeal shall substitute for the verdict of the High Court a verdict of acquittal.

(4) The term of any sentence passed by the Court of Appeal in the exercise of the powers conferred by subsection (3) shall, unless the court otherwise directs, begin to run from the time when it would have begun to run if passed in the proceedings in the High Court.

(5) In this section—

(a) "insanity" includes diminished responsibility defined in section 194 of the Penal Code Act;

(b) "special finding" means a special finding made under—

(i) section 48(1); or

(ii) section 194(1) of the Penal Code Act.

Clearly a special finding under section 48 (1) of the Trial on Indictment Act is the finding of not guilty by reason of insanity by the High Court. Secondly, section 194 (1) of the Penal Code Act provides that where a person is found guilty of murder or being a party to the murder of another and such person was suffering from abnormality of mind, the court would make a special finding to the effect that the accused was guilty of murder but with diminished responsibility. For emphasis section 194 (1) of the Penal Code Act provides that:

194. Diminished responsibility.

(1) Where a person is found guilty of the murder or of being a party to the murder of another, and the court is satisfied that he or she was suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind, or any inherent causes or induced by disease or injury, as substantially impaired his or her mental responsibility for his or her acts and omissions in doing or being a party to the murder, the court shall make a special finding to the effect that the accused was guilty of murder but with diminished responsibility.

(2) On a charge of murder, it shall be for the defence to prove that the

person charged was suffering from such abnormality of mind as is mentioned in subsection (1).

(3) Where a special finding is made under subsection (1), the court shall not sentence the person convicted to death but shall order him or her to be detained in safe custody; and section 105 of the Trial on Indictments Act shall apply as if the order had been made under that section.

(4) The fact that one party to a murder is by virtue of this section not liable to be sentenced to death shall not affect the question whether any other party to it shall be sentenced to death.

Therefore, we do not accept the submissions of the appellant's counsel that a special finding includes the refusal of bail by the High Court. Further under section 36 of the Criminal Procedure Code Act, appeals from other orders have to be read in harmony with the specific provisions of the Trial on Indictment Act because they do allow appeals from other orders specifically. Those orders include, appeals from a special finding under section 48 of the Trial on Indictment Act, appeals against an order of costs under section 125 (3) of the Trial on Indictment Act and appeals against an order of compensation issued by the High Court under section 126 (4) of the Trial on Indictment Act among others. Under all those sections, specific provision is made allowing appeals. It follows then that the Legislature intended any right of appeal to be expressly provided for.

The rights of appeal from the above orders are expressly provided for under the Trial on Indictment Act. However, the provisions dealing with bail under sections 14 to 21 of the Trial on Indictment Act do not expressly provide for any right of appeal against an order of refusal of bail under section 15.

We therefore come to the conclusion that the Trial on Indictment Act which is a later Act than the Criminal Procedure Code Act, allows for appeals against acquittals or dismissals, conviction and sentence and any other orders such as special orders, and other orders specifically provided for as orders from which an appeal lies from a decision of the High Court. We further came to the conclusion that it is unnecessary to classify a right of

appeal on the basis of whether the order is an interlocutory order or a final order unless the statute says so. It is an entrenched principle of law that an appeal is a creature of statute. Where the statute confers a right of appeal, it would not matter whether it is from an interlocutory order or a final order. The right is conferred by statute which should speak for itself.

We now turn our attention to the provisions of section 16 of the Human Rights (Enforcement) Act, 2019. Mr. Rwakafuuzi submitted that an application for bail is an application for enforcement of fundamental rights and freedoms under Article 50 of the Constitution of the Republic of Uganda. The right to apply for bail is a recognised right under Article 23 of the Constitution which deals with the right to liberty. It is provided under Article 23 (6) of the Constitution that:

> *(6) Where a person is arrested in respect of a criminal offence—*
>
> *(a) the person is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable;*
>
> *(b) in the case of an offence which is triable by the High Court as well as by a subordinate court, the person shall be released on bail on such conditions as the court considers reasonable, if that person has been remanded in custody in respect of the offence before trial for one hundred and twenty days;*
>
> *(c) in the case of an offence triable only by the High Court, the person shall be released on bail on such conditions as the court considers reasonable, if the person has been remanded in custody for three hundred and sixty days before the case is committed to the High Court.*

Article 23 (6) (a) of the Constitution allows a person detained on a criminal charge to apply for bail whereupon the court may grant the bail on such conditions as the court may deem reasonable. This has to be considered together with the section 15 of the Trial on Indictment Act which gives some of the conditions to be considered before granting or declining to grant bail. The Constitution therefore provides for enforcement of the right to liberty

under Article 23 (6) of the Constitution and the matter does not necessarily fall under Article 50 of the Constitution which deals with enforcement by a competent court in cases of breaches or threats of breaches to rights under Chapter 4 of the Constitution. The Human Rights (Enforcement) Act, 2019 deals with enforcement of fundamental rights and freedoms where there has been an infringement of a fundamental right of freedom provided for in the Constitution. It provides under section 1 (2) that the Act applies to enforcement of human rights by a competent court. Section 2 defines an application as:

> *... an application to a competent court under Article 50 of the Constitution for redress in relation to the fundamental rights and freedoms guaranteed under Articles 20 to 45 of the Constitution.*

It is in addition provided in Section 3 (1) of the same Act that a person or organisation who claims that the fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened may;

> *... without prejudice to any other action with respect to the same matter that is lawfully available, apply for redress to a competent court in accordance with this Act.*

Clearly, even if there is any other remedy available such as a civil suit or other proceedings such as an application for bail, an application may be made to a competent court for enforcement of a fundamental right of freedom where such rights have been infringed or threatened.

An application to the High Court under section 4 is to be in the form prescribed by regulations. Rule 7 of the Judicature (Fundamental and Other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019 prescribes the procedure to be by notice of motion in accordance with the form prescribed in the schedule. Secondly, rule 8 thereof provides that the motion under the rules shall specify the right infringed or **threatened to be infringed**. It shall provide for the provision of the Constitution violated or threatened to be validated, the category of persons affected, the grounds of the application and the relief or reliefs sought. Redress sought presupposes that the right was infringed, violated or threatened. The redress is the

redress ordered to vindicate the violation of a right or freedom or a threat to do so.

Suffice it to note that the appellant's application in the High Court was an application for bail. We are that that in an indirect way the applicants applied for enforcement of fundamental right to bail but not on an allegation that their fundamental rights and freedoms had been infringed or was threatened with infringement in relation to the right to bail under Article 23 (6) of the Constitution. It was therefore not an application envisaged under the Human Rights (Enforcement) Act, 2019. Furthermore, section 16 of the Act which confers the right of appeal from a decision of a competent court deals with a decision made with regard to an application for redress to obtain an appropriate relief following violation or threats of violation of fundamental rights and freedoms. It does not deal with an application for bail, which application deals not with infringement but with the exercise of any jurisdiction to grant bail and assert the right. For emphasis the applicants who are now the appellants applied under Article 23 (6) (a) of the Constitution, section 14 (1) of the Trial on Indictment Act and rule 2 of the Criminal Procedure (Application) Rules S.I – 1 for their release on bail "*pending the hearing of criminal Case number...*". It was not an application for the enforcement of fundamental rights and freedoms *per se* where it is necessary to allege that such a right i.e. the right to bail had been infringed or threatened with infringement.

We therefore find that section 16 of the Human Rights (Enforcement) Act, 2019 only applies to applications alleging infringement or threatened infringement of fundamental rights and freedoms and pursuant to an application to a competent court for the enforcement of the infringed or threatened rights and freedoms where a party aggrieved by a decision of a competent court desires to appeal. It is inapplicable to applications for bail in the ordinary course of a criminal trial proceeding.

We have further considered the authorities cited by counsel. In **Charles Harry Twagira vs Uganda; Supreme Court Criminal Appeal No 027 of 2003** the Supreme Court considered an interlocutory decision of the High Court

pursuant an appeal against a ruling of the Chief Magistrates Court. The Supreme Court considered *inter alia* section 204 (1) of the Magistrates Court Act on the question of whether it allowed an appeal against an interlocutory order in the trial by the Chief Magistrate. It was held that:

> *With due respect to learned counsel, we think that he stretched the import of a fair trial to unreasonable limits. Accepting his reasoning would make it practically impossible for trial courts to finish any criminal trial in reasonable time. In such a situation, it is conceivable for an accused to launch appeals against every interlocutory order made during the trial which he or she perceives it (even incorrectly) to be wrong and thereby render a trial prolonged on frivolous points by appealing on every point of objection. This would unduly undermine procedures, effective trials and would open the gates to abuse of the process of court and the due administration of justice.*

While this is a general provision as to the right of appeal from interlocutory orders, we have already found that sections 132 and 133 of the Trial on Indictment Act, enable powers of court from other orders specifically allowed by the Trial on Indictment Act but not with regard to bail which is not provided for.

We have further considered the decision of this court in **Makumbi Moses v Uganda; Supreme Court Criminal Appeal No 068 of 2021**. There was an appeal against the decision of the trial Judge cancelling bail. At the hearing of the appeal, the respondent objected to the appeal on the ground that the Court of Appeal had no jurisdiction to hear an appeal against the decision cancelling bail. The court considered among other things the right of appeal to the High Court under section 132 of the Trial on Indictment Act and found that:

> *The operative words from the above provision are "... conviction and sentence by the High Court". Section 132 (1) (a) of the TIA above is crystal clear that the only right of appeal conferred upon an accused person is in respect of a* ***conviction and sentence*** *by the High Court in the exercise of its original jurisdiction. A conviction and sentence presuppose that there has been a full trial by the High Court and a final order made.*

No right of appeal is conferred upon an accused person aggrieved by the High Court order relating to bail or any other interlocutory order in criminal matters.

The Court of Appeal found that the decision of the Supreme Court in **Charles Harry Twagira v Uganda** (supra) is binding. The Court of Appeal also considered section 36 of the Criminal Procedure Code Act and found that it comes into play only after an appeal is properly before the court. They found that it was not a foundation for a right of appeal against an interlocutory matter.

In the premises, we find that the decision of the Supreme Court in **Charles Harry Twagira v Uganda** (supra) though binding on us, was not exactly on the same issues as in this court where we are *inter alia* required to consider section 16 of the Human Rights (Enforcement) Act 2019. Secondly the decision of the Court of Appeal in **Makumbi Moses v Uganda** (supra) is that of a court with the same jurisdiction and is binding on us and we may only depart from it a few grounds if for instance we find that it was decided per incuriam or contrary to the decision of the Supreme Court or another later decision of this court. We agree with it in light of our interpretation of sections 132, 133 of the TIA as well as sections 34, 35 and 36 of the Criminal Procedure Code Act. We only emphasize that an appeal is a creature of statute.

We agree with the decision of the High Court of Tanzania in **Desai v Warsama [1967] 1 EA 351** where Hamlyn J noted that:

It is well-established law that a judgment of a court without jurisdiction is a nullity and 9 Halsbury 351 sets out the proposition briefly thus:

"Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing."

We find that proceeding in this matter to hear the appeal would be without jurisdiction and would amount to nothing. We accordingly sustain the preliminary objection to the appeal on the ground according to sections 132, 133 of the Trial on Indictment Act, sections 34, 35 and 36 of the Criminal

Procedure Code Act, section 10 of the Judicature Act and Article 134 (2) of the Constitution, the Court of Appeal has no jurisdiction to hear the appeal. The appellant is not precluded from following any provisions of the Human Rights (Enforcement) Act, 2019 where it is applicable.

Thus our decision is that the appeal before us is incompetent.

Although we have found this appeal incompetent, we are concerned about some of the complaints raised by the appellants. They stated that they have been on remand for nine months without trial. That they have filed four applications for bail and only two have been concluded. They contend that no reasons have been given to explain why the other two have not been fixed and heard. The appellants are members of Parliament who have civic duties and are representatives of the people, thus their fate should not be in doubt.

At the hearing of this appeal, the representatives of the DPP stated that they were ready to prosecute the appellants. Therefore, it is incumbent upon the High Court to ensure that the trial of the appellants begins and is expeditiously concluded so as to meet their human and constitutional rights.

We therefore direct the Registrar of this Court to ensure that all files in respect of the appellants are placed before the Principal Judge, to ensure that the trial of the appellants begins and is expeditiously concluded.

That said, the appeal before us is incompetent, and we accordingly strike it out with no order as to costs.

Dated at Kampala the 29th day of June 2022

Cheborion Barishaki

Justice of Appeal

Christopher Madrama

Justice of Appeal

Eva K Luswata

Justice of Appeal