

5 **THE REPUBLIC OF UGANDA IN THE COURT OF  
APPEAL OF UGANDA AT KAMPALA**

[Coram: Musoke, Gashirabake & Luswata, JJA]

**CRIMINAL APPEAL NO. 057 OF 2018**

*(Arising from Court Martial Appeal 004 of 2018)*

10 1. KASHITA MOSES  
2. LUBEGA JOLLY  
3. WASWA SULAIMAN.....APPELLANTS

**VERSUS**

**UGANDA .....RESPONDENT**

15 *[Arising from the decision of Hon. Mr. Elly Turyamubona and Col. Micheal Kagambirwe of  
the Court Martial Appeal Case No. 004 of 2018 dated 26<sup>th</sup> September 2019]*

**JUDGMENT OF COURT.**

**Introduction.**

The facts that led to prosecution of the Appellants are that during the months of  
20 January and February 2015, a group of about twenty people hatched a plan to rob  
a Forex Bureau in Kampala. On or about the 3 March 2015 at about 1100hrs,  
while at Esso corner on Kampala–Jinja Road in Kampala, the Appellants putting  
on army uniforms swung into action. Using a fire arm, they robbed UGX  
525,000,000= ( Five hundred twenty five million shillings) being the property of  
25 Mr. Maddy Mulema Kalembe of Sports Forex Bureau.

The Appellants being civilians, were brought under the ambit of Section 119  
(1)(g) and (h) of the Uganda Peoples Defence Forces Act (UPDF Act) No. 7  
/2005 and were charged with aggravated robbery C/S 285 and 286 of the Penal  
Code Act. At first the Appellants pleaded not guilty, but as the trial progressed.  
30 They decided to change their plea of not guilty to that of guilty. The General  
Court Martial being satisfied with their change of plea accepted their plea of  
guilty and convicted and sentenced them to ten years' imprisonment each on their  
own plea of guilty.

5 Dissatisfied with the sentence imposed by the General Court Martial the Appellants appealed to the Court Martial Appeal Court on ground that the sentence was manifestly harsh.

The Court Martial Appeal Court, heard the Appeal and instead enhanced the sentence from 10 years imprisonment to 15 years having deducted 3 years spent  
10 on remand. Dissatisfied by the Court martial appeal court decision , the Appellants appealed to this court on two grounds that:

1. The learned members of the Court Martial Appeals Court erred in law when they enhanced the sentences of the Appellants without following the requisite procedure.
- 15 2. The learned members of the Court Martial Appeals Court erred in law when they entertained a matter in which they lacked jurisdiction.

### **Representation**

The Appellants were represented by Mr. Henry Kunya. The Respondent was represented by Mr. Simon Peter Semalemba, assistant DPP.

20 The Court at the hearing adopted written submissions filed in support of the respective parties ,which submissions have been considered in this judgment.

### **Ground 1**

#### **Submissions by counsel for the Appellant.**

Counsel for the Appellant submitted that according to the law, the appellate court  
25 is not to interfere with a sentence imposed by the trial court which has exercised its discretion on sentences unless the exercise of the discretion is such that the trial court ignored to consider an important matter or circumstances which ought to be considered when passing the sentence, as was in the case of **Kiwalabye v Uganda (SC Cr App No. 143 of 2001)** as was cited in **Kimera Zaverio V Uganda ( COA Cr App No. 427 of 2014)**.  
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5 Counsel submitted that the learned members of the Court Martial Appeal Court in enhancing sentences of the Appellants relied on the provisions of **Section 236 (4) (b) and 239 (2) of the UPDF Act 2005**. Counsel submitted that the prosecution never filed any cross appeal against the sentences imposed against the Appellants who challenged their respective sentences of 10 years  
10 imprisonment.

Counsel further submitted that where an appellate court intends to enhance a sentence, it ought to give the Appellants advance notice before a sentence is enhanced to be afforded a hearing on the new sentence in the interest of justice. The case of **Kwamusi Jacob v Uganda (SC Cr. App No.22 of 2014)** was  
15 highlighted by counsel.

Counsel submitted that the failure to follow the above requisite procedure by the members of the Court Martial Appeal court led the Appellant to suffer a miscarriage of justice since they were not given any opportunity to be heard before their respective sentences were enhanced, furthermore the time spent on  
20 remand was not put into consideration.

Counsel concluded by stating that the honourable court finds the sentences of 15 years imprisonment illegal.

## **Ground 2**

### **Submissions by Counsel for the Appellant**

25 Counsel for the Appellant submitted that the Appellants were civilians and hence were not subject to military law and both courts lack jurisdiction to try them. Furthermore, the offence for which they were indicted was not a service offence to warrant any appearance before these military courts as was held in **Lt. Ambrose Ogwang V Uganda CACA No. 107 of 2013** cited with approval in  
30 **L/CPL Nasasira grace & Ors v Uganda caca no. 250 of 2017**.

5 Counsel concluded by praying that this honourable court allows the appeal, quash the conviction and set aside the impugned sentences. And if the conviction is upheld it should be substituted with appropriate ones in a bid to meet the ends of justice.

**Submissions by counsel for the Respondent.**

10 Counsel for the Respondent raised a preliminary point to dispose of this appeal. The point of law raised by counsel for the Respondent was “*whether the Court of Appeal has jurisdiction to hear appeals from the Court Martial Appeal Court.*”

In support of his submissions counsel relied on the decision of this court in **PTE Muhumuza Zepha vs. Uganda Criminal Appeal No. 031/2016**, the Appellants  
15 were charged by the divisional court martial on three counts of murder and sentenced to death, they appealed to the Court Martial against only one sentence of death and it was set aside and substituted with a sentence of 40 years, the Appellants being dissatisfied with the sentence appealed to the court martial appeal court and the sentence was reduced to 30 years.

20 Still dissatisfied with that sentence, the Appellants appealed to this honourable court, but their appeal was dismissed for lack of jurisdiction. This honourable court held inter alia that a right to appeal is a creature of statute. **Section 8** of the **UPDF Act** confers on the General Court Martial some appellate jurisdiction under the Act but no further provision is made to the Court of Appeal of Uganda.

25 He concluded that the provisions in the UPDF Act do not confer any further rights of appeal to the Court of Appeal of Uganda. Counsel further stated that the facts of the case above are almost similar to the instant case.

Counsel concluded by praying that the Appellants appeal before this court is incompetent and therefore should be struck out.

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5 **Consideration of Court**

The Respondent raised a preliminary point of law as to whether the Court of Appeal has jurisdiction to hear appeals from the Court-Martial Appeal Court. This question was addressed by this Court in the case referred to by Counsel for the Respondent in **PTE Muhumuza Zepha vs. Uganda Criminal Appeal No.**

10 **031 of 2016.** Where this court held that:

“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 ..... Spry Ag P held,

15 ‘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.”

This court in **PTE Muhumuza (Supra)** exhaustively dealt with this matter and discussed the different laws that govern the jurisdiction of this court like Article 134(2) of the Constitution of Uganda and Section 10 of the Judicature Act Cap 20 13 of laws of Uganda 2000 which confers on this Court of Appeal the general appellate jurisdiction to hear appeals emanating from the decisions of the High Court only. In that very case court observed that in the strict sense of the above provisions the Appellate Jurisdiction does not confer jurisdiction to hear Appeals emanating from Court Martial Appeal Court, other than decisions of the High 25 Court.

This Court also examined Regulation 20 of the Uganda People’s Defence Forces (Court –Martial Appeal Court) Regulations: Statutory Instrument 307, which provides that the Appeal from the Court- Martial Appeal Court are final.

We have no reason to divert from the decision of this court. When the law clearly 30 stipulates the jurisdiction of a court, it is illegal and a nullity to file the suit in a court without jurisdiction, let alone for the presiding judicial officer to hear the

5 same. See: **Paul K. Semogerere and 2 Others v. A.G. SCCA 1/2002**; where it was held: Jurisdiction is defined in **Mulla on the Code of Civil Procedure at page 225** as;

10 "By jurisdiction it meant authority which court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way, for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be exercised or restricted by the like means. If no restriction or limit is imposed, the Jurisdiction is unlimited."

15 It is therefore justified to say that the lack of jurisdiction goes far beyond the original errors or technicalities. It is an illegality to handle a matter without Jurisdiction. **In Desai v. Warsama (1967) EA 351**, court held that:

20 "lack of jurisdiction goes far beyond any error, omission, or irregularity nor can it be regarded as a mere technicality and that there is in law nothing to be reversed or altered and there is a complete absence of any material from which an appeal can be

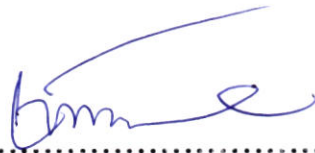
25 Consequently, since under Regulation 20 of the Uganda People's Defence Forces (Court-Martial Appeal Court) Regulations Statutory Instrument 307- 7, it is provided that the decisions from Court –Martial Appeal Court are final, this court would be acting ultra vires to entertain this matter. This court has no power to intervene in this matter.

It is therefore our considered opinion that since this Appeal is incompetent before this court and it is hereby struck out.

We so Order.

30 **Dated at Kampala this ... 23<sup>rd</sup> ..... Of ..... sept- ..... 2022**

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ELIZABETH MUSOKE  
JUSTICE OF APPEAL

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.....  
CHRISTOPHER GASHIRABAKE  
JUSTICE OF APPEAL

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EVA K. LUSWATA  
JUSTICE OF APPEAL