

**THE REPUBLIC OF UGANDA**

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

**CRIMINAL REVISION NO. 8 2004**

UGANDA –

VERSUS

A1 NABAKOZA JACKLINE

A2 NAMUBIRU STELA

A3 BIRUNGI HAWA

A4 NAMATA MAUREEN

A5 NANTONGO ROSE

A6 NAKAWESI ZAITUN

A7 KAMYA KITANDWE TONNY

A8 SSENDAGIRE HOHAMADA

A9 YUSUF KABUYE

A10 ZIWA GEORGE WILLIAM

**7<sup>th</sup> September 2004**

**BEFORE: THE HON. MR. JUSTICE R.O. OKUMU WENGI**

**ORDER:**

This revision relates to the order of the Chief Magistrates court dated 7/7/2004. That order was made following the arrest on 6/7/2004 and prosecution of ten persons six of whom were women. All of them were in their twenties or so. They were arrested at Abayita Babiri on the Entebbe Kampala Highway on the very day when the COMESA summit delegates were also making their entry into the Capital City. The ten were then taken to court the following day and at once charged with being idle and disorderly C/S 167 (d) of the Penal Code Act. They all pleaded guilty to the charge and were accordingly convicted and sentenced to three months imprisonment each with no option of a fine. The court also made the following orders namely that:-

“2. For further deterrence the girls’ skimpy wear is to be handed to the police immediately the ladies are received in prisons; for police to

destroy through burning when duly witnessed by a court official and DPC Entebbe.

3. The girls' big weaves should be undone and their heads shaven to avoid stampede at the Women's Prison Wing.
4. The vehicles engine, since the vehicle was impounded is forfeited to the state, as a deterrent step to such activities."

All the ten pleaded for leniency and or sought leniency, while others expressed much remorse and vowed never again to do the acts they were accused of. The prosecutor had asked for a deterrent sentence. He said:-

"Yesterday we were receiving heads of States for the COMESA meeting in Kampala. Putting into consideration the shame the nation got due to the paraded scantily dressed group and their supporters, I pray for a deterrent sentence."

In pronouncing sentence, the learned Chief Magistrate stated.

"True, yesterday was a day for awaiting COMESA delegates. Indeed the entourage group was a nuisance on the highway skimpily dancing away on top of a vehicle at loud music while the heads of state and public were using the same highway. It depicted/depicts a high level of moral decadence of the country yet not. The group should have put up their performance at a licenced place but not besides a highway to the general public eye. It was, and is a shame to the nation! The girl's are almost naked! The involved are all young and have better chances to make good use of their time, talents and bodies."

The court then pronounced the sentence, which jolted the person from whom the vehicle had been hired for the troupe. He filed an epistolary complaint hence

these revision proceedings. The D.P.P was invited to be heard on the matter but has not come to court. Secondly, the ten persons who were sentenced to imprisonment have duly served their sentence and have been released from custody on 18.8.2004. (Vide letter from O.C Kigo Prison dated 6/9/2004 in response to a production warrant).

There are generally two or three issues in this matter. Firstly, there is the order of forfeiture of the “offending items” namely the vehicle engine, and the girls’ costumes. The weaves and hair of the women were undone or shaven. The trial court did not however cite the law under which these orders were made though one would imagine they were made under section 202(1) of the Magistrates Court Act Cap 16. The principle of law regarding forfeiture is that it would only be ordered in a limited number of cases and offences. There is no general permission for a court to order goods forfeited to the Republic such that before such order is made it should be explicitly authorized by the law governing the offence in question: **See Munyao Muu Vs R [1957] EA 891.** It is therefore always good practice for a court imposing forfeiture to specify the authority under which it is made. Even where it is discretionary, a court making an order of forfeiture should act judicially and not arbitrarily and give sound reasons to support its order. The purpose of a forfeiture order is normally either to deprive the accused of the fruits of his crime or to remove from his or her possession instruments or materials as would aid in further commission of the offences. And where the article sought to be forfeited belongs to some person other than the accused, that person must be called before the court and be given an opportunity to show cause why an order for forfeiture should not be made. If he is innocent and the object itself is not unlawful (such as a gun, military uniforms coining or counterfeiting items or equipment etc) then it should be restored to him.

In the present case the ten accused persons were, charged under section 167 of the PCA which provides “Any person who –

“‘d’ publicly conducts himself or herself in a manner likely to cause a breach of the peace; shall be deemed an idle and disorderly person and is liable on conviction to imprisonment for three months or to a fine not exceeding three thousand shillings...”

The vehicle or its engine did not belong to the accused persons and indeed no evidence of its ownership was produced in court. The prosecutor did not ask for forfeiture nor the driver or owner of the vehicle neither of whom was before court according to the record. One Enos Kabuye in his complaint dated 2/8/2004 has stated that the vehicle forfeited belongs to him.

From the above I can say that the forfeiture order was not only improper but strange and unprecedented given the nature of the offence with which the accused persons were charged. The order at once fails the test of due process, offends the principle of legality and fair trial and amounts to unlawful deprivation of property of the individual as protected by article 26 of the constitution of Uganda. On the shaving of the heads of the girls dismantling weaves constructed thereon, and burning of their costumes there are a few things that can be said.

Firstly, the offence the accused were charged with provided for the option of a fine. Once this is the case; it serves as an indication that a fine has been envisaged by the legislature as the principal mode of punishment. Imprisonment in view of the crowded prison conditions in the country and the introduction of community service in our justice system, should not be so readily awarded. In this case the very maximum sentence was meted out. The combination of a custodial sentence and a maximum one at that at once sounds harsh, excessive and quite oppressive given that the procession of heads of state of COMESA, with due respect, would not be a special circumstance to warrant it. The girls were enroute to an orderly theatre arts fete and were adorned in the costumes for it. They were in effect not that idle. In essence the act they were engaged of a

victimless nature and being in motion their play was in movement and as such it was transient. In a country where pastoralist communities in the South West and North East of the country and the pygmies dress lightly compared to the suit clad citizens in the city center, the girls were judged rather harshly. Even amongst themselves the women were treated to a harsher sentence than their four male counterparts. Their costumes or covering as well as head covers were wrenched from their bodies and their heads forcibly shaven. Their male counterparts were not similarly affected. This smacked of a discriminatory treatment that also demeaned the girls and assailed their dignity as women amounting to them suffering cruel, degrading treatment and punishment. Article 24 of the constitution provides

“24 No person shall be subjected to any form of torture, cruel inhuman or degrading treatment or punishment.”

This prohibition is the basis for outlawing corporal punishment in ***Uganda. In Hobbs et al Vs The Queen (1993)*** Caribbean Law and Business 32 the Court of Appeal considered whether whipping persons using a Cat – 0’ nine tails was, among other things, degrading. It was held that the test was whether the punishment would humiliate, or debase the prisoner to such an extent as to constitute an assault on his dignity and feelings as a human being. The court also found that in so far as the punishment was not authorized by law as a lawful punishment it contravened article 15(1) of the Barbados constitution which is similar to our article 24. In the present case the order to destroy hair weaves and clothing as well as shaving of the heads of the women in this case was quite uncalled for and constituted an assault on the dignity of the women. One would go further and argue that the differential treatment, which targeted the females and did not affect the males was not only discriminatory but was unfair and not justified. Articles 33 of our constitution accords equal dignity of the person to women as it does to men. Their being subjected to a peculiar punishment thus encroached on their freedom from degrading treatment which is entrenched in article 44(a) of the constitution of Uganda.

I have failed to appreciate the perceived national shame brought about by the women on the occasion of the Comesa summit and I do not think this justified the unprecedented sentence imposed on these people. In the result I would set aside the sentence of three months imprisonment on all the accused persons quash the order impounding the vehicle engine which should forthwith be freed to the possession of its rightful owner. I am unable to reverse the orders to burn the skirts worn by the women or their braids and hair that was shaved off their heads. In *Ramadhan Tendua Vs R Criminal Appeal 166 A – 67 (1970) HCD* 149, Platt J as he then was, experienced a case where maize exhibit in the case had already been disposed of by the police. The learned Judge stated:-

“The applicants substantive rights against the government therefore are the same as if they had suffered damages or loss through a tortious act of any private citizen.”

In the present case, the damage arose in the course of a sentence of court and orders thereof. In terms of section 50 and 51 of the Criminal Procedure Act and section 17(2) of the Judicature Act (Cap 13), the orders are set aside and in place of the custodial sentence, a caution is substituted for each of the ten persons named herein. The vehicle engine is to be released forthwith and handed over to its rightful owner un conditionally. It is so ordered.

**R.O. Okumu Wengi**

**JUDGE**

**7/9/2004.**