THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

CRIMINAL REVISION NO 08 OF 2006

(Originating from the Chief Magistrate's Court of Makindye Case No. TOR 171/ 06)

ASIIMWE GIDEON …….APPLICANT

VERSUS

UGANDA…….RESPONDENT

Before: The Hon. Mr. Justice E. S. Lugayizi

ORDER

This is an Order. It is in respect of an application Messrs Shonubi, Musoke & Company Advocates & Solicitors brought before this Honourable Court, by way of Notice of Motion, under section 50 of the Criminal Procedure Code (Cap. 116) and section 33 of the Judicature Act (Cap. 3). An affidavit the applicant swore on 19th September 2006 accompanied the above application.

In essence, the contents of the application and the affidavit in support thereof sought this Court's order to nullify the trial Magistrate's ruling dated 1st August 2006 in respect of Makindye TOR 171/06.

To understand the above application fully one needs to know the background that gave rise to it. Briefly, that background was as follows:

The State alleged that on 20th June 2006 at around 11.00 a.m the applicant carelessly drove motor vehicle registration No.UAB 484 along Gaba road. As a result, the police arrested the applicant; and took him to a police station. Thereafter, the police released him on a bond. On 28th June 2006 the applicant reported at the police station. This time the police took him to a Magistrate's court at Makindye; and charged him with the offence of careless driving contrary to sections 119 and 46(1) (c) of the Traffic and Road Safety Act (Cap. 361). The applicant denied that offence. Later on, a Magistrate released him on bail; and fixed his case for hearing on 11th July 2006. On 11th July 2006, at the request of his counsel (Mr. Sebuliba) the said Magistrate adjourned the applicant's case to 1st August 2006. When that day came, Mr. Sebuliba raised a preliminary objection. Among other things, he submitted that failure on the part of the police to comply with the procedural requirements of the law in section 159 of the Traffic and Road Safety Act (Cap. 361) before taking the applicant to court rendered the applicant's prosecution in Makindye TOR 171/06 a futile exercise. Therefore, Mr. Sebuliba prayed the Magistrate to dismiss the charge against the applicant. Mr. Ejoku (the DPP's representative) did not agree with Mr. Sebuliba's

submission. In Mr. Ejoku's opinion the police properly brought the applicant to the Magistrate's court; and his prosecution was not a futile exercise. After considering the above submissions the learned trial Magistrate agreed with Mr. Ejoku. She over-ruled Mr. Sebuliba in respect of the preliminary objection; and ordered that the trial of the applicant should proceed. That decision aggrieved the applicant. Therefore, through his advocates (Messrs Shonubi, Musoke & Company Advocates & Solicitors) the applicant made an application to this Honourable Court with a view to obtaining an Order in revision nullifying the learned Magistrate's decision.

At the time of hearing the application Mr. Sebuliba represented the applicant; and Mr. Byansi represented the Director of Public Prosecutions. However I will not reproduce learned counsel's submissions here, for those submissions are substantially the same as the ones the parties herein made before the learned Magistrate on 1st August 2006. Nevertheless, whoever might wish to read those submissions will readily find them on the record of this Honourable Court.

At this juncture, Court wishes point out a few things. Firstly, on a quick reading of the Traffic and Road Safety Act (Cap. 361) it is clear that the offence the applicant allegedly committed falls under Part V1 of the Traffic and Road Safety Act (Cap. 361). For that reason the provisions of section 159 of the above law were a relevant factor in that matter.

Secondly, it is also clear that the record of the Magistrate's court in respect of Makindye TOR 171/06 does not bear any evidence contradicting the applicant's complaint to the effect that the police did not comply with any of the requirements in section 159(1) of the above law. Therefore, in resolving the matter that is before this Honourable Court the all important question to answer is this: Did non-compliance with the procedural requirements in section 159 of the Traffic and Road Safety Act (Cap. 361) render the prosecution of the applicant in respect of the offence in section 119 of the above Act a futile exercise?

In Court's opinion, the answer to the above question is to be found in various sections of the Traffic and Road Safety Act (Cap. 361) and the Magistrates Courts Act (Cap. 16); and its substance lies in whether or not compliance with the procedural requirements in question is mandatory.

The relevant parts of section 159 of the Traffic and Road Safety Act (Cap. 361) read as follows:

"Institution of proceedings"

159. Warning to be given before prosecution.

(1) Where a person is prosecuted for an offence under Part V1 of this Act (excluding the regulations), he or she shall not be convicted unless -

(a) he or she was warned in writing at the time the offence was committed that the question of prosecuting him or her for an offence under Part V1 of this Act would be considered;

(b) within twenty-eight days after the commission of the offence, a summons for the

offence was served on him or her; or

(c) within twenty-eight days after a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on him or her or sent by registered post to him or her or the person registered as the owner of the motor vehicle, … at the time of the commission of the offence.

(2) Notwithstanding anything in subsection (1) –

(a) failure to comply with a requirement of subsection (1) shall not be a bar to the conviction of the accused in any case where the court is satisfied that –

(i) neither the name and address of the accused nor the name and address of the registered owner of the motor vehicle, …could, with reasonable diligence, have been ascertained in time for a summons to be served or for a notice to be served or sent under that subsection; or

(ii) the accused by his or her own conduct contributed to the failure; and

(b) the requirements of this section shall, in every case, be presumed to have been complied with until the contrary is proved."

Despite creating exceptions and, in a way, shifting the burden on the accused in subsection (2) the general tone of section 159 of the Traffic and Road Safety Act (Cap. 361) gives the impression that the procedural requirements laid out in that law could be mandatory. This is particularly so when it comes to light that subsection (1) of the above section uses the word ***"shall",*** which ordinarily has a mandatory import.

However, the foregoing is not all there is to consider before making a final decision in this matter. Section 161 of the Traffic and Road Safety Act (Cap. 361) is also important to keep in mind. It provides as follows:

"161. Institution of traffic proceedings.

(1) Traffic proceedings may be instituted -

(a) *in the manner provided by the Magistrates Courts Act; or*

(b) …"

Following the above to its logical conclusion section 42(1) of the Magistrates Courts Act (Cap. 16) provides that criminal proceedings may be instituted where a police officer brings a person he or she has arrested, with or without a warrant, before a Magistrate upon a charge.

Indeed, the charge referred to above means any charge (traffic or otherwise). Consequently, where the above happens the Magistrate before whom such person is brought has power to hear and determine the case in question; and no one would, lawfully, be able to raise a query against the procedure used in bringing such person to the Magistrate for trial.

All in all, the above boils down to this: The procedural requirements in section 159 of the Traffic and Road Safety Act (Cap. 361) are not mandatory. Their purpose is simply to high-light the ideal standard. In turn, that means there is no conflict between section 159 of the Traffic and Road Safety Act (Cap. 361) (as a specific law) and section 42 (1) of the Magistrates Courts Act (Cap. 16)) (as a general law) that would justify the need to invoke the rule of statutory interpretation Mr. Sebuliba referred to in his submissions in the lower court and in this Court. After all, the application of section 42 (1) of the Magistrates Courts Act (Cap. 16) enters the above scenario, not on its own initiative, but at the behest of section 161 of the Traffic and Road Safety Act (Cap. 361).

From the foregoing it follows that non-compliance with the requirements of section 159 of the Traffic and Road Safety Act (Cap. 361) did not render the prosecution of the applicant in respect of the offence in question a futile exercise. In any case, the applicant did not even allege that the said default on the part of the police would later on prejudice him in his defence!

In conclusion Court has no choice, but to dismiss the application herein; and it is hereby ordered so.

The Deputy Registrar Crime is hereby requested to return to Makindye Magistrate's Court the record of Makindye TOR 171/06 as soon as possible so that the trial of the applicant should continue.

E. S. Lugayizi (J)
15/5/2008

Read before: At

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15/ 5/2008