

**THE REPUBLIC OF UGANDA**  
**IN THE CHIEF MAGISTRATE’S COURT OF GULU**  
**HOLDEN AT GULU**  
**CRIMINAL CASE NO. – 00 – 083/2003**

**REPUBLIC OF UGANDA:.....PROSECUTION**

**VERSUS**

**OPOKA PYENLYCE DAVID NICHOLAS:.....ACCUSED**

**BEFORE HIS LORDSHIP, HON. JUSTICE REMMY K. KASULE**

**RULING**

This Ruling relates to the Chief Magistrate’s Court of Gulu Criminal Case Number 83 of 2003.

The accused in the case is a MR. OPOKA PYENLYCE DAVID NICHOLAS, now aged 67 years, a businessman of plot 4 Andrea Olal Road, Gulu Municipality.

The charge against the accused is Treason contrary to section 25(1) of the Penal Code Act.

The particulars of the charge are that the accused, being a Ugandan, during the period of November 2002 up to the day he was charged i.e. 13<sup>th</sup> February, 2003, at diverse places in Gulu District, levied war against the Republic of Uganda.

The accused first appeared in the Magistrate’s Court, Gulu, on 17<sup>th</sup> February 2003, when the charge was read to him. He denied the charge. This was six (6) years ago to date.

Thereafter the accused was remanded into prison. He was later released on bail.

Accused has, however, for six (6) years now, continued to report to court on the average of twice a month in answer to his bail conditions and also to be informed of the progress of the investigations in the case.

For six (6) years to date, the investigations are still on going and the accused has not been committed for trial by the High Court. The charge of Treason against him has also not been withdrawn. The main minute appearing on the court record of the Magistrate's Court, every time the accused reports to court is " A.B.E" that is: "Accused's Bail Extended"

On 30<sup>th</sup> January, 2009, the Magistrate Grade II, His Worship Mike Okonye, seeing the state of affairs of the prosecution of this case decided to forward the case file to the High Court for directions and/or possible further action.

On the same day of forwarding the file the High Court directed that the court file be placed before the Judge on 2<sup>nd</sup> March, 2009 at 9.00 a.m., and it was further directed that the accused and the Resident State Attorney, Gulu, representing the Director of Public Prosecutions, be served with that date, to appear before the Judge, so that court is addressed as to the state of the investigations and prosecution of the accused. Service was duly effected upon both.

On 2<sup>nd</sup> March, 2009, the accused appeared before the Judge in person. No one turned up from the office of the Resident State Attorney, Gulu.

The accused in his address to court, submitted that he was being oppressed by reporting to court constantly in respect of a heinous crime of which he was totally innocent. He had suffered as a result of the charge hanging on his head, was spending money to come to court and had been disabled to carry on his duties as a cultural leader amongst his people. As he could not effectively work, he was unable to support his children at school. The children's education had thus been jeopardized.

Accused concluded by praying court to dismiss the charge against him as there was no iota of evidence to support the same. If any evidence was there, the same would have been produced during the last six (6) years, or so, since he was last charged.

As already pointed out, this court did not have the benefit of any response from the Director of Public Prosecutions.

The power to institute, prosecute and/or discontinue before judgment is delivered, criminal proceedings is constitutionally vested in the Director of Public Prosecutions: See Article 120 (3)(b) (c) and (d) of the constitution. Even where the law allows for private criminal prosecutions, the Director of Public Prosecutions, under the powers already stated, may take over such private prosecution.

In carrying out the powers vested in the office, the Director of Public Prosecutions is not to be subjected to any direction or control by any person or authority: see Article 120 (6) of the Constitution.

In the case under consideration, it is obvious that it is the Director of Public Prosecutions who is responsible for the prosecution of the accused person.

For six years, the Director of Public Prosecutions has not been able to inform court whether the accused is to be committed for trial by the High Court, or whether there is no evidence against the accused and therefore the charge ought to be withdrawn. When summoned to appear before this court, to address court on the progress of prosecution of the case, no response and no attendance has been forthcoming from the Director of Public Prosecutions. Yet the accused is, in obedience to court, continuing to attend court, otherwise, he suffers to be arrested, his bail cancelled and be kept in prison on remand.

The above being the state of affairs of this case, this court has come to the conclusion, that the proceedings against the accused person have resulted into an abuse of court process, have caused oppression and prejudice to the accused.

This court cannot remain helpless in such a situation as the one of this case. It has to interfere to stop the wrong and administer justice to the accused.

Court finds authority for the above in Article 139 of the Constitution, which is also the foundation of Section 14 of the Judicature Act, which provides:

***“ 14(1) The High Court shall, subject to the constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the constitution or this Act or any other law.***

***(2) Subject to the Constitution and this Act, the jurisdiction of the High Court shall be exercised***

***(a) .....***

***(b) .....***

***(c) where no express law or rule is applicable to any matter in issue before the High Court, in conformity with the principles of Justice, equity and good conscience”***

Further, apart from the constitutional and Judicature Act statutory provisions, it is a common Law principle that, this court, is vested with a general and inherent power to protect its process from abuse. This power, of necessity, includes the power to safeguard an accused person from oppression or prejudice: see: **CONNELLY V DPP (1964) 2 ALL E.R. 401**, a House of Lords decision where at P.438 Para C Lord Devlin stated:-

***“ My Lords, in my opinion, the Judges of the High Court have in their inherent jurisdiction, both in Civil and Criminal matters, powers (subject of course to any statutory Rules) to make and enforce rules of practice in order to ensure that the court’s process is used fairly and conveniently by both sides.***

.....  
.....  
*First, a general power, taking various specific forms, to prevent unfairness to the accused has always been a part of the English Criminal law .....” and at P.442 Para H the same His Lordship continues:-*

*“Now that it emerges, it is seen to be one of great constitutional importance. Are the courts to rely on the executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused.”*

The above power, however, must be sparingly exercised by court: **see R. v. TELFORD j.j. exp. Badhan (1991) 2 Q.B. 78**

On the basis of the above principles, this court notes the fact that the accused has since 17.02.2003, the day he took his plea, to date, been attending court at least twice a month. The state has not indicated one way or the other the progress of the investigations against the accused. The accused has not been committed for trial by the High Court. The Resident State Attorney, representing the Director of Public Prosecutions never responded to summons to attend this court so as to appraise this court of the state of the prosecution of the case. The accused has suffered and still continues to suffer from the fact that a heinous crime of treason hangs on his head.

He is not able, by reason thereof, to carry out his responsibilities as a family person, a parent, a senior citizen, and a cultural leader.

This court, on considering the above facts and the law, has come to the conclusion that the criminal proceedings against the accused in Criminal Case No. A 083/03 have been used as an abuse of court process against the accused. The accused, has, as a consequence of that abuse, been oppressed and prejudiced.

Accordingly in order to stop that abuse of process, and so as to protect the accused from being further oppressed and prejudiced, this court in the exercise of statutory and its inherent power, dismisses the charge of Treason against the accused person. Henceforth the accused is to be a free person and is not to continue attending court in respect of the dismissed charge.

Remmy K. Kasule

Judge

6<sup>th</sup> March, 2009