

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KOLOLO
HCT-00-AC-SC-0070 OF 2012

UGANDA ::: PROSECUTOR

VERSUS

GURINDWA PAUL TUMUSIIME AND 5 OTHERS ::::::::::::::::::::::::::::::ACCUSED

RULING

This ruling is in respect of a request to Court by Counsel for the accused persons to refer three questions to the Constitutional Court.

The questions are as follows;

1. Whether the trial of A1 under section 203(b) and (e) of the East African Community Customs Management Act of 2004 revised 2009 contravenes Article 28(3) and Article 44 of the 1995 Constitution as Amended.
2. Whether Article 28(4)(a) of the 1995 Constitution has the effect of permitting and or legalizing the provisions of section 223(a) of the East African Community Customs Management Act.
3. Whether in light of the provisions of section 253 of the East African Community Customs Management Act, the Act takes precedence over the provisions of Article 28 of the Constitution of Uganda.

Section 203 of East African Community Customs Management Act refers to factual issues like false or incorrect entries, false declarations, refusal to answer questions, false claim, evasion of payment, interference with goods subject to customs control being in possession blank or incomplete invoices and counterfeits.

Section 203(b) and (e) specifically provides as follows

203 “A person who in any matter relating to the Customs

(b) Makes or causes to be made any declaration, Certificate, application or other document, which is false or in any particular and

(e) In anyway is knowingly concerned in any fraudulent evasion of the payment of any duty commits an offence.

Section 203(a) of the East African Community Customs Management Act places the burden of proof in respect of 203(a) and (e) upon the tax payer as follows

“In any proceedings under this Act

The onus of proving the place of origin of any goods, or payment of the proper duties, or the lawful importation, landing,removal,convegance,exportation carriage coast-wise and transfer of any goods shall be on the person prosecuted or claiming anything seized under this Act;

The fore going according to Counsel for the accused offends Article 28(3)(a) in that it interferes with the tax payers presumption of innocence. The Article provides that

28(3) Every person who is charged with a criminal offence shall

(a) Be presumed to be innocent until proved guilty or until that person has pleaded guilty.

Counsel for the accused thus submitted that Article 203 of the East African Community Customs Management Act was inconsistent with Article 28(3) (a). He buttressed his argument with Article 44 of the Constitution which placed “the right to fair trial” in the non- derogatable class of rights.

Article 28(4) (a) provides that

“Nothing done under the authority of any law shall be held to be inconsistent with

(a) Clause (3)(a) of this Article, to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;

He submitted that the relief given in the foregoing Article 28(4)(a) was only applicable to simple factual issues that did not amount to ingredients to tax evasion like those in section 203 of the East African Community Customs Management Act. And that since there was conflict between 203 East African Community Customs Management Act and Article 28(3) (a) of the Constitution, the accused had made out a premafacie case which required an interpretation by the Constitutional Court.

Counsel for the Prosecution in reply submitted that there was no direct relationship between section 203(b) (e) and section 223 of the East African Community Customs Management Act. She said the only relationship on the charge was on the burden of proof being placed upon the tax payer by section 223 in respect of matters provided for under 203(b) and (e) of the East African Community Customs Management Act. She justified that position by saying that it was necessary to place the burden of proof on the tax payer because of the nature of the offence which makes it difficult for the Prosecution to prove or disprove the same citing other Countries like Australia Counsel for the Prosecution submitted that the shifting of burden of proof onto the taxpayer was something that existed in many parts of the world.

Before considering the constitutionality or non-constitutionality of section 223 of the East African Community Customs Management Act it's imperative to look at how placing of burden of proof upon the tax payer operates.

It is important in tax cases to distinguish between questions of Law and fact because the decision of the tax Commissioner as to the facts is conclusive.

The Tax Authority Commissioner must in each case set out the primary facts as found and the conclusion arrived at from the facts.

Primary facts in this case are those facts “observed by witnesses and proved by oral testimony or facts proved by the production of a thing itself, such as original document. Their determination is a question of fact and the only question of Law that can arise on them is whether there was any evidence to support the findings “**British Launderes’ Research Association vs. Borough of Hendon Rating Authority (1949)1 KB 462.**

In a tax court, the tax payer has the burden of proof to show that he does not owe the tax money. The tax authority claims he bears the burden of proof in factual matters. This is certainly a daunting burden because it departs from what is normally expected of the accused during a trial.

The relief of the tax payer however is that he will only be required to defend himself against what the tax authorities charges specifically reveal. Anything outside those charges or any increase in demand during the hearing shifts the burden of proof onto the tax authority to the extent of that new matter.

New matters here would be those that did not appear in the earlier deficiency to the tax payer.

Therefore the notification “that the tax authority lodges by virtue of section 223 of the East African Community Customs Management Act describing the deficiency in the Court is accorded a presumption of correctness and places the burden on the tax payer. It is this presumption of correctness “that has led to a lot of confusion because as earlier said in normal criminal matters such burden would be on the complainant with the exception of those affected by section 103 of the Evidence Act.

The position that the tax authorities allegation assumes is that of a prima facie case which automatically calls for rebuttal from the tax payer.

The rationale of the shift to the tax payer of both the burden of production and burden of persuasion is because it’s the tax payer with the records and other evidence of its or his activities. This means that if the tax authority was to bear burden of producing the

evidence, it would first have to obtain most of it from the tax payer, which would create unfairness in the trial. It is this shift of burden that Counsel for the accused feels is unconstitutional.

Article 28 of the Uganda Constitution provides for the Right to a Fair Trial. Article 28(3)a demands for the presumption of innocence before and during trial. The tax payer in this case is not found guilty at plea unless he so pleads. The shift of burden is therefore not a declaration of guilt. It does not therefore do away with the presumption of innocence. It simply puts the two parties at an equal footing when it requires the one with the documents and other evidence of activities to produce them. It's this fairness in a trial that Article 28(4) promotes in its provision that;

“Nothing done under the authority of any Law shall be held to be inconsistent with clause (3)(a) of this Article, to the extent that the Law in question imposes upon any person charged with a criminal offence, the burden of proving particular facts”.

Without the foregoing provision there would be unfairness when dealing with factual matters under section 223 of the East African Community Customs Management Act. The exception in Article 28(4) is simply to bring to fruition, the right to a fair hearing envisaged under Article 28 as a whole.

Article 28(4) therefore recognizes the fact that fair trial is not a reserve for the accused. It applies to the complainant as well as the accused. It shives to have a level formed for both parties.

Counsel for the accused also submitted that Article 28(4) (a) applied only to simple factual issues and that going beyond, would be a breach of Article 44 which frowns at derogation of any rights to a fair trial.

As explained above there was no breach of Article 28(3) on presumption of innocence and it follows that article 28(4)(a) on shifting the burden of proof rightfully

accommodates section 223 of the East African Community Customs Management Act which saddles the tax payer with the burden of proof in the matters.

Lastly Counsel for the accused referred to section 253 of the East African Community Customs Management Act and submitted that it contravenes the supremacy of the Constitution as provided for in Article 2(1). The Article provides;

This Constitution is the Supreme Law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

It further provides in 2(2) that where any other Law or any custom is inconsistent with any of its provisions the Constitution shall prevail over that other Law or custom to the extent of the inconsistency.

The section 253 of the East African Community Customs Management Act provides for precedence over the Partner States Laws with respect to any matter to which its provisions relate. The Act here is in respect to tax matters and in my opinion referred to Laws governing tax in the Partner States. In any case if there is any conflict in the few articles of the Constitution that provide for policy making in matters of taxation as provided in articles 191 and 192 of the Constitution, the answer is provided in Article 2(2) of the Constitution. The sum total is that Counsel for the accused has not made out a prima facie case of the alleged violation of the Constitution to warrant this matter to be referred to the Constitutional Court for interpretation, **Atugonza Francis vs. Attorney General, 31 of 2010.**

The request by Counsel for the accused persons is therefore not granted.

HON.JUSTICE.D.K.WANGUTUSI
JUSTICE OF THE HIGH COURT
15th /08/2012

