**THE REPUBLIC OF UGANDA**

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

**HIGH COURT CRIMINAL SESSION CASE NO 0085 OF 2010**

**UGANDA……………………………………………………………………..PROSECUTOR**

**VS**

**ROBERT SEKABIRA& 10 OTHERS…………………………………………..ACCUSED**

**BEFORE: THE HONOURABLE MR. JUSTICE RALPH W. OCHAN**

**RULING**

Of the original 24 persons charged with the offence of terrorism, contrary to section 7(1) (b) and 7(2) (c) of the Anti-Terrorism Act,2002 (A7A), the state withdrew the charge against one Paul Luzikala. One Joseph Katamba was dropped at the commitment stage. Later the case was discontinued against eleven accused persons. They proceeded against eleven of the accused persons:

1. ROBERT SEKABIRA-A1
2. MUSA SENGEDO alias KAKONO-A2
3. NSUBUGA KAMADA-A3
4. LWANGA HAKIM-A4
5. KIJJAMBU RICHARD-A5
6. SAM SSEMSMBO-A6
7. MUGISHA MUZAFARU-A7
8. MAGOBA SALIM-A10
9. MUJUNI ELISA-A11
10. SEKATAWA MOHAMED-A12
11. NSUBUGA MEDDIE-A13

To prove that case against the remaining eleven accused persons, prosecution adduced evidence from the following eleven witnesses:-

1. PW1 – D/ASP Okurut Vincent
2. PW2 – ASP LEUBEN WASIIMA
3. PW3 – D/ASP ROSE NABAKOOZA
4. PW4 – D/C APOLLO MUGABI
5. PW5 – CPL MUHAIRWE BOAZ
6. PW6 – SPC Dumba Meddie
7. PW7 – W/SGT LOY NAMBOZO
8. PW8 – DCPL/ MUKHOLI EDWARD
9. PW9 – D/C JOSEPH OTIM
10. PW10 – S/SGT ISAAC NAMWANZA
11. PW11 – D/C OKELLO JOHN STEPHEN

At the close of the prosecution case, the Defence team hitherto led by Counsel Medard Ssegona was joined by counsel Apollo Makubya, learned Attorney General for the kingdom of Buganda. Court was informed he was duly instructed (on private brief) to join the defence team. Mr. Makubya took the floor and prayed that before his team submits on a “no case to answer”, there were 3 points of law he wanted to raise which in his view would dispose of the case even before the “no case to answer” submission is made. The team tendered a written submission in two parts: (a) the points of law which Mr. Makubya presented in summary and (b) the substantive no case to answer submission later argued by Mr. Ssegona.

**The 3 points of law are:**

1. **VIOLATION OF THE FUNDAMENTAL HUMAN RIGHTS:-**

Mr. Makubya submitted that the state was in violation of Article 23(4) of the Constitution. The accused persons in the dock were arrested between 10th and 15th September 2009, eleven clear days way beyond the crime prescribed under Article 23(4) of the Constitution of Uganda, which provides as follows:-

**A person arrested or detained-**

1. **For the purpose of bringing him or her before the court in execution of an order of the court; or**
2. **Upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under the laws of Uganda,**

**Shall, if not earlier released, be brought to court as soon as possible but in any case not later than forty eight hours from the time of his or her arrest.**

Their detention, in the event, amounted to false imprisonment.

Secondly, counsel submitted that the unlawful detention of the accused persons and the entire investigations was tainted with gross violation of the accused persons’ right to a fair hearing as enshrined in Articles 28 and 44 of the Constitution.

Article 28(1) provides:

**In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to fair, speedy and public hearing before an independent, court or tribunal established by the law.**

**Article 44(c)** provides for the non derogation from the enjoyment of the right to a fair hearing.

Counsel Makubya submitted on this point that the numerous incidents on court record of illegalities and violations in the investigation and prosecution in this case would give rise to a miscarriage of justice. He gave instances, documented on Court record as follows:

* Destruction of evidence by police officials’ c/s 102 of the Penal Code Act.
* Forgery of official records relating to exhibits and fabrication of evidence by police officials C/ss. 99 and the Penal Code Act.
* Making false documents C/s 345 (d) of the Penal Code Act.
* Unlawful investigations by police officials C/s 17 of the ATA;
* Perjury by police officials C/s 94 of the Penal Code Act.

In addition to the above violations, the inordinate delay of over 2 ½ years before bringing the accused persons to trial violated their human right to speedy trial under **Article 28 (1) of the Constitution.**

Counsel finally submitted on this first point of law, that the violation of the Constitutional rights of the accused persons renders their prosecution a nullity and entitles them to compensation in accordance with Article 23(7) of the Constitution.

The Constitutional Court of Uganda has pronounced that a trial tainted by human rights violations and illegalities is a nullity and the accused persons under such a trial must be set free.

*In the case of* ***Dr. Kiiza Besigye & Others vs. The A G, Constitutional petition No. 07 of 2007****. The Constitutional Court of Uganda has stated thus:-*

***This Court cannot sanction any continued prosecution of the petitioners where during the proceedings, the human rights of the petitioners has been violated to the extent described above. No matter how strong the evidence against them may be, no fair trial can be achieved at any subsequent trial would be a waste of time and an abuse of Court process. There is dicta and holdings from cases in the Republic of Kenya and the United Kingdom which provide persuasive guidance to this Court in determining whether it has power to issue such an order and when such an order may be issued. In case of Albanus Mwasia Mutua Vs. Republic of (Kenya) Criminal Appeal no. 120 of 2004* the Court of Appeal of Kenya held:**

***“At the end of the day it is the Courts to enforce the provisions of the Constitution otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the case we have cited in the judgment appears to be that an unexplained violation of a Constitution right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of******the change”***

*In* ***Republic Vs. Amos Karuga Karatu (Kenya) High Court Cr. Case No. 12 of 2006*** *the Court per Makhandia, J categorically stated:*

***“The time is near for the Judiciary to rise to the occasion and reclaim its mantle by scrupulously applying the law that seeks to secure, enhance and protect the fundamental rights and freedoms of an accused person. A prosecution mounted in breach of the law is a violation of the rights of the accused and is therefore a nullity. It matters not the nature of the violation… it matters not the evidence available against him is overwhelming. As long as (there is violation of the rights of the accused person) the prosecution remains a nullity.”***

*This call is very relevant to Courts in Uganda because in the process of producing and presenting suspects in our Courts, the police and the prosecution do violate numerous constitutional rights of accused persons, yet even where such violations are brought to the notice of Courts, the prosecution go ahead as if nothing as if nothing has gone a miss. We think it is high time the judiciary reclaimed its mantle and apply the law to protect fundamental rights and freedoms our people as the constitutional requires.*

*The British authorities on this matter are also extremely instructive. In* ***Lord Griffiths in R vs.******Horseferry Road Magistrates Ex parte Bennet (1994) 1 A. C. 42*** *the Lords stated:*

***“….the judiciary accepts responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule of law… (Authorities in the field of administrative law contend) that is the function of the High Court to ensure that the executive action is exercised responsibly and as parliament intended. So also it should be in the field of criminal law and if it comes to the attention of the Court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it…. The Courts, of course, have no power to apply direct discipline to the******police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power regarding their behavior as an abuse of process and thus preventing a prosecution”***

*These authorities are not binding on Uganda Court but they are highly persuasive. The situation their Lordships were dealing with in Kenya and Britain is very similar to the situation we are dealing with in this petition. We cannot stand by and watch prosecutions mounted and conducted in the midst of such flagrant, egregious and mala fide violations of the constitution and must act to protect the constitutional rights of the petitioners in particular and the citizens of Uganda in general as well as the rule of law in Uganda by ordering all the tainted proceedings against the petitioners to stop forthwith and directing the respective Courts to discharge the petitioners.*

*The proceedings in the First and Second Court Martial were declared null, and void by the Supreme Court. The proceedings of the treason trial, the Arua and Bushenyi murder charges are equally null and void.*

Counsel Mr. Makubya submitted that this Court is faced with circumstances similar to those in the Kiiza Besigye case above. It is apparent that the state has not learnt from the decision of the Constitutional Court. It has continued in its ways. This court cannot and should not condone that behavior. It cannot allow aprosecution of the accused persons based on the gross violations of their constitutional rights to liberty as well a fair and speedy trial. This court cannot support impunity or actions that undermine the rule of law. He invited this court to send a strong and clear signal to all concerned that court will not tolerate the violation of fundamental rights guaranteed in the constitution. That signal should be sent by acquitting the accused persons.

Principal State Attorney Wagona also tendered written submissions which he orally summarized in this Court. Mr. Wagona conceded that there was a breach of the Constitution in so far as the accused were held in police custody for more than 48 hours. They were in fact in police custody for 11 days being charged with the offence of terrorism. He however invited Court to take into account the events of the time: this case involved over 24 suspects and the accused were not arrested at the same time. They were in fact arrested between 11th and 15 September 2009. Counsel Wagona submitted that the police force must have been over stretched when one considers that the riots were going on in different places around Kampala and a large number of suspects were arrested in connection with the riots. Prosecution further submitted that the state was committed to a speedy trial as evidenced by the defence Exhibit 9. When the trial commenced, the prosecution demonstrated its commitment to a speedy trial by the expeditious disclosure of all evidence in their possession relating to the case, to the defence team. The state was ready for trial within 5 months of the accused persons’ first appearance in Court. There was no derogation on the part of the prosecution regarding the right to fair hearing. Counsel submitted that although D/C Okello John Stephen admitted to signing on the exhibit slips in place of others who should have done it, that act, in his opinion was not evidence of the falsity of the contents of that document. Finally, Counsel Wagona submitted that the trial is not tainted by Constitutional and human rights violations, forgeries, uttering false document and perjury to the extent of rendering the prosecution a nullity. (No authorities were referred to either in the written submission or in the oral presentation of the case for the prosecution on this first point of law). 13 authorities were however filed and incorporated in the prosecution’s written submission. The key point to note here is that the prosecution conceded that there were violations of Articles **28(1) and 44(c)** of the Constitution, in so far as the accused persons were unlawfully detained beyond the 48 hour limitations, before being charged in Court of law. Mr. Wagona simply invited court to take into account the circumstances that led to the violation of the Constitution.

The question is: is there any authority, statutory or case based that grants this Court power to excuse a breach of any provisions of the Constitution, an entrenched provision, at that. Certainly Mr. Wagona provided none. He left that burden to Court to resolve. The task is simple and straight forward. I am bound by the authority of the Constitutional Court that was brilliantly articulated by their Lordships in the **Constitutional Petition No. 7 of 2007, Dr. Kiiza Besigye Vs**. AG. which was extensively quoted and relied on by the defence.

For purposes of further clarity, the Constitutional Court stated the law in these words:

***“This Court cannot sanction any continued prosecution of the petitioners where during the proceedings the human rights of the petitioners have been violated to the extent described above. No matter how strong the evidence against them may be, no fair trial can be achieved and subsequent trial would be a waste of time and an abuse of court process”.***

The Courts of Uganda have not been unmindful of duty to guard the Constitution from violation by agents of the state. In the of **U Vs KALAWUDIO WAMALA CRIMINAL SESSION CASE** **NO 442** at the High Court at Masaka, the accused Kalawudio Wamala was taken into Police custody on 13th September 1994, long after 48 hours since his arrest. Egonda Ntende J, had this to say.

***“The Constitution has set a new threshold for all organs and agencies of government and persons, including men and women serving in those organs and agencies. It positively commands all agencies and organs of government to respect uphold and promote the fundamental rights and freedoms set forth in the Constitution. This imports, in my view that each officer is beholden, in carrying on his duties, to respect, or uphold and promote those rights and freedoms. Where an officer of an organ or agency of government fails to respect or uphold or promote the rights and freedoms set forth in Bill of rights (chapter 4) such officer and consequently the organ or openly he/she belongs to is in breach of Article 20(2) of Constitution…..”***

It is clear from the above quote that the High Court before the recent Constitution Petition **No. 7** ***of 2007,*** was already very much in the forefront in guarding those human rights and freedoms enshrined and entrenched in our Constitution. On authorities on record we have no hesitation in sustaining the first point of law raised by the defence. There is concession by the state on record of long illegal detention of accused persons beyond the constitutionally prescribed period of 48 hours. To that end I hold that the state was in violation of Article 23(4) of the Constitution. Ialso find that 2 ½ years in an inordinate delay.

I cannot accept the half letter by the DPP to the Deputy Registrar dated 28/7/2010 by which he requested the Deputy Registrar to “fix this case for hearing at next session of the High Court”. There are several Deputy Registrars in High Court. Which one of them was this letter addressed to? I find that the inordinate delay violated Articles 28(1) and 44(c) of the Constitution. Iam reinforced by in this finding by numerous instances of blatant illegalities and violations of the law, substantive as procedures in the investigation and prosecution of this case that would, if allowed to stand, give rise to grave miscarriage of justice.

1. **DEFECTIVE CHARGE UNDER S7 (1) (b) and S7 (2) (C) of the ANTI TERRORISM ACT, 2002;-**

On this second point of law, Counsel Makubya submitted that the charge under **section 7 (1) (b)** and 7 (2) is void for vagueness. Article **28 (7)** of the Constitution provides, inter alia, as follows:

***“28 (7): No person shall be charged with or convicted of a criminal offence which is found on an act or omission that did not at the time it took constitution a criminal offence”***

Counsel Makubya submitted that S7 (2) (c) of the ATA, 2002 does not clearly define that that constitutes the offence of terrorism. Counsel further submitted that the rules of statutory interpretation require that legislation must be interpreted based on the plain meaning of words or phrases used in the law. In his view, the current selection does not make sense. It does not define the “person” that should be the subject of the murder, kidnapping, maiming or attack, whether actual, attempted or threatened. This Counsel submitted, is unlike S7 (2) (b) that provides that a person commits an act of terrorism who, carries out the acts in outlined above against a person or groups of persons in public or private institutions. For S7 (2) (c) to make sense, the word “or’ that appears before the words “diplomatic agents” should read “of” Counsel submitted that as it is presently written, S7 (2) (c) of the ATA 2002 is vague, obscure, ambiguous and when read in the context of the rest of the section, it is capable of being understood in two or more ways. It is not definite.

Counsel undertook a comparison with laws in other jurisdictions:

Art. 2 of the Convention on the prevention and punishment of Crimes against Internationally protected persons, including Diplomatic Agents provides that the intentional commission of (a) A murder, kidnapping or other attack upon the person or liberty of an internationally protected person (B) A violent attack upon the official premises, the private accommodation or the means of transport an internationally protected person likely to endanger his person or liberty constitutes a crime.

S.8 of the protection of Constitutional Democracy against Terrorist and Related Activities Act of South Africa provides for offences relating to causing harm to internationally protected persons. It states that “Any persons who, knowing that a person is an internationally protected person, internationally (a) murders or kidnaps or otherwise violently attacks a person upon the official premises, the private accommodation or the means of transport of that person, which attack is likely to endanger his or her person or liberty, is guilty of an offence relating to causing harm to an internationally protected person.

* **In the United States of America – Section 112 of No. 18 U.S.C and 112 offers protection of foreign official guest, and internationally protected persons. It states that (a) whoever assaults, strikes wounds, imprisons, or offers violence to a foreign official, official guest, or internationally protected person or makes any other violent liberty of such a person, or, likely to endanger his person or liberty, makes a violent attack upon his official premises, private accommodation, or means of transport or attempts to commit any of the foregoing shall be fined under this title or imprisoned not more than three years, or both.**

The void for vagueness doctrine: Void for vagueness is a legal concept in America Constitutional Law that states that a given statute is void and unenforceable if it is too vague for the average citizen to understand. There are several ways, senses or reasons a statute might be considered vague. In general, a statute might be called void for vagueness reasons when an average citizen cannot generally determine what persons are regulated, what conduct is prohibited, or what punishment may be imposed.

In the case of vagueness, a statute might be considered void on constitutional grounds. American courts have generally determined that the vague laws deprive citizens of their rights without fair process. In Connally vs. General Constitution Co., 269 U.S. 385(1926) Justice Sutherland stated that:

***“The terms of a penal statute […] must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties… and a statute which either forbids or requires the doing of an act in terms of vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”***

In Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) quoted in village of Hooffman Estates vs. The Flipside, 445 U.S 489, 498 (1982) the American Courts held that

***“Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must explicit standards of those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.”***

The void for vagueness doctrine is applicable under English Law. In **Black-Clawson International LTD vs. Papierwerke Waldhof-Aschaffenburg Ag [1975] AC 591** Lord Diplock states that;

***“The acceptance of the rule of law as a constitutional principle requires that the citizen, before committing himself to any course of action, should be able to know in advance what the legal consequences that will follow from it. Where those consequences are regulated by a statute says. In constructing it the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates”.***

Counsel Makubya submitted in the end, that the void for vagueness doctrine is encapsulated in Article 28 (7) and (12) of the Constitution of the Republic of Uganda, which as earlier quoted, provides that no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by the law. He accordingly invited this Court to find that by charging the accused persons under S 7(2) (C) of the ATA, the state offended Article 28(7) of the Constitution. This is because at the time the accused persons were charged, S 7(2) (c) of the ATA was indeterminate and did not constitute a definite act for the offence of terrorism. This rendered the prosecution a nullity.

Counsel Vincent Wagona for the state submitted as follows:

On the submission by the defence that sections 7 (1) (b) and 7 (2) (c) under which the accused persons were charged is defective and offended Article 28 (7) of the Constitution, Mr. Wagona invited Court to reject that submission on the ground that it has been be raised too late, when the prosecution had already closed its case. He relied on Section 50 (1) of the Trial on Indictment Act. Further Counsel invited Court to be alive to Article 126 (2) (c) of the Constitution which provides for substantive justice taking precedence over technicalities. He submitted that in this case, the interest of justice enjoins court to consider ordering an appropriate amendment rather than declaring the trial a nullity or acquitting the accused on the ground that the indictment is defective.

Secondly, on the defence submission that the indictment was an omnibus indictment that did not disclose which of the accused persons did what in regard to alleged act of terrorism, Counsel Wagona saw nothing saw nothing wrong with the indictment as presented. He submitted that the law allows for a joinder of persons in the same charge for committing the same offence in the course of the same transaction. Further, the indictment should be read together with the summary of the case. Further, details are in the witness statements all of which were disclosed to the defence. Any lack of clarity in the indictment alone, is cured by the summary of the case and the disclosed witness statements. Everything was done, Counsel concluded, to enable the accused persons know with exactness what they are alleged to have done.

Thirdly, Counsel Wagona submitted that sections 7 (1) (b) and 7(2) (c) are not vague or indeterminate. He further submitted that there is no requirement that countries have exactly similar laws on the same subject or that a country’s law should be exactly similar to a provision in an international convention that it seek to domesticate. The convention cited by the defence (Annexture 2) relates specifically to the prevention and punishment of crime against internationally protected persons, including diplomatic agents. The South African law cited by the defence (Annexture 3) relates specifically to offences against internationally protected persons. Further the USA law also relates to protection of foreign officials, official guests and internationally protected persons. On the other hand, Counsel submitted, section 7 of Uganda’s ATA applies to the offence of terrorism generally and seeks to provide for a number of acts of terrorism.

Furthermore, subsection 7(2) (c) should not be singled out for interpretation. Rather, it should be read in its entity in as far as it also relates to the influencing the Government or intimidating the public or a section of the public. Counsel submitted that the legislature intended our section 7 (1) (b) and 2(c) of the ATA to be the way it is. Whereas Section 7 (1) (b) was meant to be limited to acts relating to persons, Section 7(2)(c) was meant to extend beyond persons to include premises, means of transport and to cover internationally protected persons. Counsel reiterated that Section 7 (1) (b) and 2(c) of the ATA was meant to be the way it is.

I have carefully considered the submissions of both Counsels. I have also perused over sub section 7 (2) (c). I find that the submission of counsel for the defence, supported by several; very persuasive authorities is the correct interpretation of the section. In its present form, even more crucial, properly drafted the sub section’s target persons are diplomats and interpretation is nothing more than deductive interpretation. I therefore agree with Counsel Makubya that this Section offends Article 28 (7) of the Constitution. I can add that even if the section was drafted, it would have been inapplicable to these accused persons. They are not diplomats and I doubt if any of them is an “internationally protected person” as I understand that concept. This point of law is sustained.

1. **Unlawful investigation and prosecution contrary to Section (7) and schedule 3 of the Anti-Terrorism Act**

On this point of law Mr. Makubya submitted that the 3rd schedule to ATA defines an Investigating Officer to mean a police officer authorized in writing by the Director of Police persecutions. Counsel submitted that there is no evidence on record that investigations in this case were done by a police officer in this case was then Detective Constable Okello John Stephen, PW11, now a Detective Sergeant. This fact was brought out clearly in cross examination. Also Mr. Okello’s police statement reveals at the heading thereof to be “STATEMENT OF INVESTIGATING OFFICER.” Counsel submitted that because of the low level of whole group of investigators, all of whom were below the rank of superintendent the entire investigation was characterized by incompetence and lack of professionalism. He gave a number of examples which are on Court record:-

1. Destruction of crucial evidence from the prosecution file by D/ASP – Okurut Vincent.
2. Forgery and fabrication of documents relating to exhibits.
3. The SOCO’s methodology at covering the scene of the scene of the crime was limited to listing of items and no photographs of crucial evidence were taken.
4. Some police witnesses produced here could neither read nor write could not remember their ages or places of residence unless prompted.
5. Some police witnesses could remember could remember their household items like mattresses, fridges and DVD players but could not produce any evidence what so ever on the ownership of cars, motorbikes and bicycles that were destroyed.
6. The entire investigation focused on the loss of properties like mattresses, fridges and DVD players and ignored the loss of lives of over 25 people that were killed during this period.

Mr. Makubya concluded that the result of this shoddy investigation cannot be relied on by this honorable court to convict the accused persons. The whole investigation is tainted and incurable. If rendered the prosecution a nullity in law, he submitted. Mr. Makubya relied on the following authorities;

**Phipson on Evidence**by John H Buzzard (11th Edition) at page 268 Annexture 7

**“where evidence is obtained in manner which is not in accordance with a prescribed statutory procedure and compliance with that statutory procedure is necessary step towards securing a conviction for a particular offence, then notwithstanding the general principle enunciated in kuruma v R such evidence will not be admissible”.**

The principle is restated in English case of **Scott vs. Baker [1968] 2 ALLER at 993 (Annexture 8)** that Court held that where a person was charged with an offence against S. 1 of the Road Safety Act 1967 (of which he could only be guilty only if excessive alcohol proportion in his blood were ascertainable from a specimen provided in accordance with S.3) the offence was not established unless it was shown that the specimen had been provided in accordance with S.3)

In Kenyan case 9**Mwaura vs Republic [2004] 1 EA 183(Annexture**) the Court held that where unqualified person conducted part of the trial, the proceedings are null and void.

In another Kenyan case of **Nyakundi and Another vs. The Republic [2003] 2 EA 647 (Annexture 10)** the Court of appeal held that…

**“the entire trial was a nullity as the Court prosecutor was not a person entitled to prosecute on the basis of provisions of section 85 (2) of the criminal procedure code”**

Counsel Vincent Wagona for the state submitted that the ATA provides for different roles to be played by different categories of people, including authorized officers, investigation officers and police officers. As I understood him, he took the position that the different parts of the Act give powers to different category of public officers including police officers to participate in various aspects of investigations in terrorism offence. For example under part VII of the Act, interceptions of communications and surveillance are to be carried out by an officer designated for that purpose by the minister.

He submits that certain powers obtaining information are to be exercised by a person referred to as the “investigation officer”. This is the person referred to in section 17 (1) of the ATA. This person referred to in Section 17 (1) has been empowered by schedule 3 to obtain information for purposes of terrorist investigations, namely, investigations into the commission, preparation or instigation of

1. Acts of terrorist; or
2. Any other act which constitutes an offence under this Act.

Under paragraphs 7 of the third schedule for certain aspects of investigation, even the Investigation Officer must obtain a court order.

Mr. Wagona concedes at of his written submission that investigation officer is defined in the Third Schedule as a police officer not below the rank of Supermarket of Police Public officer authorized in writing by the DPP.

At the same page 4, submits that the ATA envisaged other police officers to be involved in enforcing the Anti-Terrorism Act. For example sections 15 to 30 refer to police officers, whom he submitted, are not necessarily designated as authorized officers or investigation officers. In light of that, Counsel Wagona submits that the ATA does not bar police officers below the rank of superintendent from carrying out terrorism investigations.

Mr. Wagona submitted that in this case, according to PW11 O/C Okello John Stephen, the investigation team included D/ASP Aisu Victor, D/SP Mugarura Andrew, D/ASP Vincent Okurut. Mr. Wagona submitted that had any occasion risen requiring the others referred to in the Third Schedule, an officer of the required rank would have applied for and exercised the under such orders.

My opinion is that this is an attempt by Mr. Wagona to confuse and mislead Court. Section 17 (1) of the ATA which he himself quoted, states:

“The third schedule has the effect of conferring powers to obtain information for purposes of terrorist investigations, namely, investigations into the commission, preparations or instigation of:

1. Acts of terrorism
2. Any other act which constitutes an offence under this Act.

It is the carrying out above acts which constitutes investigation and this is the preserve of the Investigation Officer as defined the Third Schedule. This is very clear to me and no amount of obfuscation or obscurantism can change this clear statement of the law. It is on Court record and in the police statement that D/C Okello John Stephen was the “Investigation Officer” in this case. He does not qualify under the law to undertake terrorism investigation. And by the way an investigation officer does not have to do everything in the process of investigation by himself. He is in charge of the investigation. That is raison for him being of a senior rank; to enable him supervise and oversee the details of the process such as recording of statements, drawing sketch plan, site visits by SOCO.

I find that in this case there was a violation of S 17 (1) and the Third Schedule of the ATA, 2002 in that the designated Investigation Officer was below the rank of Superintendent of Police. The entire investigation is incurably tainted, rendering the prosecution a nullity.

All three points of law having succeeded, the accused persons are accordingly acquitted and set free forthwith.

Before I take leave of this matter, I must record my disappointment, deep disappointment with both the Police and to some extent the prosecution. This case failed because both the Police ant the prosecution, in their desire to achieve a conviction at all costs totally ignored the basic and elementary requirements of not just Police procedures and criminal procedure, but also ignored most importantly the fundamental duties imposed by all of them by the Constitution. Mr. Wagona prepared one short paragraph in which he regretted violation of the Constitution and in the same space told Court to note that the Police were under great pressure and therefore had no time to worry about the notices of the 48 hour rule! The Constitution is the foundation, and pillar of our struggle to create a free society governed by laws and not men. I expect very legal practitioner to emphasize to their lay clients, the cardinal importance of this.

As for Mr. Leuben Wasiima, a man who lied with a straight face, he failed to carry out the first step in dealing with a mob under the Law. Nowhere in his testimony did he ask the mob to disperse, thus bringing to life the first element of “riot”. Instead he went about (according to him) advising shop keepers to close their shops as there was likely to be trouble in the area. He never declared that a riot existed. At least he never told Court so. In the end, even easy to prove offences under part 8 of the Penal Code eluded the prosecution. How sad that a police station gets burnt to the ground and a most incompetent team is tasked to investigate it. The message to the lawless elements in our society is that one can get away with such abhorrent act. This is tragic. I hope some lessons have been learnt.

One last point, on the substantive charge against the accused persons. If I had to rule on a “no case to answer”, I would have found the evidence on record so thoroughly discredited as to be unworthy of calling on the defendants to make a reply. Again here I hope that some lessons have been learnt by the state.

**Ralph W. Ochan**

**JUDGE**

**14/05/2012**

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