THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(ANTI-CORRUPTION DIVISION)

HCT - 00 - AC - CM - 0005 - 2015
(Arising out of Criminal Case No. 070/2012)

UGANDA :: APPLICANT

VERSUS

GULINDWA PAUL AND TUMUSIIME :::::::::::::::::::::::: RESPONDENT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

The Director of Public Prosecutions hereinafter referred to as the Applicant filed this application against Gulindwa Paul seeking orders that the hearing and delivery of judgment in HC–00–ACD–CSC-070/2012, in which the Respondent is an accused, proceeds in his absence.

The background to this application is that on the 18th day of June 2012, the accused person was charged with five others on several counts of tax evasion. Five of the accused persons later pleaded guilty to the offences, were convicted and sentenced; leaving the Respondent to undergo trial.

The prosecution called 11 witnesses after which it closed its case. Both the state and defence counsel made submissions on whether the accused should be put on his defence or not. On 24th April 2013, this Court found that the prosecution had established a prima facie case and put the accused on his defence.

His right to call witnesses, make a sworn statement, an unsworn statement or to remain silent if he did not want to say anything, was explained to him. The matter was adjourned to 10th May 2013 when he was expected to defend himself.

On the 10th May 2013, the Respondent did not appear in Court. His advocate told Court that he did not know where his client was.
He further told Court that he had placed several phone calls, having failed to reach him, but all were in vain.

Sureties were summoned who attended Court on 22nd May 2013. They informed Court that they had failed to trace the Respondent. The Respondent did not come to Court or communicate.

On the 27th January 2015, one year and 7 months since the disappearance of the Respondent, the Director of Public Prosecutions filed this application.
This application is seeking Court to proceed with the hearing of the case in the absence of the Respondent on the ground that the abscondment of the Respondent from Court has frustrated the right of the complainant to a speedy and fair hearing.

Furthermore, that Ugx.1,908,278,739/= by way of tax stands to be lost if this trial is not brought to conclusion.

This application was fixed for hearing, after serving Counsel for the Defendant Mr. Tusasiirwe who had acted on the Respondent's behalf throughout. A notice was also placed in the New Vision Newspaper of 18th February 2015. The summons read in part;

> *"Whereas your attendance is necessary to answer to charges of; fraudulent evasion of payment of duty c/s 203 of EACCMA Act, 2009.*

> *You are hereby commanded to appear before the Court on the 23rd day of March 2015 at 2:30pm in the forenoon/afternoon or soon thereafter as the case can be heard."*

The meaning of this notice demanded personal attendance of the Respondent. He did not come and this would have posed a great difficulty to the Court as the question of notification would have to be dealt with. **Colozza V Italy (1985) 7 EHRR 516.**

The issue of service upon the Respondent was however cleared by the appearance in Court of Ms Nakawoya Sarah, an advocate from the law firm of Geoffrey Nangumya and Co. Advocates. She told Court that they had been instructed by the Respondent to appear on his behalf. When asked as to the whereabouts of the Respondent, Counsel replied that she did not know. Court would have granted an adjournment, but realizing that the Respondent had skipped bail for over two years, had disobeyed a court order to attend in person and whose notification he had received or Counsel would not have come to court; the court proceeded to hear the application in his absence.

It is worth noting that the Respondent did not file a reply to the application.
In her submission, Counsel for the Applicant stated that the Respondent attended and heard all the prosecution witnesses. That he had all the opportunity of cross examining and indeed cross examined each and every one of them. He was put on his defence and given a date to appear and defend himself. His disappearance amounted to abscondment and that having absconded and stayed away from court, he in essence, relinquished his right. She therefore prayed that this court proceeds to order a closure of the Defendant case, hear submissions and deliver judgment in the matter.

The issue raised in the circumstances is one of general public importance. The question to be answered is whether a criminal court in Uganda can conduct a trial in the absence of the accused person.

The right to a fair hearing is provided under Article 28 of the Constitution of the Republic of Uganda.

Article 28(1) directs that in the determination of civil rights and obligations or any criminal charge a person has a right to a fair, speedy and public hearing before an independent and impartial court. It requires in Article 28(2) (g) that such accused person be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the Court. Most relevant to this case is the provision found in Article 28(5) which deals with the presence of the accused person at the trial.
It provides;

> *"Except with his or her consent, the trial of any person shall not take place in the absence of that person unless the person so conducts himself or herself as to render the continuance of the proceedings in the presence of that person impracticable and the Court makes an order for the person to be removed and the trial to proceed in the absence of that person."*

This position is also recognized by International Conventions. Article 14(3) (e) of the International Covenant on Civil and Political Rights, 1996 provides that in the determination of any criminal charge, a person shall be entitled;

> *"To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing."*

See also **Ekbatani V Sweden (1988) 13 EHRR 509**

The wording of these provisions clearly indicates that a judicial officer has discretion in these matters. The discretion to proceed with a trial in the absence of the accused however demands extreme care after considering the case against its context in proceedings with the sole purpose of conducting a fair trial.

The lense must not only be pointed at a fair trial but also towards satisfaction of public interest.

The Court must be satisfied that the accused was served. Furthermore, that he had the opportunity to instruct legal counsel (**Colozza V Italy (ibid**), knew the date of the trial and of his obligation to attend.

In the instant case, the Respondent certainly knew of the date of the application. His advocate's presence in court and declarations that she had instructions to appear was a clear indication that the Respondent had had opportunity to instruct counsel and even knew the venue of the trial.

His obligation to attend was clearly spelt out in the notice which informed him of the necessity of personal attendance.
The words *"You are hereby commanded to appear before this court on the 23rd day of March 2013 at 2:30pm in the forenoon/afternoon or soon thereafter as the case can be heard"* could not have been misunderstood.

The facts that; the Respondent was present in court when his defence was deferred to 10th May 2013 but he did not appear, he disappeared from not only his advocates but all his 3 sureties; for close to two years he has not appeared; and further more that on receiving the notification, he refused to attend court but sent his advocate, the Respondent can be regarded as "*latitante*" that is, a person willfully evading the execution of a warrant of arrest issued by this court.

The question that arises now is; how should a case of a person who has skipped bail be treated? **Williams J** opined in **R. V Abrahams (1985) 21 VLR 343 at 347** in these words:

> *"If an accused person failed to appear at a trial and was found, when the trial came on, to have absconded, he had clearly waived his right to be present and the prosecution might elect to go on with the trial in his absence.*
> *In such event, the Judge would exercise his discretion whether to allow the trial to continue, paying particular attention to whether the Defendant was represented."*

This is an old case, but that notwithstanding, would a Court with competent jurisdiction find a breach of the constitution where an accused person, fully informed of a forthcoming trial but voluntarily chooses not to attend, if the Court went ahead to hear the case in his absence?

In my view, a Defendant of full age and sound mind, who is properly notified of his trial and chooses to absent himself, as a result violates his obligation to attend court, deprives himself of the right to be present, and when a criminal trial proceeds in his absence, he cannot come up and claim he had been denied his constitutional rights. I hold this view because I do not think that one who voluntarily chooses not to exercise a right given to him by the constitution, cannot turn around and say he has lost the benefits he might have expected to enjoy had he exercised it. **Regina V Johns (1972) 1 WLR 887**.

In the foregoing case, Lord Bingham of Cornhill while discussing a similar situation wrote:

> *"If the court has no discretion to begin the trial against that Defendant in his absence, it faces an acute dilemma. Either the whole trial must be delayed until the absent Defendant is apprehended, an event which may cause real anguish to witnesses and victims or the trial must be commenced against the Defendants who appear and not the Defendant who has absconded.*
>
> *This may confer a wholly unjustified advantage on that Defendant. Happily, cases of this kind are very rare. But a system of criminal justice should not be open to manipulation in such a way."*

In this case the Respondent was, as earlier stated given full opportunity of a fair trial. He knew the case he was to answer and yet he decided to abscond.
Salmond J in **R V Governor of Brixton Prison, BXP Caborn – Waterfield (1960) 2 QB 498 at 508** faced with a similar situation dealt with it in the following words;

> *"The Applicant was treated with complete fairness and indeed was shown every consideration by the French court. He was fully appraised of the very strong case he had to*

meet and repeatedly given the fullest opportunity of meeting it. He elected not to do so and on 3 separate occasions without any excuse, he failed to appear in person before the French court.

Accordingly, it certainly does not lie in his mouth to complain that the case was dealt with in his absence."

It is also important to consider the extent of fairness in a trial. The trial is not only for the accused person. The effect of a trial exceeds the accused and engulfs the complainants, victims and the public.

It follows therefore that where an accused skips bail, he prevents the trial from being fair as against all the others Judge **Pettiti** in **Poitrimol V France (1994) 18 EHRR 130** described this position in these words

"Equality of arms must be considered not only in the relationship between accused and prosecution but also in the relationship between victims, civil parties and accused. If a Defendant is absent because he has refused to appear, it may put the victim or the civil party to the proceedings at a disadvantage."

To allow accused persons to abscond from prosecution and staying that prosecution would completely disarm the state in its function of administration of justice.

Having looked at the above authorities, although they are European and American, they are persuasive because they deal with similar situations and legislation, some of which is word by word to Article 28(5) of the Constitution of Uganda.

What amounts to waiver of the right to be present was discussed in **Falk V United States 15 App. DC. 446 (1899)** where in the Court held;

"Where the offence is not capital and the accused is not in custody, if after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial; but on the contrary operates

as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present."

In the case of **Diaz V United States 223 US 442 (1912)** the court treated 'mid-trial flights' as a knowing and voluntary waiver of the right to be present

"Whether or not the right constitutionally may be waived in other circumstances, and we express no opinion here on that subject, the Defendant's initial presence serves to assure that any waiver is indeed knowing."

In the above cited case, Justice Morris could not have put it better when he said;

"It does not seem to us to be consonant with the dictates of common sense that an accused person being at large upon bail, should be at liberty whenever he pleased to withdraw

himself from the courts of his country and to break up a trial already commenced. The practical result of such a proposition, if allowed to be law, would be to prevent any trial until the accused person himself would be pleased to permit it."

Lastly, the discontinuance of a case where an accused person has skipped bail and voluntarily absconded from court attendance would lead to perforation of public policy if the courts were to stop proceeding with such trials because of voluntary absence.

Their Lordships in **Diaz V State (Ibid)** dealt with this proposition to some extent, in these words

"The question is one of broad public policy, whether an accused person placed upon trial for a crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the process of that law, paralyse the proceedings of courts and jury and turn them into a solemn farce and ultimately compel society, for its own

safety, to restrict the operation of the principle of personal liberty. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong and yet this would be precisely what it would do, if it permitted an escapee from prison or an abscondee from the jurisdiction while at large on bail and during the pendency of a trial before a jury to operate as a shield."

It would therefore be against public policy to allow the frustration of court proceedings by accused persons who have voluntarily absconded and therefore waived the right to be heard.

In this case, when the Respondent skipped bail, he knew that there was a subsisting case. He knew the venue, he was fully availed with a chance to be heard, he had the opportunity to hire a lawyer of his choice, his rights at the time of defending himself were clearly spelt out to him. His decision therefore to abscond amounted to waiving his right to be heard.

It is for those reasons that this application is allowed and court therefore orders the closure of the Defence. It is ordered that the prosecution proceeds to make final submissions not with standing the absence of the Respondent and a judgment be delivered thereafter.

…………………………….
David K. Wangutusi
JUDGE

Date: 27 - 03 - 2015