

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MA . NO. 10 OF 2017

ARISING FROM MC. 163 OF 2016

5 **MAJIBU SSEBYARA.....APPLICANT**

V

1. ATTORNEY GENERAL

2. MAJ. RAPHEAL MUGISHA ,

PROSECUTOR GENERAL COURT MARTIAL... RESPONDENTS

10 **BEFORE HON. LADY JUSTICE H. WOLAYO**

RULING

INTRODUCTION

In an amended notice of motion filed on 12.6.2017, the applicant sought the following orders under sections 14; 33 and 39 (2) of the Judicature Act and
15 section 98 of the CPA:

1. A declaration that the respondents acted in contempt of court and in disrespect of the rule of law when they failed to prevent the arraigning, charging and prosecution of the applicant by the Uganda Peoples Defence Forces (UPDF) before the General Court Martial in criminal case No.
20 UPDF/GCM/19 /2016;
2. An order setting aside the convictions and sentences passed against the applicant in the said criminal case;
3. An order that the applicant be produced by the UPDF before the Registrar and discharged forthwith;

- 25 4. General, aggravated and exemplary damages for the harm suffered by the
applicant as a result of the contempt;
5. Costs.

The respondent filed an affidavit in reply opposing the application.

Representations

- 30 Mr. Ssemakadde of Centre for Legal Aid appeared for the applicant while
Mr. George Kallemera SSA appeared for the respondent.

Both counsel filed written submissions that I have carefully considered.

Particulars of alleged contempt

- Particulars of alleged contempt as narrated in the applicant's affidavit in
35 support and supplementary affidavit are reproduced below.

1. The High Court on 22.11.2016 in HCMC 163 of 2016 directed the
respondents

- To stay proceedings in GCM 15 of 2015
- to discharge the applicant from criminal proceedings in GCM 15
40 of 2015
- prohibited the respondents from using any information, confession
or admission obtained from the applicant through torture, in any
process or charges in GCM 15 of 2015.

2. In spite of the High Court order, the respondent commenced another trial
45 against the applicant on 12.12.2016 under GCM 19 of 2016 based on
information obtained through torture from the applicant on charges
prohibited by the decree in HCMC 163 of 2016 and

3. Have denied the applicant his personal liberty in spite of order of discharge by the High Court.

50 **The law**

In **Const. applic. 73 of 2013 Uganda Super league v AG**, Justice Kiryabwire JA cited Black's Law dictionary 7th edition definition of contempt of court as '*conduct that defies the authority or dignity of the court*'.

Justice Kiryabwire also cited Halsbury's **Laws of England** definition (**vol. 9, 4th edition**) where contempt is classified in two categories: criminal contempt which is committed by words or acts that impede administration of justice and Civil contempt which arises when there is disobedience to judgment, orders or other court process and involves private injury.

A common principle in both categories is that courts frown on conduct that impedes administration of justice.

That said, the question that arises is whether a court of law can be found to be in contempt. I have carefully read all authorities cited by counsel for the applicant and found none both here and in foreign jurisdictions where a court of competent jurisdiction has been found to be in contempt by another court with competent jurisdiction.

In Const. Applic. No. 73 of 2013 Uganda Super League ltd v AG, and Charles Bakabulindi the latter who was Minister of Sports was found to be in contempt when a court order in Const. Applic. No. 41 of 2013 was not honoured.

70 **In HCMA 283 of 2012 Ayebazibwe Raymond v Barclays bank**, Justice Madrama held that the contempt complained of was allegedly committed by the bank.

In Const. Petition 30 of 2011 Prof. Gilbert Bukenya v Attorney General ,
the petitioner argued immunity from prosecution for acts done while he
75 chaired the cabinet committee meeting for CHOGM. The constitutional court
held that he did not have immunity from prosecution.

In Const. Pet. No. 53 of 2010 Behangana Domaro v Attorney General . The
respondent agents were found to have violated fundamental rights of the
petitioners.

80 All these precedents deal with contempt of court orders by individuals or
corporate persons and none deals with a situation where a court with competent
jurisdiction is found to be in contempt by a court with equivalent jurisdiction or
a superior court.

Halsbury's Laws of England vol. 9, 4th edition, cited by counsel for the
85 applicant clearly contemplates **contempt OF inferior courts and Court
martial but not contempt BY inferior courts and court martial.**

The clear statement by Halsbury's laws of England that it is acts of contempt
against inferior courts and court martial that are punished , and in the absence
of any precedent where a court with competent jurisdiction has been found to
90 be in contempt I am unable to agree with counsel for the applicant that this
court has powers to hold another court and for that matter the GCM in
contempt .

The above notwithstanding, I will discuss whether there was disobedience of
High court orders.

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Whether there was disobedience of order to discharge the applicant

In GCM 19 of 2016 , the applicant was charged with two counts.

Count one.

100 Offence relating to security c/s 130 of the UPDF Act.

It was alleged that the applicant on 12.6.2015 at Barawe in Somalia disclosed confidential information to wit, materials of the Defence forces to members of the public.

Count two.

105 Conduct prejudicial to good order and discipline c/s 178 (1) (2) (5) (b) of the UPDF Act.

It was alleged that on 12.6.2015, at Barawe in Somalia , he trespassed on the property of Umar Hussein Ibrahim a Somali national contrary to the code of conduct of the defence forces.

110 **In GCM 15 OF 2015, the** applicant was charged with failing to protect war materials c/s 122 (1) (2) (g) of the UPDF Act. Clearly the charges in GCM 19 of 2016 and charges in GCM 15 of 2015 differ. The only similarity is in the date when the offences took place.

115 Counsel for the applicant submitted that there was disobedience of the High Court order discharging the applicant because he was flown to Somalia to complete the trial commenced in Kampala. (para 29 of his submissions).

An examination of the affidavits of Lt. Col. Wandera and Major Bizimana are silent on whether the applicant was discharged as ordered by the High court in HCMC 163 of 2016.

120 Although the two affidavits are silent on whether the applicant was discharged in GCM 15 of 2015, the fact that he was charged in GCM 19 of 2016 with different offences for his conduct on 12.6.2015 means that the charges in GCM

15 of 2015 are inconsequential especially since he is now serving sentence after conviction. Therefore, whether there is absolute discharge or not in GCM 15 of 125 2015 , the proceedings therein are of no consequence following the High court order that the applicant be discharged and that the proceedings in GCM 15 of 2015 are null and void. Clearly, disobedience by the GCM does not arise at all as the declaration that proceedings in GCM 15 of 2015 were a nullity was sufficient to render them of no consequence in law.

130 **Suppressed evidence of torture**

It was the High court order that evidence obtained from the applicant as a result of torture should not be adduced. The evidence obtained as a result of torture was captured by the court as follows:

135 In para. 24 of the ruling, Hon. Lady Justice Basaza observes that the torture complained of by the applicant took place prior to the point when he took soldiers to the Somali civilian.

140 In para. 26, the court finds that the applicant was made to stand on a bag of sand , placed his hands above his head, and sack removed from under him thereby leaving him hanging. The judge found that ‘ he was told by major Bbalimbya to admit that he is the one who stole the missing ammunition and he would be let go. The applicant agreed he was the one who took the missing ammunition and his hands and testicles were untied.’

145 This torture happened before the applicant took the soldiers to the Somali civilian’s home.

The evidence suppressed by the High court was the applicant’s admission he stole missing ammunition. The court did not suppress evidence by other witnesses relating to offences charged in GCM 16 of 2016 or preclude the

GCM from trying the applicant for other offences disclosed by investigations
150 into the conduct of the applicant on 12.6.2015 . Neither did the High Court
constrain the Prosecutor General in exercise of his discretion to prefer other
charges different from the ones prohibited by the High Court.

In **Supreme Court Const. Appeal No. 1 of 2012 Uganda v Thomas
Kwoyelo**, the respondent contended that he was entitled to benefit from the
155 Amnesty Act having denounced rebellion and that therefore the DPP ought not
to have charged him with War crimes as these were committed in furtherance
of the rebellion. The Supreme court held that the DPP could exercise normal
prosecutorial powers to charge the respondent with specific offences if he was
not satisfied that those specific offences were not committed in furtherance of
160 the war or rebellion. (para 15 of Supreme Court judgment)

Consequently, the GCM cannot be said to have disobeyed the High Court orders
because the Prosecutor General has prosecutorial powers to charge applicant of
offences other than the offence prohibited by the High court and the GCM is
competent to try those charges. Furthermore, the Prosecutor General was free
165 to adduce evidence other than the suppressed evidence in support of the
charges.

Whether the 2nd respondent was properly joined as a party.

The question of whether the 2nd respondent was properly sued need not be
170 answered because I have found that the GCM cannot be cited in contempt nor
can the second respondent.

Remedies

As I have found a court of law cannot be held in contempt and the GCM did
175 not disobey the High Court orders to discharge the applicant and to suppress

evidence admitted by the applicant as a result of torture, this application is dismissed with no order as to costs.

DATED AT KAMPALA THIS 6TH DAY OF OCTOBER 2017

180 **HON. LADY JUSTICE H. WOLAYO**