

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISC. CAUSE NO. 26 OF 2017

OOOLA DAN ODIYA.....APPLICANT

V

ATTORNEY GENERAL.....RESPONDENT

BEFORE HON. LADY JUSTICE H. WOLAYO

RULING

The applicant by motion brought an application under article 50(1) of the Constitution as amended for enforcement of article 28 (1) of the Constitution . He prayed for the following orders:

1. A declaration that the UPDF Unit Disciplinary Committee and General Court martial has no jurisdiction to try the applicant for the offences disclosed in the charge sheet for CR. Case No. UPDF/UDC/MP/07/2017 dated 16.01.2017.
2. A permanent injunction restraining the respondent , its agents, servants and all those acting on behalf of the respondent from continuing with the prosecution of the applicant in any UPDF tribunal for the offence disclosed in the charge sheet .
3. The applicant be released from remand forthwith.
4. Compensation be ordered for violation of applicant's right to a fair hearing and freedom to personal liberty.

The grounds of the application are contained in the motion itself and affidavit in support. The respondent filed two affidavits in reply of Nabasa Charity and Cpl. Nkomejimana Julius opposing the motion.

Mr. Walubiri appeared for the applicant while Ms. Apita Susan Okello State Attorney appeared for the respondent.

Both counsel did not address me on whether this court has jurisdiction to hear this application because the issue was not raised but I realised it is necessary to address it first before going into issues raised by both counsel.

The **Const. Court in Const Pet. No. 18 of 2005** held that the High Court is equivalent to the General Court Martial with concurrent jurisdiction and that the GCM is neither subordinate nor superior to the High Court.

I reproduce the full text of the holding:

The General Court Martial is the equivalent of the High Court in the civil court system. Both have concurrent jurisdiction, same sentencing powers in capital offences with exceptions. Their decisions in capital offences are appealable to the Court of Appeal and eventually Supreme Court. Both courts have supervisory powers over their subordinate courts. The General Court Martial is, therefore, neither subordinate nor superior to the High Court but has to be equivalent to it.

In spite of equality in jurisdiction, article 50 of the Constitution as amended confers on the High Court jurisdiction among other courts in the hierarchy to enforce violations of the Constitution. This means that this application brought under article 50 of the Constitution to enforce the applicant's right to a fair trial by a court of competent jurisdiction is properly before me.

Applicant's case

It was the applicant's case that on 15.6.2016 he was charged in the chief magistrate's court Gulu vide criminal case No. AA 31 of 2016 and on 12.1.2017, a nolle prosequi was entered and he was discharged.

That in spite of the discharge, he was immediately re-arrested with his co-accused and charged in the UPDF disciplinary committee unit with treachery and murder.

It was the applicant's case that he is not a UPDF soldier and has never aided or abetted any soldier in the commission of any offence and therefore not subject to military law.

Respondent's case

It was the respondents case that a nolle prosequi is not an absolute discharge and that the applicant was properly charged with a service offence under section 119 (g) of the UPDF Act and committed for trial before the General Court Martial .

Whether article 28 (1) of the Constitution was violated.

Counsel Walubiri for the applicant submitted that to try the applicant in a military tribunal is a violation of his right to a fair trial under article 28(1) because he is not subject to military law.

Counsel submitted that although the applicant was charged under section 119 (g) for aiding and abetting commission of an offence, no evidence has been produced by the respondent to show that he worked with a UPDF soldier to commit the alleged offence nor was he charged together with a UPDF soldier. It was counsel's contention that jurisdiction is determined by disclosed facts and yet no such facts have been disclosed.

He concluded that the applicant's right to a fair hearing before an impartial tribunal under article 28 (1) of the Constitution has been violated because the applicant does not belong to the class of persons for which the military tribunal was established.

Counsel Apita for the respondent argued that the applicant has not demonstrated that the GCM is not an independent and impartial tribunal. Furthermore, that the GCM is enjoined by the UPDF Act to apply principles applicable in civilian courts. That therefore it is not possible to determine if it is not competent before the trial kicks off.

Counsel further argued that it is not for this court to consider whether there is evidence of aiding and abetting and that it has been held in decided cases that the GCM is competent to try civilians.

Article 28 (1) commands that

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

There are two main aspects to the issue under determination.

1. There is a challenge to the competency of the GCM to try the applicant.
2. There is a challenge to the charge as framed in as far as it does not disclose that the GCM has jurisdiction to try the applicant.

Challenge to the competency of the GCM to try the applicant

This challenge goes to jurisdiction of the GCM. The Supreme Court in **Constitutional Appeal No. 1 of 2016 Attorney General v Uganda Law Society** held that the GCM is a creature of UPDF Act which also creates many offences that are referred to as service offences. This same issue of jurisdiction and competency of the GCM was recently discussed by my learned sister Justice Basaza in **Misc. Cause No. 135 of 2016 Hon. Kabaziburuka v AG** where she found that the GCM had jurisdiction to try civilians charged with service offences. It is therefore now settled law that the GCM has jurisdiction to try civilians charged with service offences.

Challenge that the charge sheet does not disclose that the GCM has jurisdiction.

Counsel for the applicant challenged the charge sheet as framed on the grounds that it did not disclose the nexus between the applicant who is a civilian and section 119 (1) (g) of the UPDF Act in order to bring the applicant under the jurisdiction of the GCM.

Section 119 (1) (g) of the UPDF Act brings under the jurisdiction of the GCM any person not otherwise subject to military law if that person

‘aids or abets a person subject to military law in the commission of a service offence.’

Counsel for the applicant submitted that all the co-accused persons are not soldiers which means they too must be shown to have aided and abetted in the commission of a service offence to the same degree as the applicant.

Service offences are described as an offence under the Act or any other Act for the time being in force committed by a person while subject to military law.

As to whether the applicant was charged with a service offence depends on the charge as framed. The applicant was charged with four others in two counts:

Count 1: Treachery c/s 129 (a) of the UPDF Act

It is alleged that Oola David, resident of Kanyagoga A Zone Gulu district person subject to military law and ‘others still at large’ on 27.5.2016 with intent to prejudice

the security of the Republic of Uganda infiltrated the Defence Forces at Opit Army Detach in Gulu district.

Count two

Murder c/s 188 and 189 of the Penal Code Act

Oola David resident of Kanyagoga Zone A , Gulu district and four others on 27th May 2010 at Opit Army Detach in Gulu district with malice aforethought unlawfully caused the death of RA /098243 Pte Odong Alphonse Ojara.

Treachery is a service offence under section 129 of the UPDF Act.

With respect to murder, section 179 (1) of the UPDF Act prescribes that

A person subject to military law , who does or omits to do an act in Uganda which constitutes an offence under the Penal Code Act or any other enactment ...

Commits a service offence and is on conviction , liable to a punishment .’

Sections 179 and 119 compliment each other on the issue of jurisdiction of the GCM to try civilians.

Section 119 (1) (g) confers jurisdiction on the GCM to try civilians but only in instances where the civilian **who is not otherwise subject to military law** has aided and abetted a **person subject to military law**. The latter persons are described in section 119 (1) (a) to (c) as

- a) Every officer and militant of a regular force
- b) Every officer and militant of a reserve force
- c) A person attached or seconded as an officer to any service or force of the defence forces.

The other category of persons is described as **not otherwise subject to military law** but

- d) Is serving in the position of an officer or a militant of any force raised and maintained outside Uganda and commanded by an officer of the defence forces
- e) Who voluntarily accompanies any unit or other element of the defence forces which is on service in any place.

- f) While serving with the defence forces under an engagement by which he or she has agreed to be subject to military law
- g) Who aids and abets a person subject to military law in the commission of a service offence.

Section 179 of the UPDF Act is with respect to civil offenses e.g. under the penal code committed by persons subject to military law. The reference to ‘**persons subject to military law**’ in section 179 is deliberate because it leaves out the other category ‘of **persons not otherwise subject to military law**’. There is therefore a presumption in law that civilians are not subject to military law unless they aided and abetted persons subject to military law as prescribed in section 119 (1) (g) of the UPDF Act.

Section 19 of the Penal Code is a good guide to the definition of aiding and abetting. It prescribes as follows:

- 1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with committing it:
 - a) Every person who does the act or makes the omission which constitutes the offence.
 - b) Every person who does or omits to do an act for the purpose of enabling or aiding another person to commit the offence.
 - c) Every person who aids or abets another person in committing the offence.

Therefore, there is a difference between aiding and abetting on the one hand and committing the actual offence on the other hand.

With respect to section 119 of the UPDF Act persons not otherwise subject to military law are subject to military law when they aid and abet **persons subject to military law**.

Therefore, it is imperative that the charge sheet on the face of it discloses this essential requirement.

I am fortified in this analysis by the decision of the **Constitutional Court in Const. pet. No. 18 of 2005 (ulii) Uganda Law Society v Attorney General** where one of the issues for determination was whether the GCM had jurisdiction to try civilians jointly with military

offenders. One of the charges the GCM had preferred against accused persons was possession of firearms contrary to the Firearms Act. The court held that where the prosecutor relies on section 119 (1) (g) of the UPDF Act, particulars of the acts complained of must be stated in the charge sheet and where there is no principal military offender to abet or aid, the charge sheet is defective.

A critical examination of the charge sheet shows that the applicant is described as a person subject to military law and he is charged with 'others still at large'.

B.J. Odoki in Criminal Procedure in Uganda, third Edition, LDC publishers , 2006 discusses at length the principles with respect to framing charges.

He states that the basic requirement of the content of every charge is that it must contain the statement of the specific offense or offences with which the accused is charged together with such particulars as many be necessary on the nature of the offence.

Jurisdiction is a matter of law and not evidence, therefore this means where a civilian is charged in the GCM the charge sheet must from the outset ,on the face of it disclose that the GCM has jurisdiction to try the civilian.

The constitutional court in **Const. Petition 18 of 2005** went on to explain that

Due to the importance of national security, it is generally accepted that those members of civil society who assist in anyway the commission of military offenders or abet military offenders should be answerable in military courts. It is presumed they had a common intention with military offenders when alleged offences were committed.'

The current charge sheet is defective in as far as it doesn't disclose the other persons subject to military law whom the applicant aided and abetted. It is not sufficient to simply allude to 'others at large' or that the applicant is subject to military law. In any case, it is a wrong description to describe the applicant as a person subject to military law when in fact he is a person 'not otherwise subject to military law'.

That aside, the charge sheet should at least have charged the applicant with a principal offender who is subject to military law i.e, person or persons described in section 119 (1) (a) to (c) in order to bring the applicant under the jurisdiction of the GCM.

The charge of treachery could have brought him under the jurisdiction of the GCM if it had been clearly stated in the particulars that principal persons subject to military law were involved. This is not the case.

For the GCM to try the charge of murder against a civilian, he must have aided and abetted a person subject to military law in the commission of the same. The particulars as they stand disclose the applicant as a principal offender and not an accessory before or after the act. Therefore, the GCM is precluded by section 119 (1) (g) of the UPDF Act from trying the applicant for murder because he is not charged jointly with person subject to military law per se. Neither do the particulars of the offence disclose a common intention with military offenders.

Counsel for the respondent submitted that this is a matter of evidence to be determined by the trial court.

As said earlier, jurisdiction is a matter of law which must be evident from the pleadings. The jurisdiction of the GCM is dependant on the charge sheet showing in a substantial manner that the civilian acted with a person or persons described in section 119 (a) to (c) by joining them or in the particulars of the charge sheet.

In the absence of particulars in the charge sheet disclosing that the applicant aided and abetted a military offender, the GCM is not competent to try the applicant and therefore continuation of proceedings in the GCM is a violation of the applicant's right to a fair trial by a competent court or tribunal as commanded by article 28 (1) of the Constitution.

Remedies.

I now turn to remedies.

The applicant prayed for general damages for the infringement of the applicant's rights to fair trial and infringement of his liberty.

Before the applicant was charged in the Unit Disciplinary Committee, a nolle prosequi had been entered by the DPP in the criminal charges pending in the chief Magistrate's court, Gulu. This means he has been unlawfully deprived of his right to liberty since 16.1.2017 when he was charged afresh under military law.

I consider a sum of 10,000,000/ adequate for the wrong suffered.

In the premises, this application is allowed and I make the following orders:

1. The applicant's right to be tried by a court of competent jurisdiction was violated .
2. The GCM had no jurisdiction to try the applicant based on a charge sheet that did not disclose the requirement under section 119 (1) (g) of the UPDF Act.
3. A permanent injunction shall issue restraining the respondent , its agents, servants and all those acting on behalf of the respondent from continuing the prosecution of the applicant on the impugned charge sheet or on the particulars disclosed in that charge sheet.
4. The applicant shall be released from custody immediately.

Each party to bear its own costs.

DATED AT KAMPALA THIS 13TH DAY OF APRIL 2017.

HON. LADY JUSTICE H. WOLAYO