

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL REVISION 02 OF 2013
(ARISING FROM BUG. RD MISC. APPL. NO. 22 OF 2013)

HASSAN BASSAJABALABA:.....APPLICANT

VERSUS

KAKANDE BERNARD:.....RESPONDENT

BEFORE: HON. JUSTICE LAMECK N. MUKASA

Mr. Mulindwa Allan of counsel for Mr. Kakande Bernard – the Private
Prosecutor

Mr. Kavuma Kabenge

Mr. Caleb Alaka

Mr. Mwebesa Obed

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of counsel for the

Accused persons

Mr. Fred Kakooza (PSA) for Director of Public Prosecutions.

Court Clerk:

Ms Jackie Busingye

RULING:

The background to this matter is that on 9th January 2013 a Complaint on Oath deponed to by Kakande Bernard was filed before the Chief Magistrate Court Buganda Road against Hassan Bassajjabalaba, the Accused persons.

On 10th January 2013, Mr. Mulindwa Allan , counsel for Mr. Kakande Bernard made the application before the Chief Magistrate. In her ruling dated 11th January 2013, the Magistrate found that the Complaint on Oath discloses a prima facie that offences had been committed by the Accused persons and decided to draw up formal charges against the Accused persons. A Charge Sheet was drawn dated 11th January 2013 signed by both the Chief Magistrate and the Private Prosecutor.

The Accused persons were jointly charged with conspiracy to defeat Tax Law c/s 392(a) of the Penal Code Act in Count I and Uttering false documents c/s 351 of the Penal Code Act in Count 3 and in Count 2 Hassan Basajjabalaba was charged with forgery of Judicial Document c/s 349 of the Penal Code Act; Criminal summons were issued for the Accused persons to appear in court on 14th January 2013.

On 14th January 2013 the Accused persons appeared before court, they were charged and pleas of not guilty recorded from them respectively. They were granted bail and that matter adjourned to 12th February, 2013.

On the 16th January 2013, Mr. Martin Rulando, a Resident Senior State Attorney assisted by Mr. Julius Tukairwe, State Attorney, in the absence of the Accused persons and their consent applied to discontinue the prosecution. In her ruling the learned Chief Magistrate consented to the to withdrawal. The accused persons were on 16th January 2013 charged before Chief Magistrate at Anti-Corruption Court with the same offence.

By letter dated 29th January 2013, the Ag. Chief Registrar requested the Buganda Road Chief Magistrate's file to be placed before a Judge for possible revision order on the grounds that:

1. There is a Resident State Attorney at Buganda Road Court but it appears the RSA was neither consulted nor summoned to be present and the inquiry into the complaint.
2. The court ignored the fact that Mr. Bassajjabalaba was wanted by police, information that was in public and widely reported in the local media.
3. Buganda Road Court lacked jurisdiction to entertain the complaint as the accused is resident in Munyonyo within the jurisdiction of Makindye Chief Magistrate Court.
4. The Charge Sheet is defective.

This was apparently done pursuant to section 48 of the Criminal Procedure Code Act which provides:

“The High Court may call for and examine the record of any criminal proceedings before any magistrates court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentences or order recorded or passed , and as to the regularity of any proceeding of the Magistrate Court”.

Section 50(1) of the same Act lays down the orders the High Court can make on revision and subsection (2) provides:

“ No order under his section shall be made unless the Director of Public Prosecutions has had an opportunity of being heard, and no order shall be made to the prejudice of accused person unless he or

she has had an opportunity of being heard either personally or by an advocates in his or her own defence”

The DPP, the Accused persons and the Private Prosecution were accordingly served.

In response Hassan Bassajjabalaba filed an affidavit wherein, relevant to this matter, he stated:-

“18. THAT the proceedings in the Chief Magistrate’s Court of Buganda Road of 16th January 2013, was unknown to me and in total disregard of my rights under the Constitution and without my consent to be tried in absentia and I was denied a right to be heard.

19. THAT the Chief Magistrate Buganda Road Chief Magistrates’ Court irregularly, unlawfully and without being formally moved and without any application filed in Court by the Director of Public Prosecution and without securing a fresh date and fixing a new date convened Court on the 16th day of January 2013, despite the already fixed date of 12th February 2013.

20. THAT in the said proceedings of the Chief Magistrate Court of Buganda Road of the 16th day of January, 2013, the Resident State Attorney from the office of the Director of Public Prosecutions without applying to take over and continue with Miscellaneous Application No. MA22 of 2013 applied to discontinue proceedings

and sought Consent of the Court to terminate the proceedings in the Chief Magistrates' Court of Buganda Road.

21. THAT the Chief Magistrate Court of Buganda Road unlawfully, irregularly and illegally entertained this flawed and irregular application.

22. THAT as a result of the irregular proceedings of the Chief Magistrate's Court of Buganda Road, on the 16th day of January 2013, the Court irregularly and illegally consented to the withdrawal of the Proceedings instituted by way of Private Prosecutions”.

He further avers:

“36. THAT I have further been informed by my aforesaid lawyers which information I verily believe to be true that under the Magistrate Court's Act, the Resident State Attorney need not to be consulted nor summoned when a private person institutes criminal proceedings against an accused person.

37. THAT I have further been informed by my aforesaid lawyers which information I verily believe to be true that the Chief Magistrate's Court of Buganda Road could not take into consideration media reports and issues pertaining to my being wanted by police and she cannot be faulted for having ignored this information.

38. THAT I am aware that the Chief Magistrate Buganda Road Chief Magistrates Court was seized with jurisdiction to handle my matter under the Magistrate’s Court Act.”

Counsel for the Accused person, the Private Prosecution and for the DPP made submission which I have carefully considered.

Section 42(1) of the Magistrate Courts Act provides;-

“Criminal proceedings may be instituted in one of the following may:-

(a) -----

(b) -----

(c) By any person, other than a Public Prosecutor or a public officer, making a Complaint as provided in subsection (3) and applying for the issue of a warrant or a summons in the manner hereafter mentioned”.

To ensure against a miscarriage of justice section 42 elaborately lays down the procedure to follow in a private prosecution. This court considered these provisions in -

Charles Mbiire & 12 others vs Uganda HCT-00-CR-CV-0015/2012

Under subsection 3 any person who has reasonable and probable cause to believe that an offence has been committed by a person may make a Complaint of the alleged offence to a magistrate who has jurisdiction to try or inquire into the alleged offence or within the local limits of whose jurisdiction the accused person is alleged to reside or be. Every such complaint may be made orally or in writing signed by the Complainant but if

made orally shall be reduced into writing by the magistrate and when so reduced shall be signed by the complainant.

In the instant case there was a written Complaint on Oath signed by the Complainant Kakande Bernard filed on 9th January 2013. The complainant therein avers to various acts of the Accused persons which he averred amounts to forgery of a Judicial Document c/s 349 of the Penal Code Act, uttering a false document c/s 352 of the Penal Code Act and Conspiracy to defeat Tax Law c/s 392 of the Penal Code Act.

The Complaint was filed before the Chief Magistrate Court, Buganda Road. The Complaint must be made to a magistrate who (1) has jurisdiction to try or inquire into the alleged offence or (2) within the local limits of whose jurisdiction is a creature of statute does not expressly confer such jurisdiction, a court cannot competently entertain the matter. **See: Imelda Ndiwalungi vs Roy Busulwa & Anor (1997) HCB 73.** jurisdiction may be geographically or depend on the nature of the offence. Section 161 of Magistrate Courts Act provides that the Chief Magistrate may try any offence other than an offence in respect of which the maximum penalty is death. Therefore the Chief Magistrate had the jurisdiction to try the offence charged in the instant case. However section 34 of the same Act provides that every offence shall ordinarily be inquired into or tried by a court within the local limits of whose jurisdiction it was committed.

While section 35 thereof provides;

“When a person is accused of commission of any offence by reason of anything which has been done or of any consequence which has ensued the offence may be inquired into or tried by a court within

the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued.”

Under the Magistrate Courts (Magisterial Area) Instrument No.5 of 2007 Kampala Magisterial Area extends over Central and Rubaga Divisions with Chief Magistrates’ Courts at Buganda Road and Mengo. I have carefully studied the complaint and the annexures thereto, save for the uttering of a false document stated to have been uttered in the High Court which is within the Central Division of Kampala, it is not indirect where within Kampala the other offences were committed.

In the Charge Sheet the offences are stated have been committed in Kampala District. As of 11th January 2013, the date of the Charge Sheet, there was and there is no area in Uganda known as Kampala district. The court should make a clear finding on whether the offence complained of was committed within its local limits. As to the local limits of whose jurisdiction the accused person is alleged to reside or be the complaint does not indicate where any of the Accused persons resided or was at the material times.

In the Charge Sheet Hassan Bassajablaba is stated to be a resident of Munyonyo, Makindye Division and Bassajabalaba Muzamiru is stated to be a Resident of Najjanakumbi Makindye, Ssebagala, Wakiso District. The Accused persons residency would place the matter before the Chief Magistrate Court at Makindye. There was no evidence to show that the Accused person were removed from the area within which the offence is committed and found within another area in which case the Magistrates Court within which jurisdiction the person is found shall, under section 32 of the MCA, cause him or her to be brought before it. But even where this

happens unless authorized to proceed in the case, such court is required to send the person in custody to the court within whose jurisdiction the offence is alleged to have been committed.

The importance of jurisdiction was considered by Hon. Justice **Musoke Kibuuka in Kasibante Moses vs Katongole Singh Marwaka & Anor – Kampala Election Petition No. 23 of 2011** – where it was stated:

“The term jurisdiction is not a term of art. It is a term of law. It is a term of very extensive legal import. It embraces every kind of judicial action. It confers upon the court the power to decide any matter in controversy. It presupposes the existence of a duty. Constituted Court with full control over the subject matter under adjudication. It also presupposes full control by the court of the parties to the subject matter under investigation by it. Jurisdiction defines the power of a court to inquire into facts, to apply the relevant law, to make decisions and to declare the final outcome of the subject matter under its inquiry”

His lordship further stated:

“It is trite law that no court can confer jurisdiction upon itself. It is equally trite that no Court can assign or delegate jurisdiction vested in it”

In Ahmed Kawoza Kangu vs Bangu Aggrey Fred & Anor SCC Application No. 4 of 2007 Hon. Justice Bart Katureebe held that jurisdiction of the court is not a matter for implication but must be prescribed by law. In Gabula

Benefansio vs Wakidalu Meraso HCT Civil Appeal No. 29 of 2006 (Jinja)

Hon. Justice Bashaija stated:

“The lack of jurisdiction by a court over a matter cannot be regarded as a mere technicality under Article 126(2)(e) of the Constitution. Issues of jurisdiction are substantive and go to the core of a case and if a court lacks jurisdiction whether pecuniary or territorial, over the subject matter of limitation its judgment and orders however precisely certain and technically correct, are of no legal consequences and may not only be set aside anytime by the court in which they were rendered, but be declared void in every court in which they are presented. Similarly jurisdiction cannot be conferred on court by consent of the parties and any waiver on their part, cannot make up for the lack of jurisdiction. See Assanard & Sons (U) Ltd. Vs East Africa (1959) EA 360”

To safeguard against such clear consequences the magistrate before whom a Complaint is filed must satisfy himself or herself that her court has either pecuniary or territorial jurisdiction on the matter, the Charge Sheet should also be drawn to clearly indicate the offence allegedly committed, where the offence was committed and the residence of the accused properly indicates for certainty of jurisdiction of the court.

Subsection 4 of the section 42 above requires a magistrate upon receiving a complaint to consult the local chief of the area in which the complaint arose and put on record the gist of the consultation but where the complaint is supported by a letter from the local chief the magistrate may dispense with the consultation and thereafter put that letter on record. There is no record that the learned Chief Magistrate consulted the local chief of the area in

which the complaint arose. The complaint is supported by a letter dated 6th January 2013 written by one Musoke Kabisala, chairman, Kategula Zone Local Council I, Kibuye II Parish, - Makindye Division kampala District. The letter is Re: Mr. Kakande Bernard and states:-

“The above mentioned person is a resident of Kategula Zone LCI Kibuye II Makindye Division. He reported a complaint to our office on the 4th January 2013 regarding gross theft and uttering false documents and conspiracy to evade taxes by Mr. Hassan Bassajjabaaba and his counterpart. Bassajjabalaba Muzamuil.”

The letter does not indicate that the complaint arose in Kategala zone. Neither is it stated in the complaint or in counsel’s address to court that the complaint arose in Kategala Zone. What is of relevancy is the consultations to be conducted by the magistrate in the area. Where the complaint arose and not where the complainant resides. Apparently on the basis of the above letter the learned Chief Magistrate dispensed with the consultation with the consultations with the error in view of the contents of the letter which do not disclose that the complaint arose in that area. In view of the holding by the Constitutional Court in Rubaramira Ruranga vs Electoral Commission & AG Constitutional Petition No. 21 of 2006.

I wonder whether the LCI Chairperson can be regarded a local chief for purposes of the subsection. Further the spirit of the Local Governments Act show that Chairpersons are the political heads of the units and not Chiefs or administrative heads and accounting officers of their respective sub counties or parishes. See Section 69 of the Act.

In the circumstances the complaint was not supported by a letter from the local chief. Therefore the learned Chief Magistrate erroneous dispense with

the consultation. Yet the requirement is mandatory where there is no supporting letter from the local chief.

Sub- section 42 of the MCA provides:

“After satisfying himself on herself that prima facie the Commission of an offence has been disclosed and that the complaint is not frivolous or vexatious the magistrate shall draw up and shall sign a formal charge containing a statement of the offence or offences alleged to have been committed by the accused”.

Before drawing up a formal charge the magistrate is required to make a finding on the two issues:-

- (i) prima facie the commission of an offence has been disclosed, and
- (ii) the complaint is not frivolous or vexatious

In her ruling dated 11th January 2013, her worship stated:

“Court is satisfied the complaint on oath discloses a prima facie case that offences have been committed by the said Hassan Bassajjabalaba and his Co-director Muzamiru Bassajjabalaba in respect of----- Court will accordingly draw formal charges in respect to the above offence and issue criminal summons for both all to appear in court on 14/10/2013 to answer the said charges.”

A Charge Sheet dated 11th January 2013 was accordingly drawn. However the learned Chief Magistrate did not make any findings as to whether the

complaint was frivolous or vexatious. This was a material omission on the part of the magistrate.

Following the charge subsection 6 provides:

“ Where a Charge has been-

(a)-----

(b)drawn up under the provisions of sub section 5 the magistrate shall issue either a summon or a warrant, as he or she shall deem fit, to compel the attendance of the accused person before the court over which he or she presides, or if the offence alleged appears to be one which the magistrate is not empowered to try or inquire into, before a competent court having jurisdiction; except that a warrant shall not be issued in the first instance unless the charge is supported by evidence on oath, either oral or by affidavit.”

In the instant case the Chief Magistrate issued summons, in compliance with section 44 of the MCA, dated 11th January 2013 requiring the Accused persons, respectively to appear at the Magistrate’s Court of Buganda Road on 14th January 2013.

And sub-section 7 provides:-

“ Notwithstanding subsection (6) a magistrate receiving any charge or complaint may if he or she thinks fit for reasons to be recorded if writing, postpone the issuing of a summon or warrant and may direct an investigation or further investigation, to be made by the police into that charge or complaint, and a police officer receiving such a directive shall investigate or further investigate the charge or complaint and report to the court issuing the direction”.

In the request the learned Ag. Chief Registrar stated that the court ignored the fact that Mr. Bassajjabalaba was wanted by police which indicates that there were investigations being conducted by the police. Such investigations were independent of the complaint.

In its consultation upon receipt of a Complaint the magistrate is not required to consult the police. The magistrate is not under a mandatory obligation to direct an investigation by the police. It is only at the discretion of the magistrate to so direct if he or she thinks fit and when he or she does so he or she is required to record his or her reason for so directing.

In his letter the Ag. Chief Registrar faults the Chief Magistrate for not consulting the Resident State Attorney at Buganda Road Court and not summoning his or her to be present at the inquiry further that the court ignored the fact that Mr. Bassajjabalaba was wanted by police, information that was in the public domain and widely reported in the local media. Court must conduct proceedings before it judicially. It must base its findings and decision on the evidence presented before it and not on information which it comes by, either through the media or otherwise. However in the instant case Mr. Kakande Bernard in his Complaint on Oath states:-

“THAT I have come across newspaper article in the New Vision newspaper dated 3rd January 2013 stating that Mr. Hassan Bassajjabalaba was issued with police summons (A photocopy is hereby attached and marked annexure “A”).

The annexure in part reports:

- (1) ***“The police have summoned city businessman Hassan Bassajjabalaba for allegedly forging a court document.....Bassajjabalaba has been accused of forgery and uttering false documents”.***

- (2) ***“Summons for the businessman came hardly a day after it emerged that the Director of Public Prosecutions (DPP) Richard Buteera had okayed charges of forgery against Bassajjabalaba.***

By attachment of this newspaper to the Complaint on Oath, it became part and partial of the evidence upon which the learned Chief Magistrate based to make her finding that the Complaint had disclosed prima facie the commission of the offences. Section 42(5) MCA requires the Magistrate to satisfy her/herself that the Complaint is not frivolous or vexatious. The Black’s Law Dictionary 9th Ed. Page 1701 defines a “vexations suit” to mean:

“ A lawsuit instituted maliciously and without good grounds; meant to create trouble and expense for the party being sued” .

Had the learned Chief Magistrate addressed herself to the statement in paragraph 4 of the Complaint and annexure A thereto she would have discovered that the Complainant was already aware that the case was already under police investigations, that the DPP had already sanctioned the same Charges to be brought against the Accused persons and that summons had already been issued for them to report to the police in respect of the same charges. With such knowledge exhibited in his complaint to have brought a

Complaint in respect of the same charges the complainant must have been acting maliciously with no good cause with the intention to aggravate the Accused person's problems. Had Her Worship so addressed her mind she would have found the Complaint was vexatious.

I agree with Mr. Kavuma Kabenge that in Private Prosecution proceedings there is no requirement to involve the Director of Public Prosecution or his staff in inquiring or conduct of the proceedings.

However section 43 of the MCA empowers the Director of Public Prosecutions to take over and continue or discontinue such prosecutions. It provides:-

“ (1) where Criminal proceedings have been instituted by a person other than a public prosecutor or a police officer under section 42, the Director of Public Prosecutions may-----

- (a) take over and continue the conduct of the proceedings at any stage before the conclusion of the proceedings;
- (b) discontinue the prosecution of the proceedings at any stage of an inquiry or a trial before a magistrates court; and
- (c) require such person in relation to those proceedings:-
 - (i) to give him or her all reasonable information and assistance and
 - (ii) to furnish him or her with any documents or other matters and things in the persons' possession or under his or her control”

Article 120(3) of the constitution provides:-

“ The functions of the Director Public Prosecutions as the following-----

(a)-----

(b)-----

(c) to take over and continue any criminal proceedings instituted by any other person or authority;

(d) to discontinue at any stage before judgment is delivered, any Criminal proceedings to which this article relates, instituted by himself or herself or any other person or authority; except that the Director of Public Prosecutions shall not discontinue any proceedings commenced by another person or authority except with the consent of the court.”

The court record shows that on 16th January 2013 two learned State Attorneys appeared before the learned Chief Magistrate and on behalf of the DPP applied under Article 120 (3)(d) of the Constitution and section 43(1) (b) of the MCA applied for court consent to terminate the proceedings. The learned Chief Magistrate consented to the withdrawal. The withdraw was accordingly tendered.

Mr. Kavuma-Kabenge and Mr. Alaka argued that the consent to withdrawal was granted in error or irregularly as the DPP had not applied prior to the application to withdraw the proceedings applied to take over the conduct of the proceedings. In effect they argued that the DPP had no locus in the matter. I do not agree.

Article 120(3) provides the functions of the DPP. The functions as provided was independent of the other, they are not consequent upon the

other. In (c) the DPP may “take over and continue” . While the other the DPP may “discontinue’ the proceedings provided that where he or she so decides, in respect to proceedings commenced by another person or authority it must be with the consent of the Court. This is what was done in the instant case. I accordingly find that the right procedure was followed.

When the complainant and the Accused person were last in court learned Chief Magistrate adjourned it to 12th February 2013. The court record, however shows that court was held on 16th January 2013, in the presence of only the State Attorney from the Director of Public Prosecutions department who sought courts consent to withdraw the matter. The record clearly shows that the Accused persons were absent and apparently the Complainant or/and his Counsel were absent. Article 28 of the Constitution provides that on determination of any Criminal Charge a person shall be entitled to a fair hearing and every person who is charged with a Criminal offence shall be permitted to appear before the Court in person or at that person’s own expenses, by a lawyer of his or her choice. The Accused persons were denied their right to be present.

In consideration of all the above I make the findings below:

1. The Chief Magistrate at Buganda Road Court did not have jurisdiction on this matter. She should have issued the summons to compel the Accused persons to appear before the Chief Magistrate Court at Makindye.
2. The Charge Sheet should have clearly indicated where each of the respective offences was allegedly committed.

3. The learned Chief Magistrate did not consult the local chief of the area in which the alleged Complaints arose yet the Complaint was not supported by a letter of the local chief.
4. Before drawing the charge the learned Chief Magistrate did not make a finding whether the complaint was not frivolous or vexatious.
5. It was irregular for the Court to re-schedule the court appearance date and to have proceeded in the absence of the Accused persons or their advocate.

Section 50 of the Criminal Procedure Act provides:

“ (1) In the case of any proceedings in a magistrates court the record of which has been called for or which has been reported for orders or which otherwise comes to its knowledge, when it appears that those proceedings an error material to the merits of any case or involving a miscarriage of justice has occurred , the High Court may-----

(a) in the case of a conviction, exercise any of the powers conferred on it as a Court of appeal by sections 34 and 41 and may advance the sentence;

(b) a the case any other order, other than our order if acquitted, alter or reverse the order”.

Counsel for the Accused persons sought that proceedings of 16th January be expunged for the Lower court record. This court is not mandatorily required to make any of the orders are not made in vain. If the proceedings of 16th January 2013 are expunged from the record of the lower court it will mean a reversion to the private prosecution proceedings commenced by Mr.

Kakande Bernard. Yet as averred by Hassan Bassajjabalaba in his affidavit the Accused persons were Charged afresh by the DPP with similar offences before the Anti-Corruption Division of the High Court in the Chief Magistrates Court. A withdraw of Criminal Charge is not a bar to fresh Charges being pressed. A reinstatement of the private prosecution proceedings would lead to two parallel proceedings which is prejudicial to the Accused persons.

In the premises I decline to make the orders sought by counsel for the accused persons for the proper conduct of future Private Prosecution proceedings.

I order the Ag. Chief Registrar to circulate this Ruling for the guidance of the lower court's judicial officers.

I so order.

LAMECK N. MUKASA

JUDGE

26/04/2013