

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KABALE
CRIMINAL REVISION NO.001 OF 2016
(Arising from Rukungiri Criminal Case No.AA39/2016)

UGANDA

APPLICANT

VERSUS

NDYAMUHAKI JULIUS&ORS

RESPONDENTS

RULING

This is an Application for revision brought by the Director of Public Prosecutions in a Petition for Orders to quash the Orders made by the Magistrate Grade 1 at Rukungiri Court on the grounds that;

1. The learned Magistrate had no jurisdiction to take plea on a charge sheet with counts of Murder, Attempted murder and being Accessory after the fact to Murder .
2. The learned Magistrate had no jurisdiction to grant bail to A 15 and A 16 on a Charge sheet where there are counts of Murder and Attempted murder
3. The learned Magistrate acted irregularly and contrary to the law when she granted bail to A5, A13 and A14 without hearing from the Prosecution and without giving reasons.
4. The learned Magistrate acted illegally when she made an Order that the Charge sheet be amended by charging A15 and A16 separately.

The Applicant seeks the following Orders:

- (a) The Orders of the Magistrate be quashed.
- (b) A 15 and A16 be remanded together with other Accused Persons on the same Charge Sheet.
- (c) The case file be handed to another Magistrate for proper handling.

The Application was brought under the provisions of Sections 48 and 50 (5) of the Criminal Procedure Code Act and Section 17(i) of the Judicature Act.

The background to this application is that on the 18th/05/2016 a one Sirigenda Joel was allegedly murdered at Kagogo Coffee factory, Rukungiri Municipality, Rukungiri District. On the same date and place there was an attempt to unlawfully cause death to a one Twesigye Emmanuel.

The Police arrested 14 people who were on the 7th/06/ 2016 charged with Murder Contrary to Section 188 and 189 and Attempt to Murder Contrary to Section 204 of the Penal Code Act. They were remanded in custody as inquiries were still ongoing. This group of Accused persons shall be referred to as A1 to A14 in this Ruling.

The Magistrate at the same sitting invoked Section 91 of the Children's Act to release on bail A5, A13 and A14 who are juveniles and the case was adjourned for mention on the 20th/07/2016.

On the 13th/07/2016, an Amended Charge sheet was presented joining Ogwal Michael (A15) and Turamy Frank(A16) on two counts of Accessory after the fact to Murder Contrary to Section 206 of the Penal Code Act. The particulars are that the two Accused persons who are Police Officers at Rukungiri Police Station on the 19th/05/2016 assisted a one Ngabirano Dennis who to their knowledge was guilty of the murder of Sirigenda Joel to escape punishment.

The same Accused persons are in another count alleged to have on the 20th/05/2016 assisted a one Namara Bright escape punishment for the murder of Sirigenda Joel yet they knew that she was guilty of the murder of Sirigenda Joel.

The two Accused persons were charged on the 13th/07/2016 and both pleaded not guilty to the offences preferred. The Magistrate granted them bail and adjourned their case for mention on the 3rd/08/2016 and to the 20th/07/2016 in respect of A1 to A14. The Magistrate also ordered the Applicant to amend the Charge Sheet and charge A15 and A16 separately since the offences preferred against them are within the jurisdiction of her Court in the Magistrates Courts Act.

Mr. Baguma, Senior State Attorney represented the Applicant and Mr. Bwagi represented A15. Mr. Mwesigye represented A16.

I wish to appreciate the spirited arguments, submissions and Case law presented by all Counsel which I have carefully considered but not fully reproduced in this Ruling.

It was argued for the Applicant that the Magistrate did not have jurisdiction to take Pleas and grant bail to A15 and A16 who were charged with the offence of being Accessories after the fact to Murder Contrary to Section 206 of the Penal Code Act. The basis for this argument is that A15 and A16 are jointly charged with others(A1 to A14) who are accused of Capital Offences for which Court lacks jurisdiction. Counsel for the Applicant relied on Sections 161 and 75 of the Magistrates Courts Act in support of this assertion. It was argued that the Magistrate was only required to charge and advise A15 and A16 to apply for bail in a Court with jurisdiction, hence her purported actions were irregular and a nullity at Law.

The Learned Magistrate granted bail to A5, A13 and A14 who are juveniles, on the strength of Section 91 of the Children's Act without giving the Applicant a hearing and giving reasons. It was submitted that this amounted to improper exercise of the discretion enjoyed by the Magistrate since other factors relating to the welfare of the accused juveniles under Section 48 of the Children's Act were not inquired into.

The Order to amend the Charge Sheet to charge A15 and A16 separately from A1 to A14 was also vehemently resisted by Counsel for the Applicant. The basis of his

contention is that the Magistrate lacked overall jurisdiction to make any Orders regarding a Charge Sheet which contained Counts over which she had no jurisdiction. This was in specific reference to the two Counts of Murder and Attempt to Murder answered to by A1 to A14. It was further contended that only a Court with jurisdiction over all the Counts in the Charge Sheet can make orders for a separate trial and in any case no embarrassment had been occasioned to the Accused persons since hearing of the case had not commenced.

The Orders made by the Magistrate were thus irregular and a nullity at Law meriting to be quashed it was finally submitted for the Applicant.

Counsel for A15 and A16 were of a different view. Their contention is that the Magistrate is clothed with jurisdiction under Sections 161(1)(b) and 75 of the Magistrates Courts Act. The basis of the argument is that the Accused persons did not plead to the Charges of Murder and Attempt to Murder for which Court lacked jurisdiction. They pleaded to the Charges of Being Accessories to the Fact of Murder which are triable by the Magistrate's Court. In the same spirit it was argued, the Magistrate had jurisdiction to grant A15 and A16 bail since she had jurisdiction to hear and determine the charges to which they pleaded.

Regarding the Order to amend the Charge sheet by separating A15 and A16 from other accused persons, it was argued that the Magistrate had noted that it was improper and a mis-joinder to join the two capital offences of Murder and Attempt to Murder with one of a minor gravity the Accused are charged with. The separation it was submitted, was intended for the Magistrate to handle the Counts of Being Accessories to the fact of Murder against A15 and A16 which are within her jurisdiction as provided in Section 161(1) of the Magistrates Courts Act.

The Respondents filed an Affidavit in reply to the Petition and attached a Charge sheet and Bail Bond forms in **CRB 1350/2016 UGANDA vs ASIIMWE HELLEN and ANKUNDA BARBARA**. The Charge sheet was sanctioned on the 07/07/2016 by the Rukungiri Resident State Attorney. The Accused in that case were charged with Compounding A felony Contrary to Section 104 of the Penal Code Act. The Particulars are that the two Accused persons had on the 18th/05/2016 at Kagogo Coffee factory knowingly agreed to conceal the murder of Sirigenda Joel. The Accused had been charged on a separate Charge Sheet from A1 to A14 and had been granted bail.

It was submitted that in view of the handling of the two accused in CRB 1350/2016, it is malicious on the part of the Applicant to apply for the setting aside of the Magistrate's Orders in this Petition and to charge them with others on Capital Offences. They deserve similar treatment it was argued.

It was further submitted that A15 and A16 were not charged with the Offences of Murder and Attempt to murder like A1 to A14, that the offences in the charge sheet were allegedly committed on separate dates and in different places; and that the persons A15 and A16 are alleged to have assisted to escape Punishment are not charged with the Counts of Murder and Attempted Murder. This was a submission in further justification of the alleged malice on the part of the Applicant.

The Offences joined in the Charge Sheet it was further submitted, are not the same, are not offences committed in the same transaction and neither are they different offences committed in the same transaction to be joined. The Charge sheet is bad for mis-joinder of Counts and Persons and will cause a miscarriage of justice to A15 and A16 it was argued by Counsel. Section 87(d) of the Magistrates Courts Act was relied on for that submission. Counsel invited Court to uphold the Orders issued by the Magistrate and to order the Applicant to accordingly amend the Charge Sheet.

The powers of the High Court in Criminal Revision are laid out in Sections 48 and 50 of the Criminal Procedure Code Act. Court is enjoined to examine the record of any proceedings for purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and to investigate the regularity of any proceedings in the Lower Court.

The major issue for consideration of this Court is to determine whether the Magistrate had jurisdiction to take pleas, grant bail and order amendment of a Charge sheet with multiple counts including those of a Capital nature. It has been held before that no Court can confer jurisdiction upon itself.

In Election Petition No.23 of 2011 Kasibante Moses Vs.Katongole Singh&Anor; the term “*jurisdiction*” was succinctly explained by Hon.Justice Musoke Kibuuka, as he then was, in the following words;

“ 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 pre-supposes the existence of a duly 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.”

In Chesoni &Anor Vs Silvester (2006) EA 39 it was stated *thus;*

“ If the act is invalid, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad..... and any proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there .It will collapse.”

I have read the laws cited, the case law cited in support of the varying arguments and carefully considered the able submissions of Counsel for both the Applicant and A15 and A16. I am in agreement with Counsel for A15 and A16 that the Magistrate Grade 1 is duly clothed with jurisdiction to hear and determine the Count of Being an Accessory to the fact of murder Contrary to Section 206 of the Penal Code Act.

The Charge Sheet in the instant case however, had counts of Murder and Attempt to Murder which are clearly outside her jurisdiction. A 15 and A16 were jointly charged with A1 to A14 although on different Charges. I am in agreement with the Applicant that this relieved the Magistrate Grade 1 of the jurisdiction to take the pleas of A15 and A16 and to subsequently grant them bail. The practice in such cases is that the gravest offence in a multiple count charge sheet determines the jurisdiction. Murder and Attempt to murder charges in this case determined the jurisdiction of which Court could handle this case.

It was submitted that the Charge sheet was defective for misjoinder of counts and persons and that this is bound to occasion a miscarriage of justice and embarrassment to A15 and A16 in the preparation of their defence. This argument carries merit in view of the Rule of Practice laid out in **Alikaelis/o Alifayo Vs R (1954)21 EACA 371** and other cases. Courts have the discretion to order separation of counts and persons to ensure justice is done in course of the trial.

In the instant case and as rightly submitted by the Applicant, only a Court with jurisdiction to take plea and hear the cases on the Charge sheet can make such an Order. In view of the finding herein above, the Magistrate did not have the legal capacity to make such an Order given the nature of the Charges presented.

In **Uganda Vs Dickens Elatu &Anor** it was held by Saied J that;

“ It is not every obvious irregularity and defect in the Charge sheet that makes it bad in law, and thus render the ensuing proceedings a nullity. The criterion which has to be applied to answer the question as to what has been the effect of the defect in the charge or trial and conviction of the accused ,must be whether there has been a failure of justice....”

Determination of whether there will be a failure of justice is a preserve of a Court with jurisdiction. The Magistrate Grade 1 irregularly ordered for the amendment of the Charge sheet it follows. In sum, the Orders of the Magistrate are a nullity in law and are hereby quashed.

I however consider it pertinent to comment on the allegation of malice raised by Counsel for A15 and A16. The Charge Sheet in CRB 315 of 2016 relates to Offences allied to the murder of Sirigenda Joel on the 18th/05/2016 at Kagogo Coffee factory as

in the instant case. The Accused persons in that case were charged separately and granted bail. The offence of Compounding A felony Contrary to Section 104 of the Penal Code is a misdemeanor within the jurisdiction of a Magistrates Court. I have failed to detect any invalidity in those proceedings, which are in any case not a subject of this Petition. I would have ruled differently if the accused persons in that case had been charged together with A1 to A14 as in the instant case.

This allegation however raises issues about how this case has been investigated and managed and the Director of Public Prosecutions is urged to further interest himself into its future management. This does not however validate what was irregularly done by the Magistrate Grade One in the instant Application. I accordingly grant the Petition and Order as follows;

(a) The Orders made by the Magistrate Grade One to grant bail is hereby quashed for being irregular and a nullity at Law

(b) Bail granted to A15 and A16 is hereby cancelled and both accused are hereby remanded to Ndorwa Prison forth with.

(C) The Officer In Charge Ndorwa Prison shall make arrangements to transfer A15 and A16 to Rukungiri Prison so that they appear for mention together with A1 to A14 with whom they are charged.

(d) The case file is hereby forwarded to the Chief Magistrate,Rukungiri, for allocation to another Magistrate for proper handling.

Dated at Kabale this 15th day of August 2016.

MOSES KAZIBWE KAWUMI
JUDGE