

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

**CRIMINAL MISC. APPLICATION NO. 075 OF 2016
[ARISING FROM JINJA CRIMINAL CASE NO 0059/2016 AND 0064/2016**

**HIS MAJESTY OMUSINGA MUMBERE CHARLES WESLEY.....
APPLICANT**

VERSUS

**UGANDA.....
RESPONDENT**

RULING
BEFORE: HON. LADY JUSTICE EVA K. LUSWATA

At the hearing of the above bail application on 9/01/17, a preliminary objection was raised for the respondent that the applicant who is charged with various offences, one of which is terrorism, should have presented his application for bail in the High Court International Crimes Division (hereafter referred to as the ICD) which has jurisdiction to grant bail and try the offence of terrorism. The objection was raised without prior notice to the applicant's advocates, but an explanation was given that it was an issue of law. The applicants' lawyers objected to what they termed an ambush but resolved, and did make an oral submission in response to the objection.

Ms. Rachael Bikhole for the respondent argued that the applicant is charged with the offence of terrorism, which is created under Section 7(1)(a) and (2) of the Anti Terrorism Act 2002 (hereafter referred to as the ATA 2002) and according to paragraph 6(1) of the High Court (International Crimes Division) Practice Directions, 2011 (hereinafter referred to as the ICD Directions 2011), falls under the jurisdiction of the ICD to be tried by that Court only. She did concede that the ICD Directions 2011 did not necessarily take away the inherent jurisdiction of

the High Court, but argued that failing to place the application before a Judge of the ICD would mean omitting to follow procedures of that Court. Counsel also made reference to Rule 54 of the Judicature (High Court) (International Crimes Division) Rules, 2016 (hereafter referred to as the ICD Rules 2016) to argue that bail in the ICD is the prerogative of a trial Judge or Panel of Judges of the ICD and if an application is to be heard outside that Court, then according to the ICD Directions 2011, a Judge would first have to be designated by the Principal Judge for that purpose. Counsel was prepared to have the entire trial moved to the ICD and specifically prayed that the bail application be referred to the same Court for hearing.

Caleb Alaka and Evans Ochieng opposed the objection. They argued that that the respondent by filing a response to the application without raising any objection to jurisdiction was an indication that they had submitted to my jurisdiction and thus, the objection was being made in bad faith. Counsel Alaka argued that the law cited by respondent's counsel, applied strictly to an applicant who had already been committed (in this case for trial in the ICD) but not one whose case was still on mention. He stressed that mine was not a committing Court, but one with inherent unlimited jurisdiction granted by Article 138 and 139 of the Constitution, and, no less than that of the Judges of the ICD to entertain a bail application, which is a matter of discretion.

Alaka argued further that the ICD is a division of the High Court set up as an administrative arrangement for convenience to hear certain cases. That the ICD Directions 2011 which have been held by the Constitutional Court to be purely administrative, were issued subject to Article 133(1)(b) of the Constitution and the powers of the Chief Justice therein was purely administrative and could not override jurisdiction of the High Court. He argued further that the applicant whose offences originated from Kasese was instead charged in the Jinja Chief Magistrate's Court on the directives of the Chief Justice upon the prompting of the Director of Public Prosecutions (DPP) who is stopped at this point to cause yet another shift to the ICD, a court that was in existence at the time the charges were preferred. He regarded the objection as one being a mere technicality, designed to delay justice for his client.

Counsel Ochieng in addition submitted that the powers of the High Court in unlimited jurisdiction is well supported by authority and the Constitution cannot be amended by a Legal

Notice. He added that since the applicant is faced with other offences triable in the High Court, then a similar argument could be made against applying for bail, or trying the matter in the ICD. He too invited the Court to reject the objection.

In a brief rejoinder, counsel Bikhole clarified that according to paragraph 6, the ICD Directions 2011 govern the entire proceedings in the ICD. That a transfer of these proceedings to the ICD would occasion no prejudice to the applicant or cause any delay. She stated but did not provide authority that the ICD has previously tried offences of an international nature together with those tried by the High Court, which was their intended course of action here. That the bail in the ICD could be granted before or after committal and invoking the provisions of the ICD Directions 2011 did not amount to an amendment of the Constitution.

The ICD to which the respondent wants the application referred, is a special Division of the High Court of Uganda established in July 2008, pursuant to powers of the Principal Judge under Article 141 of the Constitution. The objective was to establish a court to try perpetrators of war crimes and crimes against humanity, and as such, some of its principal statutes include the Geneva Conventions Act Cap. 363 and the International Criminal Court Act 2010 (that domesticated the International Criminal Court Act). That way, the ICD can be viewed as a court of complementarity to the International Criminal Court [ICC].

My understanding therefore is that, the ICD is meant to try crimes with an international component and indeed a careful reading of the Anti-Terrorism Act 2012, indicates jurisdiction of the ICD in matters that are extra-territorial in nature. However, the ICD can and does try 'local' crimes and its rules allow the applicability of the Constitution of Uganda as well as the traditional rules of evidence and penal laws of Uganda. Similarly, the Constitutional Court was of the view that a Judge sitting as a High Court can try (and therefore grant bail), to one charged with terrorism alongside other crimes. See for example Consolidated **Constitutional Petition Nos. 55 and 56/2011 Omar Awadh Omar Vs AG**. A similar situation pertained in **Cr. Case No. 1/2010, Uganda Vrs Hassan Hussein & 18 Ors** in which the accused were tried on multiple charges of terrorism, murder and attempted murder in the High Court.

At its inception, in the absence of a specific legislations to guide ICD, its functions were first operationalized by the ICD Directors 2011, issued by the Chief Justice. They are subject to Article 139 of the Constitution and pursuant to both Articles 133 [1] and [b] and Article 144 of the Constitution, are in place as administrative and procedural orders for the proper and efficient administration of justice. Although I do agree with counsel Ochieng that the directives cannot amend or supersede constitutional or legislative provisions, they are nonetheless important because they do address a specific branch of our criminal justice system, and it is expected that the ICD has in place unique procedures and specialized personnel to handle the crimes specified in paragraph 6.

I stress however that, what the respondent was raising were matters of bail and not trial which is the basis of this application. In my view, a trial and a bail application are parallel proceedings and should be regarded as such. In fact, the practice of courts has been to encourage, that different Judicial officers handle the bail application and trial of a particular accused person to eliminate all possibility of bias.

The ICD Regulations 2011, aside, the ICD Rules 2016 came into force in April 2016 and apply to all matters and proceedings under the jurisdiction of the ICD. [Emphasis of this court]. As rightly argued by counsel Alaka, the applicant who has not yet been committed to the ICD, cannot be deemed to be subject to that law. Those arguments are supported by Rule 54[1] which provides as follows: -

“[1] In accordance with section 14 of the Trial on Indictments Act, the trial Judge or trial Panel may, at any stage in the proceedings, release an accused person on bail...”

Further, according to Rule [2]

“...the trial Judge or trial Panel may, on remand, admit the accused person to bail subject to such conditions as may seem appropriate.”

Under Rule 3, an “*accused person*” means a person who has been committed for trial before the Division. In this particular case, the accused is not yet so committed, and again as observed by Alaka, mine is not a committing court, but one to which one charged with several crimes, has approached for release on bail.

Further the argument by Ms. Bikhole that I can only hear this application by designation of the Principal Judge is misconceived. I believe she was referring to the interpretation paragraph [2] of the ICD Directions 2011 that “*Judge*” means a *Judge of the Division or any Judge designated by the Principal Judge.*” I believe the powers of the Principal Judge are invoked whenever necessary to appoint a Judge to act as a single Judge or as member of a Panel of Judges of the ICD. This again would be in respect of a trial or proceeding in respect of one who is already committed to that court.

It was argued in the converse for the applicant and in fact not contested by Ms. Bikhole, that, none of the ICD legislation mentioned above ousted the jurisdiction of the High Court to hear a bail application. I would agree as much because, the right to bail is guaranteed under Article **23[6][a] of the Constitution** which provides as follows: -

“A person is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable.”

I would conclude therefore that at this point in the criminal proceedings of this case, the applicant may but is not as a rule to be subjected to the provisions of the ICD Directions 2011 or the ICD Rules 2016 with respect to his bail application. Under Section 14 TIA, release on bail shall be at any stage of the proceedings, including pre-committal period. Therefore, the applicant would qualify to apply and have his bail application heard before me. In my view, by filing this application in this court, the applicant is ready to plead his release on bail and it would be prejudicial and a violation of his constitutional right to due process, to have the application transmitted to yet another court to hear the bail application.

I would hasten to add, that my decision should not be interpreted to hinder any future plans of the DPP if they deem it fit, to present the applicant for trial in the ICD. They will of course be expected to have fulfilled the provisions of all legislation that governs the ICD.

Accordingly, the objection made for the respondent is overruled and the bail application may go to hearing.

I so order.

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EVA K. LUSWATA

JUDGE

12/01/17