

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

(CRIMINAL DIVISION)

MISC. APPLICATION NO. 43 OF 2018

(Arising from Misc. Cause No. 42 Of 2018)

HAJI ABDALLA KITATA.....APPLICANT

VERSUS

UGANDA.....RESPONDENT

BEFORE: HON. MR. JUSTICE J. W. KWESIGA

RULING:

The Applicant, Abdalla Kitata, filed an application for Bail pending a trial by a Notice of Motion stated to be brought under Articles 23(6)(a), 43(2)(b), 50(1) 120(5) and 250(4) of the Constitution of Uganda, Section 14 of Trial on indictments Act, Rules 2 and 4 of Judicature (Criminal Procedure) Application Rules and all other enabling Laws of Uganda. The Application states that the Applicant is under a trial in *Uganda Versus Haji Kitata Abdalia & 12 Others - Criminal Case No. UPDF/GCM/005/2018* before General Court Martial.

The application further stated that there is a pending application in this court (Criminal Division), namely; *Misc. Cause No. 42 of 2018 - Haii Kitata Abdalla Versus Attorney General and Others* in which the Applicant challenges the jurisdiction of general court martial in the above mentioned on going criminal trial.

When the above application came for hearing on the 23rd day of *May 2018*, Mr. Jimmy Muyanja appeared for the Applicant. The Applicant was not in court.

Miss Barbra Kawuma, Senior State Attorney appeared for the Respondent. This court sought to resolve one question before indulging in the hearing of the application. The question put to the two parties to address court is *Whether this application is properly before this court?*

The foundation of this application is that the Applicant, a civilian, was charged and is being tried by the General Court Martial under ***Criminal Case No. UPDF/GCM005/2018 - Uganda Versus Abudalia Kitata & 12 Others***. The Applicant before this Bail Application filed ***Misc. Cause No. 02 of 2018*** challenging the jurisdiction of the General Court Martial and therefore, this application basically seeks bail as an inter-locutory relief pending the disposal of the main application.

I have had the opportunity of accessing the Ruling by my brother Justice Nyanzi Yasin dated 23rd May 2018 in which he disposed off the main application.

The Learned Judge held that Miscellaneous Cause No. 02 of 2018 was filed in the wrong Registry and therefore, incompetent. He held that a person seeking any reliefs under Article 50 of the Constitution of Uganda has enforcement in Civil Procedure Act and Rules made there under and can proceed under the Civil Registry to seek the reliefs. Therefore, there was no and there is no competent Application pending before this court to warrant an inter-locutory relief sought in the instant application.

Miss Barbra Kawuma for the Respondent contended that this criminal court could only entertain a bail application if there was a pending criminal case before it, and she referred to Section 14 of Trial on Indictments Act (Cap.23)

1. To resolve the question that I stated for disposal, the answer has been provided in the ruling in ***Misc. Cause No. 02 of 2018*** on which this application for bail as an inter-locutory relief is founded. The outcome of the main cause is that it was filed in the wrong court and therefore, incompetent. It follows that this application is also not properly before this court and it is hereby struck off the record as incompetent.
2. ***The provision of Section 14 of Trial on Indictments Act states:- "(1) The High Court may at any stage in the proceedings release the Accused person on bail — to appear before the court on such a date and at such a time as is named in the bond" In***

my view, this section permits the High Court to release a person on bail where it has practical control over the proceedings. The proceedings must be before the High Court or under it's supervision. It is my view that for any court to exercise it's discretion to grant bail, it should be fully possessed with the facts and the circumstances obtaining at the pending trial.

It was disclosed by Mr. Jimmy Muyanja in answer to the Judge's question that at the time this application was filed, there was a pending application for bail before the General Court Martial. This is the competent Court for purposes of Bail application because it is in a better position to assess the suitability of granting bail after considering how it would affect or influence fair trial. It is the trial court that would determine the appropriate recognizance, appropriate sureties, appropriate date and time to bind the Accused/Applicant or his sureties to make sure that he returns for his trial. I hold that it is wrong practice for persons under trial by the General Court Martial to by-pass its jurisdiction and seek bail from the High Court on the grounds that the General Court Martial is a subordinate court.

3. The General Court Martial, notwithstanding that by Law it is subordinate to the High Court, has powers to entertain bail applications and to grant or reject the application discretionally. The Lesotho High Court made a persuasive holding in the case of *Mahase & Others Versus Morethi & Others (1999) LS CA 68*

that "It is undue and unnecessary interference with functions of courts of Law where, for example, as in the Magistrate's court proceedings for bail are removed to the High Court before they are finalized except proceedings outside the jurisdiction of the Magistrate's Court. The Martial Court is already proceedings against Applicants on the offence of mutiny and as this court is seized with this crime, it would seem the martial court is the proper court to grant bail provided it has jurisdiction to do so or the Defence Force Act or Martial Court rules have such provisions regarding the grant of bail".

I have also considered the views that the High Court has unlimited jurisdiction over all the offences under trial however, bail is not an offence but a discretionary procedural relief that is inter-locutory and the court handling the trial is the most appropriate to grant it after considering all the circumstances of the case as a whole.

Therefore, for these reasons, this application is declared to be before a wrong court and I Order that it be struck out.

Dated at Kampala this **06th** day of **June 2018**.

J. W. Kwesiga

High Court Judge

06/06/2018

In the presence of:-

- > Ms. Kwikiriza Sharote - Senior State Attorney for Respondent
- > Mr. Kikomeko holding brief for Jimmy Muyanja for the Applicant
- > Haji Abdalla Kitata - Absent.