

1 **THE REPUBLIC OF UGANDA**
2 **IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO**
3 **HCT-14-CR-CV-0002-2019**
4 **RTD MAJOR GENERAL MATAYO KYALIGONZA:..... APPLICANT**
5 **VERSUS**
6 **UGANDA:.....RESPONDENT**

7
8 **BEFORE HON. LADY JUSTICE MARGARET MUTONYI, JUDGE HIGH COURT**

9 **RULING**

10 1. This Ruling as in respect of the Application brought under sections 48 and 50 of the Criminal
11 Procedure Code Act CAP 1216 and section 17 (1) and 33 of the Judicature Act Laws of
12 Uganda.

13 2. RTD Major General Matayo B. Kyaligonza herein after referred to as A1,
14 No.221607 Lance Corporal Bushenbich referred to as A2 and No.230924 PTE Okurut
15 Robert A3 are seeking for the following Orders:-

- 16 (i) That the Ruling of the Chief Magistrates Court of Mukono in Criminal
17 Case No.0312 of 2019 be revised.
- 18 (ii) That upon revision, this court varies the orders in the said Ruling by setting aside the
19 Orders that the Applicants appear before the Chief Magistrates Court of Mukono.
- 20 (iii) That the Respondent pays the costs of this Application.

21 The grounds of the Application that are contained in an Affidavit of Mukama Sanyu
22 Jamil an Advocate of the Courts of Judicature are:-

- 23 (i) That the Applicants are aggrieved by the said Ruling.

24 (ii) That the Chief Magistrate’s Court of Mukono acted with incurable procedural
25 irregularity and as well exercised its jurisdiction illegally or with material
26 irregularity or injustice and also exercised jurisdiction not vested in it in law to
27 wit

28 (a) By finding that the Applicants who are already appearing before the Unit
29 Disciplinary Committee of the Military Police should as well appear before
30 the Chief Magistrates Court of Mukono and be tried on the same facts they
31 are being tried for in the Unit Disciplinary Committee.

32 (b) By finding that the double jeopardy could not be raised not until the
33 Applicants had taken plea in the Chief Magistrates Court of Mukono yet
34 Applicants are already being tried in the Unit Disciplinary committee of the
35 Military Police over the same facts like the ones in the Chief Magistrates
36 Court in Mukono.

37 © By ordering for the arrest of the Applicants yet the 2nd and 3rd Applicants are
38 already in custody of the Military Police over the same facts in issue.

39 (d) That the Applicants are persons subject to Military Law and are being tried in
40 the Unit Disciplinary Committee of the Military Police, therefore the Chief
41 Magistrate’s Court exercised jurisdiction not vested in law by issuing arrest
42 warrants against them.

43 (iii) That the said Orders are likely to cause a miscarriage of Justice.

44 3. The Applicants were represented by Mr. Mpata Kalid, David Balondemu and Evans Ochieng
45 while the State was represented by Senior State Attorney Mr. Jonathan Muwaganya.

46 4. **Brief Background of the Case**

47 The brief background of this case is that the 3 Applicants were charged before the Chief
48 Magistrates Court vide a charge sheet dated 18th March 2019. The file was cause listed for plea
49 taking on 10th April 2019.

50 The Accused did not appear before Court in person but were represented by Mr. Alaka who
51 informed court that A2 and A3 were under custody while A1 was a serving Ambassador in

52 Burundi who gave him instructions that morning. He promised that his client would appear in
53 court. The case was then adjourned to 29th April 2019. On that date, the Accused did not appear.

54 The Advocates appeared and challenged the proceedings pleading double jeopardy. The Chief
55 Magistrate did not agree with them and issued a warrant of arrest. The Accused through their
56 Defence Counsel wanted the file to be closed on the ground of double jeopardy.

57 They filed for Revision hence this Application.

58 4. The submissions were orally made and I will refer to them as and when necessary.

59 5. The main issue for resolution is whether the Chief Magistrate acted with incurable procedural
60 irregularity and exercised jurisdiction illegally with material irregularity.

61 **Resolution of issues:**

62 *Section 48 of the Criminal Procedure Code* empowers High Court to call and examine the
63 record of any Criminal proceedings before any Magistrate's court for the purpose of satisfying
64 itself as to the correctness, legality or propriety of any finding, sentence or order recorded or
65 passed and as to the regularity of any proceedings of the magistrate.

66 The key constituents of section 48 are: correctness, legality, propriety and regularity.

67 When the High Court is considering the element of **correctness of the proceedings**, it looks at
68 the quality of the proceedings being free from error and whether the evidence support the
69 elements of the charge or not to determine whether the decision of conviction or acquittal was
70 correct.

71 As regards **legality**, the High Court looks at whether the proceedings, were conducted and
72 decision made in accordance with the statutory or the established principles of the law.

73 When dealing with the **complaint on propriety**, the High Court examines the proceedings with
74 a view of satisfying itself whether the Magistrate's court acted in conformity with the
75 conventional accepted standards of criminal procedure from the time the accused appeared
76 before it.

77 And when probing into the allegations of **irregular conduct**, the High Court looks at how the
78 entire process ought to have been done according to the established rules of procedure in respect
79 of the act complained about.

80 The issue before me is basically founded on 3 main grounds;

- 81 1. Whether the finding that the Applicants who are already appearing before the Unit
82 Disciplinary Committee of the Military Police should as well appear before the Chief
83 Magistrates Court of Mukono and be tried of the same facts they are being tried in the
84 Unit Disciplinary committee was made with material illegality, irregularity and
85 impropriety and is not correct. (in other words, Whether the Plea/Principle of double
86 jeopardy is available to them).
- 87 2. Whether they should appear before the Chief Magistrates Court for Plea Taking.
- 88 3. Whether the warrant of arrest issued by the Chief Magistrate should be vacated.

89 **Let me start with the issue on double jeopardy;**

90 Counsel for the Applicants submitted on page 6 of the typed proceedings that “it is not in
91 contention that the Applicants have been charged in the Unit Disciplinary Committee of the
92 UPDF.

93 I am referring to Annexure A on the Affidavit of Mukama Sanyu Jamil, which clearly sets
94 out the names of the Accused persons.

95 By ordering the Applicants to appear in the Chief Magistrates Court of Mukono on similar
96 facts and charges as these under the Unit Disciplinary Committee of the Military Police, it
97 would amount to double jeopardy”.

98 Counsel for the Applicants was making reference to the Military tribunal.

99 He went on to submit on page 6 paragraph 4 that

100 “it is worth noting that when criminal case No.312 of 2019 first came up on the 29th day of
101 April 2019, in the Chief Magistrates Court of Mukono, the 2nd and 3rd Applicants were
102 already in the lawful detention on the orders of the court martial.

103 Therefore court ought to have been cognizant of the fact that the Applicants were already
104 undergoing Trial and issuing orders to compel them to appear in another court would amount
105 to double jeopardy.

106 He relied on the Authority of *Uganda Law Society Vs The Attorney General*,
107 *Constitutional Appeal No.1/2006* (I will reproduce the holding later). The learned Senior
108 State Attorney Mr. Jonathan Muwaganya, on page 9 paragraph 4 submitted that “the position
109 of the law is that double jeopardy applies in respect of subsequent proceedings, in the 2nd
110 Court. In other words this form of plea can only be raised in the 2nd court and not in the court
111 of first instance”.....

112 Annexure B to the Application which is the charge sheet by which the Applicants were
113 charged in the Chief Magistrate’s Court as well as the record is clear that the Accused
114 persons were first charged before the Chief Magistrate on April the 3rd 2019.....

115 Under *Section 42 (1) (b) of the MCA*, Criminal proceedings can be properly instituted by a
116 Public Prosecutor or a Police Officer laying a charge against any person before a Magistrate
117 and requesting for issuance of warrants or summons to compel the attendance of the person
118 so charged.

119 So by registering the charge sheet on the 3rd of April 2019, Criminal Proceedings in respect
120 of the three Applicants commenced.

121 The record is also clear that on the same day criminal summons for the 10th of April 2019
122 were issued, the record is clear that none of the Applicants answered to the summons but
123 instead instructed three Counsel namely Caleb Alaka, Evans Ochieng and David Balondemu
124 who asked for the extension of the criminal summons to 29th of April 2019.”

125 He went on to submit that on 29th of April 2019, none of the Applicants turned up but all their
126 Counsel served court with Annexure A to the effect that the 2nd and 3rd Applicants had been
127 arraigned in the Unit Disciplinary Committee on the 16th April 2019. There was nothing on
128 record to show that Applicant no.1 i.e. Rtd major General Matayo B. Kyaligonza has been
129 arraigned in any court in respect of the charges in issue. So it is not true that all Applicants
130 have appeared in the Military Disciplinary Committee.

131 What is on record is that the 2nd and 3rd Applicants were arraigned before the Disciplinary
132 Committee on the 16th of April 2019.

133 Counsel for the State posed a question which was “which of the two courts, the Military
134 Disciplinary Committee and the Chief Magistrates Court is bound by the rule of double
135 jeopardy so to say?”

136 He submitted that it was subsequent that and the Defence of double jeopardy ought to have
137 been raised in the Disciplinary Committee because by the 16th of April 2019, the 2nd and 3rd
138 Applicants were already aware that there were subsisting charges in the Magistrate’s Court
139 and they duly instructed Counsel to appear on their behalf and this fact was well within their
140 knowledge by 16th April 2019.

141 He submitted that the rule was not intended to act in retrospect because that would amount to
142 giving an Accused person liberty to choose which court to be tried.

143 Where two Courts have concurrent jurisdiction to try the same subject, the order of
144 preference depends on which Court had the charges before and in this case it was the Chief
145 Magistrate’s Court.

146 He ended up by submitting that even with respect to the 2nd and 3rd Applicants double
147 jeopardy does not apply in respect of the charges before the Chief Magistrate.

148 In Rejoinder learned Counsel Mpata Kalid for the Applicants submitted that section **124 (5)**
149 **of the MCA** which gives the various types of pleas that can be taken by an Accused person
150 was cited by his learned colleague in error because section **124 (5) of the MCA** in law deals
151 with what we call in Latin the **plea of autrefois acquit or autrefois convict.**

152 What we are dealing with is an objection of double jeopardy which specifically deals with
153 concurrent proceedings in separate courts on charges arising out of the same facts.

154 He submitted the case of ***Uganda Law Society Vs The Attorney General*** earlier cited makes
155 it clear that double jeopardy is not a plea to a charge per say but it is an objection which can
156 be raised to prevent concurrent trials on the same facts.

157 Therefore it is not true that the objection can only be raised when an Accused person is in
158 court. He submitted that it is an illegality that can be raised any time”.

159 In response to raising an objection in the court of 2nd instance, he submitted that the basis was
160 that the Applicants were first charged by the Chief Magistrates Court and therefore when
161 they appeared before the Court Martial they ought to have raised that objection.

162

163

164 He submitted that “charging is a process and not an event”, therefore when the Accused
165 persons were first arrested by the Military Police; this Honorable Court should be pleased to
166 find that the charging process had begun at that point. It is not about which court the charge
167 sheet was first filed. He submitted,

168 “In the instant case it is the Court Martial that is having custody of the Accused persons. It is
169 the Court Martial that took the first steps to have the Applicants arraigned and remanded to
170 Military Custody where they are up to this point specifically the 2nd and 3rd Applicants.

171 He submitted that Counsel for the state has not denied that indeed the Accused persons are
172 undergoing Trial in the Court Martial.

173 This in itself is enough evidence for this court to uphold the objection of double jeopardy
174 being used by the Applicants.

175 On the issue of no proof that the 1st Applicant had not been charged in any court, he
176 submitted that “whereas Applicant No.1 does not appear on the charge sheet in the court
177 Martial, it is trite law that a charge sheet can be amended at any time and since he is a
178 Military person, he will also be included on that charge sheet”.

179 With the above submissions, put into consideration, let me consider the issue of double
180 jeopardy.

181 **Double jeopardy** is an English common law maxim that states that **“no man is to be**
182 **brought in jeopardy of life or limb more than once for the same offence”**.

183 This principle was considered in the case cited by both Counsel *Constitutional Appeal*
184 *No.1/2006. Attorney General Vs. Uganda Law Society supra* where the court considered
185 the issue of having concurrent proceedings in the two courts. The High Court and the Court
186 Martial.

187 Justice Mulenga JSC at page 10-11 held that;

188 **“I also agree with the majority holding of the Constitutional Court that the concurrent**
189 **proceedings in the two courts were inconsistent with the Principle underlying the**
190 **provisions of Article 28 (9) of the Constitution which prohibits the trial of a person for**
191 **an offence of which he or she has been convicted or acquitted. In effect that provision is**
192 **an aspect of the protection of the right to fair hearing, namely the right not to be tried**
193 **more than once on the same facts or for the same actus reus”. All this is in recognition**
194 **of the Principle that an Accused person should be subjected to trial on the same facts**
195 **only once. Needless to say concurrent criminal proceedings in respect of the same facts**
196 **entail trial more than once”. From the above decision of the Supreme Court, it is clear**
197 **that the principle of double jeopardy does not only apply to previous convictions or**
198 **acquittals but to concurrent criminal proceedings arising from same facts or actus reus.**

199 The Applicants were charged on 18th March 2019 with 4 counts.

200 The first Applicant RTD Major General Matayo B. Kyaligonza was charged with *Assault*
201 *causing actual bodily harm contrary to section 236 of the Penal Code Act*, where it was
202 alleged that on the 24th February 2019 at Seeta Trading Centre in Mukono District, he
203 unlawfully assaulted No.20914 SGT Namaganda Esther thereby causing her actual bodily
204 harm.

205 The 2nd and 3rd Applicants were charged under the 2nd 3rd and 4th counts.

206 The 2nd count was *Common Assault contrary to section 235 of the Penal Code Act*. The 3rd
207 count was *obstructing a Police officer in the due execution of duty contrary to section 238*
208 *(b) of the Penal code Act* and the 4th count was *Assault causing bodily harm contrary to*
209 *section 236 of the Penal Code Act*.

210 The 2nd victim of the assault was Otai Deogratiuous and all these happened on 24th February
211 2019 at Seeta Trading Centre.

212 The file was first mentioned in court on 10th April 2019 where in the Applicants were absent
213 but represented by Kaleb Alaka, Evans Ochieng and David Balondemu appearing jointly
214 while Mr. Micheal Aboneka was on watching brief.

215 On 10th April 2019, Mr. Alaka informed Court that”A2 and A3 were in the hands of the State
216 at the General Court Martial in Makindye.

217 It was the obligation of the State to ensure that they appear before you. A1 is an Ambassador
218 in Burundi. He read it in the press and informed us in the evening that the matter was
219 coming up today. He applied for adjournment and the Criminal summons were extended to
220 29th April 2019.

221 On 29th April 2019, the Accused/Applicants did not appear in court but their Advocates did
222 appear.

223 Mr. Alaka raised points of Law to the effect that his clients belong to the UPDF who have
224 jurisdictional powers under the UPDF Act to discipline the Accused persons and that indeed
225 on the 16th April 2019 the State UPDF instituted proceedings against the Accused persons on
226 the same facts similar to the matter before court.

227 He submitted that **Section 17 (2) of the Judicature Act** prohibits and mandates Courts to
228 curtail abuse of court process. It is the same State that instigated proceedings in the court
229 martial and in this court.

230 He prayed that court terminates these proceedings.

231 The case was adjourned to 20th May 2019 with the extension of the criminal summons.

232 On 20th May 2019 all the 3 Accused persons/Applicants were absent. The 3 Advocates were
233 present in court. Mr. Alaka Caleb, prayed to court to be allowed to tender in documents that
234 court had earlier on asked them to produce. The deadline had passed.

235 The Court rejected the charge sheets from the Military Court Martial and the learned State
236 Attorney went ahead to respond to the Preliminary points of law that were raised.

237

238 In his response, the learned Senior State Attorney put his emphasis on the process of Plea
239 Taking as provided for under **Section 124 of the Magistrate's Courts Act**. He submitted the
240 preliminary points raised were premature and improperly raised because first, Counsel was
241 attempting to answer the charges on behalf of the Accused person contrary to the law
242 specifically **Section 124 of the MCA**.

243 He submitted that before a Plea is taken the Accused has to be arraigned in court and plea
244 must be in the Accused's presence.

245 In subsection **124 (1) of the MCA** it is required that the substance of the charge be stated to
246 the Accused person, he is then asked whether he understands the charge and whether he
247 admits or not.

248 Under Section **124 (5) of the MCA**, if the Accused pleads that he or she has been acquitted or
249 convicted of the same offence, the Court shall try to investigate whether it is a true fact or
250 not.

251 He went on to submit that in effect, double jeopardy should be raised as a form of plea once
252 the charge is read out to the Accused.

253 The law is specific if he is called upon, then the Accused has to raise it. Mere raising the
254 charge is not a guarantee for stay of proceedings and insisted that this cannot be done in the
255 absence of the Accused persons but can be in the presence of his Advocate. Since all
256 criminal proceedings are personal.

257 He submitted that all inquiries must be done in the presence of the Accused person with the
258 only exception under **Section 123 of the MCA**.

259 On the 2nd point of law raised, that the Accused persons have been charged on the Court
260 Martial on the same facts, he submitted that the position of the law is that double jeopardy
261 applied in respect of the proceedings in the second Court and not the first Court.

262 In other words, by the time the Accused is charged in the second Court, and then he or she
263 can raise the objection.

264 The question is which of the two courts is bound by the rules of double jeopardy?

265 He went on to submit about the procedure of institution of criminal proceedings as provided
266 under *Section 42 of the MCA* it provides; **“Criminal proceedings may be instituted in one
267 of the following ways:**

268 **(a) By a Police Officer bringing a person arrested with or without a warrant before a
269 Magistrate upon a charge.**

270 **(b) By a Public Prosecutor or Police officer laying a charge against a person before a
271 Magistrate and requesting the issue of a warrant or a summons or**

272 **(c) By any person other than a Public Prosecutor or Police Office, making a complaint
273 as provided in sub section (3) and applying for the issue of a warrant or a summons
274 in the manner hereafter mentioned”.**

275 He submitted that charges were registered in Court on 3rd April 2019, and Criminal Summons
276 were issued to that effect.

277 On 10th April 2019 all the three Accused persons duly instructed Counsel to appear on their
278 behalf.

279 The documents from the Military Disciplinary Unit particularly the charge sheet is dated 16th
280 April 2019 which shows that they brought charges after charges before the Chief Magistrates
281 Court.

282 He concluded by submitting, it is the Military Court that is bound by the double jeopardy
283 rule.

284 And the charge sheet did not include A1 who has no justification for not appearing at all and
285 prayed that Court be pleased to find that the Plea of double jeopardy is being erroneously and
286 prematurely raised in the court as it is not applicable to the charges before the court. He
287 further prayed for a Warrant of Arrest against the Accused.

288 In a quick rejoinder Counsel Caleb Alaka, stated what was raised were pre-taking issues and
289 therefor section 124 of plea taking does not apply.

290 He submitted that the State has mistaken the basis of our preliminary objection to be plea
291 taking yet it is on double jeopardy which is the concurrent institution of criminal proceedings
292 against the same people in two different courts based on the same facts.

293 He submitted Court was guided by citing the Case of the **Attorney General Vs Uganda Law**
294 **Society** supra where court held that concurrent proceedings exposed the Accused persons to
295 the risk of double jeopardy which is a question of law that must be raised at the earliest
296 opportunity and that once they take plea in both counts, an illegality would have arisen.

297 On the issue of charge sheet not including A1, he submitted the state is aware that charge
298 sheets can be amended at any time to include or remove any person and that is the law. Since
299 the UPDF Act governs both the active and retired Officers.

300 With regard to which court was the matter first instituted, he submitted and informed Court
301 that A2 and A3 were being held by the Military and as he (State Attorney) stated correctly
302 under **Section 42 (1) (b) of the MCA**, that instituting proceedings once any charge is laid
303 against any person before a Court and it is registered, then criminal proceedings are duly
304 instituted.

305 He submitted that criminal proceedings are instituted once you are arrested.

306 The Trial Chief Magistrate basing on the submissions I have reproduced resolved two issues:

- 307 1. Whether charging the Accused in the Magistrate's Court subjects the Accused to double
308 jeopardy.
- 309 2. Whether the Counsel for the Accused can raise the question of double jeopardy in the
310 absence of the Accused.

311 I will only quote the relevant part of her ruling. On the first issue, she ruled in part as
312 follows:

313

314 **“A Plea of double jeopardy only applies to criminal cases. It is a procedural defense**
315 **that prevents an Accused person from being tried again on the same (or similar)**
316 **charges and on the same facts following a valid acquittal or conviction. Double**
317 **jeopardy attaches when the court reads the charges to the Accused and he or she is**
318 **called on to take his plea”.**

319 She further held that the issue before court in *Uganda Law Society Vs Attorney General*
320 *Constitutional Petition No.18/2005* was concurrent jurisdiction not whether plea taking
321 before the Military Court amounted to double jeopardy and that they continued to appear
322 before both courts. So she resolved the 1st issue in the negative.

323 On the second issue, she ruled that **“for purposes of criminal proceedings, it is a**
324 **requirement that the accused must appear in person. The only exception arises under**
325 **Article 28 (5) which provides that except with his or her consent, the trial of any person**
326 **shall not take place in the absence of that person unless the person so conducts himself**
327 **or herself as to render the continuance of the proceedings in the presence of that person**
328 **impracticable and the Court makes an order for the person to be removed and the trial**
329 **to proceed in the absence of that person. The same is provided under section 123 of the**
330 **MCA.**

331 **This is not the case with respect to the three Accused”.**

332 In view of the foregoing, I am not persuaded by the argument by Counsel for the Accused
333 that this is a pre plea process and in absence of any authority cited, to support their point of
334 view, the Advocates do not have the capacity to raise the issue of double jeopardy in the
335 absence of the Accused.

336 She concluded by holding that, **“having said the Accused have at all times been aware**
337 **that their presence is required in this Court but they have opted not to appear but**
338 **rather sent their Legal Representative, I hereby issue a Warrant of Arrest against all**
339 **the three Accused person”.**

340

341 The above is the basis of this proceedings in revision where the Applicants are seeking to
342 have the above decision revised, proceedings, before the Chief Magistrate declared illegal
343 and warrant of arrests issued cancelled, since they are temporally stayed by this court.

344 **Decision of Court**

345 I have gone at length to reproduce proceedings especially the submissions in the lower court
346 and this court to enable the parties involved especially the Accused appreciate the facts of the
347 case and their legal responsibilities.

348 A2 and A3 were charged under the UPDF unit Disciplinary Committee of Military Police
349 held at Makindye Kampala on 16th April 2019 with **Common Assault contrary to section**
350 **235 of the Penal Code Act** which is a misdemeanor.

351 *The UPDF Act 2005 defines Military Court as a summary trial Authority, a Unit*
352 *Disciplinary committee or a Court Martial.*

353 Part VI of the Act provides for offences under that Act and section 195 of the Act provides
354 for the Unit Disciplinary Committee. **Section 195 (3) provides:**

355 **“A Unit Disciplinary Committee shall have powers to try any person for any non-**
356 **capital offence under this Act and A Unit Disciplinary Committee shall have powers to**
357 **impose any sentence authorized by law.**

358 Perusal of the UPDF Act part VI did not reveal any offence of Common Assault However,
359 section 179 (1) (a) of the UPDF Act provides that **“A person subject to Military law, who**
360 **does or omits to do an act in Uganda which constitutes an offence under the Penal Code**
361 **Act or any other enactment commits a service offence and is on conviction liable to a**
362 **punishment as prescribed in sub section (2).**

363 (2) where a Military Court convicts a person under sub-section (1), the Military Court shall
364 impose a penalty in accordance with the relevant enactment and may in addition to that
365 penalty impose the penalty of dismissal with disgrace from the Defence Forces or any less
366 punishment prescribed by this Act.

367 The 2nd and 3rd Applicants have therefore been lawfully charged before the Military
368 Disciplinary Committee.

369 Can they therefore raise the issue of double jeopardy in the Chief Magistrate's Court?

370 It is now settled that concurrent criminal proceedings amount to double jeopardy. What
371 remains to be resolved is when should the Principle be raised by the Accused person and
372 before which court.

373 Double jeopardy is not one of the Defenses available to the Accused as submitted by the
374 learned State Attorney.

375 Neither is it a procedural defence that prevents an Accused person from being tried again on
376 the same or similar charges and on the same facts following a valid acquittal or conviction,

377 It is a Principle of the Law that is available to the Accused to avoid being tried twice for the
378 same or similar charges arising out of similar facts following an acquittal or conviction and
379 or having concurrent proceedings for the same or similar charges arising out of similar facts.

380 It is also trite law that an Accused person can only raise any principle of the law before the
381 court that is trying him or has preferred charges against him. The Accused must therefore
382 avail himself and submit to court's jurisdiction.

383 Legal principles can be raised by an Accused himself if he is conversant with the law or
384 through his Advocate since it is his/her constitutional Right to be represented by Counsel
385 ***Article 28 (3) (d) refers.***

386 The Accused persons were therefore legally represented by their Counsel before the Chief
387 Magistrates Court.

388 Could Counsel raise the preliminary point of law on the Principle or rule of double jeopardy
389 in the absence of their clients in court?

390 The three Applicants are raising the principle of double jeopardy claiming they are appearing
391 before the Military Court on same charges arising out of similar facts.

392 Perusal of the charge sheet from the Military Disciplinary Unit clearly shows that the 1st
393 Applicant has not been charged.

394 Submission of Counsel that the charge sheet might be amended and include him is with due
395 respect out of speculation. It is trite law that courts base their decisions on the law and facts
396 and not on speculation that would amount to abuse of court process.

397 The trial Chief Magistrate could not therefore base her decision on speculation.

398 In respect of the 1st applicant RTD Major General Matayo Kyaligonza, he had not yet been
399 charged. He cannot therefore plead double jeopardy even in the remotest sense.

400 As regards A2 and A3, of course together with A1, The charges against them were
401 sanctioned on 18th March 2019 and criminal summons issued for court appearance and plea
402 taking on 10th April 2019.

403 All the three instructed their Advocates who appeared on their behalf on 10th April 2019.

404 The Advocates informed court that A2 and A3 were in the hands of the State at the General
405 Court Martial in Makindye. The charge sheet in Makindye shows they were charged on 16th
406 April 2019. This was after 18th March 2019. The applicants were very much aware of the
407 proceedings in the Chief Magistrate's Court because they instructed their Advocates to
408 appear in court on all the 3 occasions before the warrant of arrest was issued; That is on 10th
409 April 2019, 29th April 2019, 20th May 2019 and 27th May 2019.

410 **Double jeopardy rule applies where there is an earlier court that has either tried and**
411 **convicted or acquitted the accused or that has pending proceedings against the accused.**

412 In the instant case, the Applicants have pending criminal proceedings before the Chief
413 Magistrate's Court, Mukono.

414 The 1st Applicant Rtd Major General Matayo B. Kyaligonza for reasons best known to him
415 decided to act in contempt by refusing to appear before the Chief Magistrate's Court to take
416 plea.

417 His Advocate did not attempt to take plea on his behalf as submitted by the State. The
418 Advocates attempted to manipulate the criminal justice system by applying a legal principle
419 that is not available to him instead of advising him to appear and make a formal statement
420 stating whether he is guilty or innocent, to the charges against him, as the main function of
421 arraignment is for the Accused to enter a plea after reading the charge for him.

422 Counsel Alaka submitted that in criminal matters, summons are not given to Lawyers even if
423 they are in court. This court does not agree with that submission and the Trial Chief
424 Magistrate was correct to hold that Accused persons were at all times aware that their
425 presence was required in court, but opted not to appear, but rather send their legal
426 representatives.

427 Unfortunately, in criminal proceedings, plea taking is personal and cannot be delegated to a
428 legal representative.

429 The learned Chief Magistrate was therefore correct to apply **Section 124 (i) of the MCA** on
430 the issue of Plea Taking.

431 The 2nd and 3rd Applicants can raise the Principle of double jeopardy but this principle is
432 available to them in the Military Unit of UPDF.

433 It does not matter whether UPDF arrested them first. UDPF as a security Agency is obliged
434 and mandated to produce people under its custody to courts of law if required.

435 I must state that Courts under UPDF having concurrent jurisdiction with Civil Courts, does
436 not offer choices to their Officers to choose which court they want to be tried in. It would
437 more or less amount to choosing a Judge in one's Trial.

438 The Applicants in this case want to choose which court they are to appear to inspite of having
439 been first charged before the Chief Magistrate's Court of Mukono.

440 Of course I do appreciate that the learned Chief Magistrate understood double jeopardy as a
441 form of plea which was to be raised at plea taking of which I have stated, it is not a form of
442 plea. But she was right to agree with the State Attorney that it was raised prematurely by the
443 Defence Counsel.

444 The Applicants ought to appear before the court, take plea and raise the principle of double
445 jeopardy which ideally if proved, would lead to stay of proceedings in the 2nd court and or
446 withdrawal.

447 The Trial Chief Magistrate issued criminal summons and warrant of Arrest after the
448 Applicant particularly the 1st Applicant acted in contempt.

449 I therefore find no legal error on the part of the Chief Magistrate in the decision she took on
450 the 1st Applicant of issuing a warrant of Arrest to compel his attendance in court.

451 It was lawful, regular and proper in the circumstances where he acted in contempt.

452 As regards A2 and A3, I hold the view that issuance of warrant of Arrest was not proper.

453 Since they are under the custody of UPDF, prison in Makindye. She ought to have issued a
454 production warrant to have them produced before the Chief Magistrate's Court.

455 She would only issue a warrant of arrest after she is satisfied that they are not in custody but
456 at large and have refused to attend court.

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460 **In conclusion,**

461 1. I hold the view that the Rule or Principle of Double Jeopardy applies to the 2nd Court not
462 Court of first instance and in this case, the Applicants should appear before the Chief
463 Magistrate's Court of Mukono to answer charges against them.

464 2. Proceedings in the Military Court of Makindye in respect of A2 and A3 should be stayed
465 and or withdrawn pending determination of MKN – 00-CR-C0-0312/2019 which is in
466 Court.

467 3. The Chief Magistrate should issue a Production Warrant for A2 and A3 to Makindye
468 Military Prison. The Warrant of Arrest against them is therefore cancelled.

469 4. The Warrant of Arrest against RTD major General Matayo B. Kyaligonza is reinstated as
470 it was not issued in error to compel him to appear for plea before the Chief Magistrate's
471 Court.

472 In the Result, the Application is dismissed with modifications in respect of A2 and A3.

473 I so direct.

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475 _____

476 Margaret Mutonyi

477 **RESIDENT JUDGE**

478 **MUKONO HIGH COURT CIRCUIT**

479 20th August 2019

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