

**THE REPUBLIC OF UGANDA**

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

**HCT-00-CR-CM NO. 121 OF 2022**

**[ARISING OUT OF BUGANDA ROAD COURT CASE NO. 624 OF 2022**

**DR. KIZZA BESIGYE & ANOR =====APPLICANT/ACCUSED**

**VERSUS**

**UGANDA=====RESPONDENT/PROSECUTOR**

**BEFORE HON. JUSTICE TADEO ASIIMWE**

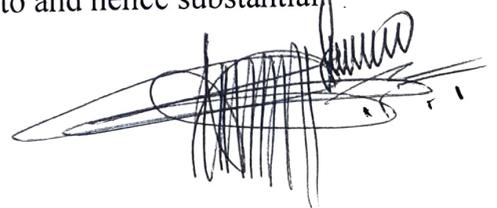
**RULING.**

The applicants were charged with the offence of Incitement to violence contrary to section 51(1) (b) of the penal code Act. They applied for bail in Buganda road Court which was rejected by the magistrate grade one.

Being dissatisfied with the decision the applicants filled a fresh application for bail in this court by way of Notice of Motion under Article 23 (6) (a) and 28(3)(a) of the Constitution, s.75(4) and section 77(3) of the magistrate's courts Act.

At hearing, the applicant was represented by counsel Earnest Kalibala, Samuel Muyizi, Abdallah Kiwanuka and Ivan Bowe While the respondent was represented by Mr. Wanamama and Njuki Mariam State Attorneys form ODPP.

The applicants filed written submissions which were adopted on record and proceeded to present sureties which were not objected to and hence substantial.



In reply to the application, the learned state attorney raised a preliminary objection relating to the Jurisdiction of this court which I will deal with before going to the merits of this application.

In support of the above objection the learned state attorney relied on the affidavits of Namakoye Catherine an assistant director of public prosecutions & Kizza Anna a chief State Attorney.

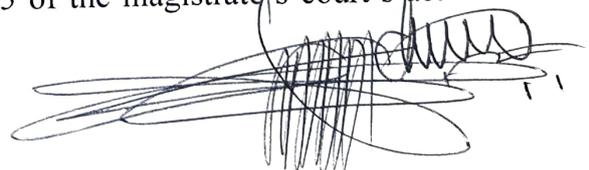
He also cited sections 75(2)(3)(4) of the Magistrate's court Act Arguing that this application is prematurely before this court as the law provides that it should have been handled by the chief magistrate before coming to this court.

In response to the objection, counsel for the applicant cited sections 75(4) and section 77(3) of the magistrate's court act arguing that the high court is clothed with un limited jurisdiction to entertain matters of this nature. In his view once the magistrate's court rejects to grant bail, both the chief magistrate and the high court have jurisdiction to entertain a fresh application for bail and that the choice on where to file the fresh application is a choice to be made by the applicant.

### **RESSOLUTION.**

I have considered the oral submission for and against the objection and the law cited by both counsel in relation to the jurisdiction of the high court in grant of bail in the circumstances. There is no doubt that both Courts have powers to grant bail to an accused person. However, the circumstances differ. Ordinarily, bail in non-Capital cases is handled by the Magistrate Courts.

The magistrates court act is very clear on procedures of bail both in the lower court and in the high court and I shall quote section 75 of the magistrate's court's act verbatim; -

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## 75. Release on bail

*(1) A magistrate's court before which a person appears or is brought charged with any offence other than the offences specified in subsection (2) may, at any stage in the proceedings, release the person on bail, on taking from him or her a recognizance consisting of a bond with or without sureties, for such an amount as is reasonable in the circumstances of the case to appear before the court, on such a date and at such a time as is named in the bond.*

*(2) The offences excluded from the grant of bail under subsection (1) are as follows—(a) an offence triable only by the High Court; (b) the offence of terrorism and any other offence punishable by more than ten years imprisonment under the Anti-Terrorism Act, 2002; [paragraph (b) substituted by section 3(a) of Act 7 of 2007] (c) an offence under the Penal Code Act relating to cattle rustling; (d) offences under the Firearms Act punishable by more than ten years imprisonment; [paragraph (d) substituted by section 3(b) of Act 7 of 2007] (e) [paragraph (e) repealed by section 3(c) of Act 7 of 2007]; (f) rape contrary to section 123 of the Penal Code Act and aggravated defilement under section 129 of that Act; [paragraph (f) substituted by section 3(d) of Act 7 of 2007] (g) embezzlement, contrary to section 268 of the Penal Code Act; (h) causing financial loss, contrary to section 269 of the Penal Code Act; (i) corruption, contrary to section 2 of the Prevention of Corruption Act; (j) bribery of a member of a public body, contrary to section 5 of the Prevention of Corruption Act; and (k) any other offence in respect of which a magistrate's court has no jurisdiction to grant bail.*

*(3) A chief magistrate may, in any case other than in the case of an offence specified in subsection (2), direct that any person to whom bail has been refused*

*by a lower court within the area of his or her jurisdiction, be released on bail or that the amount required on any bail bond be reduced.*

*(4) The High Court may, in any case where an accused person is appearing before a magistrate's court—(a) where the case is not one mentioned in subsection (2), direct that any person to whom bail has been refused by the magistrate's court be released on bail or that the amount required for any bail bond be reduced; and (b) where the case is one mentioned in subsection (2), direct that the accused person be released on bail.*

From the reading of the above provision of the law, I agree with counsel for the applicant that section 75(4) supra, clothed this court with jurisdiction to entertain an application for bail where the same has been refused by the magistrate's court.

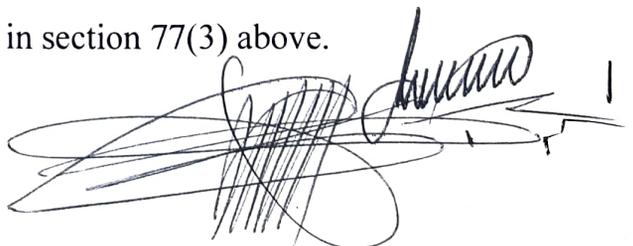
However, section 75(4) cited above cannot be read in isolation of section 75 (1), (2) & (3) which completes the administrative hierarchy of the magistrate courts while dealing with bail matters before a fresh application can be filed in the high court.

I am also alive to section 77(3) as was cited by the applicant's counsel. I shall quote it verbatim.

*"Where bail is not granted under section 75, the court shall—(a) record the reasons why bail was not granted; and (b) inform the applicant of his or her right to apply for bail to the High Court or to a chief magistrate, as the circumstances may require."*

In interpretation of the above provision of the law, my attention is drawn to the last phrase, as the circumstances may require."

In my view the above section has to be read together with section 75 for one to understand the kind of circumstances referred to in section 77(3) above.

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To be clear the circumstances are that once the bail is refused by a Grade One Magistrate, a new application is filed before the chief magistrate and once bail is refused by the chief magistrate, then a fresh application is filed before the high court.

In my opinion section 77(3) does not create co-current jurisdiction between the high court and the chief magistrates court as counsel for the applicant wants this court to believe but rather highlights on which court one can file a fresh application depending on which court denied the earlier bail.

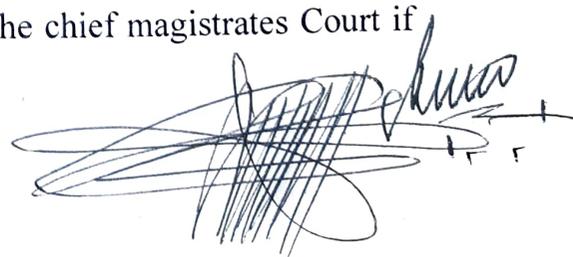
The rules of procedure in the books of law are intentional to avoid unnecessary applications/matters and to avoid opening flood gates of unnecessary matters moving to the high court before exhausting the available remedies in the lower courts.

Defying such procedures would be to interfere with the judicial processes of the lower courts and inviting premature causes in the High Court and creating an unnecessary backlog. My understanding of sections 75 and 77 is that all options in the Magistrates Court must be exhausted in non-capital court before filing in this court.

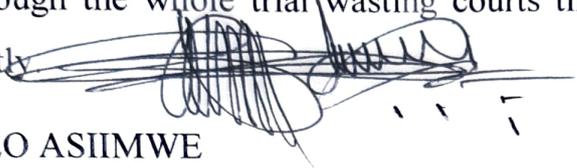
Therefore, the applicants should have filed this application before the chief magistrate before coming to the high court. There is also an option of returning to a grade one who is trying the case.

It is the finding of this court that this application was brought prematurely before this court and therefore there is no need to go to its merits. For the above reasons, the application is here by dismissed.

The applicants are free to file a fresh application to the chief magistrates Court if they so desire.

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Before I take leave of this court I wish to point out that where preliminary points of law are envisaged by any party, the same ought to be raised at the commencement of the trial. The learned state attorney in this matter failed to do so leaving Court to go through the whole trial wasting courts time. I hope in future it will be done correctly



TADEO ASIIMWE

JUDGE

30/06/2022