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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[INTERNATIONAL CRIMES DIVISION] HCT-00-ICD-0009-2022.

UGANDA:.....PROSECUTOR

VERSUS

10 TUKWASIBWE JUNIOR :..... ACCUSED

BEFORE: HON. MR JUSTICE BASHAIJA K. ANDREW

This ruling is pursuant to preliminary objections, on points of law and fact, raised by counsel for the accused pertaining to, inter alia, the jurisdiction of the International Crimes Division (ICD) of the High Court to entertain the instant case involving offences under the Prevention of Trafficking in Persons Act, 2009, and defilement, under the Penal Code Act, Cap 6.

Background.

The accused person was charged with 13 counts of aggravated trafficking in persons under the Prevention of Trafficking in Persons Act, and defilement under Penal Code Act, and he was committed for trial to the High Court at Kabale. By a letter dated 03/08/2022, the prosecution applied requesting for the transfer of the case from the High Court at Kabale so that it could be heard in the ICD at Kampala. The trial Judge at the Kabale High Court, Kazibwe J, declined the application by letter and directed that a formal application be filed pursuant to provisions of the Judicature (Criminal Applications) Rules. Court further ordered that if by 31/08/2022 no such application was made; the hearing of the case would proceed regardless. Instead of complying with the court order, the DPP on 18/08/2022 moved the Principal Judge who invoked his administrative powers and wrote a letter directing the case be transferred to the ICD at Kampala. It is against that background that counsel for the accused has raised the above

5 objections challenging the legality and propriety of the whole transfer process, and the jurisdiction of ICD to try the matter.

The objections are threefold. The first one was that the offences of aggravated trafficking in persons and defilement, are not in their nature international crimes for which the ICD was created to try. Citing Paragraph 6 of the High Court
10 (International Crimes Division) Practice Directions, 2011, on the jurisdiction of the ICD, counsel submitted that it refers specifically to “international crimes and offences”. That, however, the offences with which the accused is charged are not international in nature. Further, that Section 18 of the Prevention of Trafficking
15 in Persons Act, provides that a person charged with any offence under the Act, shall be tried where the offence was committed. That the provisions are mandatory and as such, the ICD lacks the jurisdiction to try the offences and the case ought to be dismissed, or be transferred back to the High Court at Kabale which has jurisdiction over the matter.

The second objection was that the case was already scheduled for hearing by the
20 High Court at Kabale after the Judge declined the prosecution’s application by letter to transfer the case to the ICD. That the court directed that a formal application be made and heard on merit before 31/08/2022, and failure to do so, the hearing of the case would proceed at Kabale. That instead of complying with the court order, the prosecution wrote a letter to the Principal Judge who
25 also wrote a letter directing for the transfer of the case. That as such, the prosecution is in contempt of the court order, in as much as the letter of the Principal Judge did not vacate the order of the High Court at Kabale, which still stands. Counsel argued that court orders are not issued in vain. That the prosecution violated the order and is in therefore contempt of a court.

30 Counsel cited the case of ***Mugume Ben & Another vs. Akankwasa Edward ULR [2008] 683***, for the proposition that a person who defies court orders cannot, at the same time, seek court’s protection for the unlawful activities. Counsel argued that in the present case, no reasons were assigned for the

5 transfer and that such transfer amounted to abuse of court process. To further fortify his argument on what amounts to abuse of court process, counsel cited the case of **Attorney General & Uganda Land Commission vs. James Mark Kamoga & James Kamala SCCA No.8 of 2004.**

10 The third objection was that the transfer of the case from the High Court at Kabale to the ICD was a violation of the accused's right to a fair hearing enshrined under Article 28 of the Constitution, with particular regard to a speedy trial. Citing the case of **Uganda vs. Kassiano Ezati Wadri & 31 Others, H.C Criminal Revision No.0002 of 2018 (Gulu High Court)** counsel submitted that a fair trial guaranteed under Article 28 of the Constitution requires, among
15 others tenets, a speedy trial. That under the Rules of Procedure and Evidence of ICC also applicable in the ICD, the trials require very high standards of international criminal trials and entails lengthy pre-trial procedures before the trial of an accused is commenced. That such procedures are not only quite lengthy but also complex, as opposed to the ordinary usual procedures
20 applicable in criminal trials in the High Court, which are less tedious, are shorter and faster. Counsel argued that for those reasons, the case should be dismissed against the accused, or in the alternative, court issues an order for the case to be returned to the High Court at Kabale for trial.

In reply, Mr. Joseph Kyomuhendo, Chief State Attorney representing the
25 prosecution, submitted that the case has generated a lot of public interest given the nature and profile of the accused person. That because of his influence, the accused has massively interfered with prosecution witnesses who are victims, by way of attempted bribery, threats and persuasion. That for that reason the prosecution was compelled to pick witnesses/victims from Kabale and relocated
30 them to different shelters in the country at a great expense, and hence the need to have the case tried by the ICD at Kampala, which is specifically vested with the jurisdiction to entertain cases involving human trafficking, among others. For that proposition, counsel for the state relied on Paragraph 6 of the High Court (International Crimes Division) Practice Directions, 2011.

5 Further, that Article 139 of the Constitution and Section 14 of the Judicature Act Cap 13, created the High Court of Uganda and clothed it with both original and appellate jurisdictions over criminal matters to try any offence regardless of the punishment and where it was committed in Uganda. That the ICD is a division of the High Court with such unlimited jurisdiction conferred by the
10 Constitution and an Act of Parliament cited.

Mr. Kyomuhendo further submitted that under Paragraph 6 of Practice Direction of 2011, the ICD can “without prejudice” to Article 139 of the Constitution, try any offences relating to, among others, human trafficking. That the ICD being a High Court with unlimited jurisdiction, has unfettered jurisdiction and can try
15 all offences within its mandate originating within the country. That in addition, the ICD has international jurisdiction under the enabling law which it can exercise. That there is no law that prohibits the ICD from handling offences that fall within its jurisdiction which have been fully committed within Uganda even if the court goes under the name “International Crimes Division”. That whereas
20 the High Court at Kabale is vested with the geographic jurisdiction to try offences under the Prevention of Trafficking in Persons Act (supra) committed within that area, the ICD on the other hand, is vested with national jurisdiction. That given the circumstances and reasons regarding witness interference, among others, by the accused person, it was justified to transfer the case.

25 Regarding the issues of the alleged contempt of court and abuse of court process raised by counsel for the accused, Mr. Kyomuhendo replied that they do not arise since the case was transferred by order and authorisation of the Principal Judge acting in the exercise of his constitutional administrative mandate conferred on him under Article 141 of the Constitution and Section 20 of the Judicature Act
30 Cap 13. That under the said provisions, the Principal Judge is the “chief supervisor” of the High Court, and can properly transfer cases from one court to another. That in the instant case, the Principal Judge exercised his constitutional administrative powers for the smooth running of the High Court as mandated by the Constitution and the Judicature Act. Mr. Kyomuhendo

5 prayed that the objections be dismissed and the case proceeds for pretrial hearing.

Issues.

1. **Whether the International Crimes Division (ICD) has the jurisdiction to hear the case before it.**
- 10 2. **Whether the transfer of the case by the Principal Judge to the ICD from the High Court at Kabale was procedurally and/or legally proper.**
3. **What are the remedies available to the parties?**

Resolution of the Issues.

15 **Issue 1: Whether the International Crimes Division (ICD) has the jurisdiction to hear the case before it.**

In **A.G of Lagos State vs. Dosnu (1989)3 NWLR pt 111, pg. 552 SC**, the Nigeria Supreme Court defined the term “jurisdiction” to mean the limits imposed on the power of a validly constituted court to hear and determine issues
20 between persons seeking to avail themselves of its process by reference to the subject matter of the issues or to persons between whom issues are joined or to the kind of relief sought. It therefore means and includes any authority conferred by the law upon the court to decide or adjudicate any dispute between the parties or pass judgment or order. A court cannot entertain a cause which it has no
25 jurisdiction to adjudicate upon. A court must have the jurisdiction and competence in order to be properly seized of a cause of matter. Also in **Paul K. Semogerere and 2 Others v. A.G. SCCA 01 of 2002**; the Supreme Court of Uganda adopted the definition of “jurisdiction” in **Mulla on the Code of Civil Procedure at page 225**, as follows;

30 **“By jurisdiction it meant authority which court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way, for its decision. The limits of this**

5 ***authority are imposed by statute, charter or commission under which the court is constituted and may be exercised or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is unlimited.***

Further, in ***Owners of Motor Vessel Lillian “s” vs. Caltex Oil Kenya Limited***
10 ***[1989] KLR 1***, citing ***Words and Phrases Defined Vol.31 –N page 13***, the Court of Appeal of Kenya while elucidating on the concept of jurisdiction held, inter alia, that;

“Jurisdiction is everything without it; a court has no power to make one more step. Where a court has no jurisdiction there would be no
15 ***basis for continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.***

Most importantly, this court underscores the point that jurisdiction is a creature of statute and it must be conferred expressly on a court or expressly removed by
20 an Act of Parliament. A court cannot confer on itself a jurisdiction it does not possess in any given matter nor can jurisdiction be conferred on a court by consent of the parties. Specifically, for criminal jurisdiction, such as is the issue in the instant case, it is the power which the sovereign authority of the state has vested in a court established by law to take cognisance of and determine
25 questions which arise out of crimes committed in that state.

Given these principles, the starting point to resolve the issue of the jurisdiction of the ICD is in the provisions of Article 139 of the Constitution, and Section 14 of the Judicature Act, which created and vested the High Court with unlimited original jurisdiction in all matters and such appellate and other jurisdiction as
30 may be conferred on it by the Constitution or other law. “All matters” refers to and includes criminal matters such as the instant case. Article 139 (1) (supra) thus provides as follows;

5 ***“The High Court shall, subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law.”***

Section 14(1) of the Judicature Act provides as follows;

10 ***“The High Court shall, subject to the Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or this Act or any other law.”*** (underlined for emphasis).

Section 1 of the Trial on Indictments Act also vests the High Court with the
15 unlimited jurisdiction to try any offence under any written law, as follows;

***“The High Court shall have jurisdiction to try any offence under any written law and may pass any sentence authorised by law; except that no criminal case shall be brought under the cognisance of the High Court for trial unless the accused person has been committed
20 for trial to the High Court in accordance with the Magistrates Courts Act.”***

Article 133 of the Constitution confers powers on the Chief Justice, in the exercise of his administrative functions, to issue *orders and directions* to the courts necessary for the proper and efficient administration of justice. Pursuant
25 to Article 133 (supra) the Rules Committee of the Judiciary issued the *Judicature (Designation of High Court Circuits) Instrument, 2016*, under which various circuits of High Court were created and vested specifically with territorial/geographical jurisdiction to try cases arising within their respective areas. The Chief Justice had earlier issued the *Judicature (High Court)
30 (International Crimes Division) Practice Directions, 2011*, creating the ICD and under Paragraph 6 thereof, it provides as follows;

5 ***“Without prejudice to Article 139 of the Constitution, the Division shall try any offences relating to genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy, and any other international crime as may be provided for under the Penal Code Act, Cap 120, the Geneva Convention Act, Cap 363, the***
10 ***Intentional Criminal Court Act, No 11 of 2011 or under any other penal enactments.”***

The reading of the above provision clearly conveys the idea that the ICD was created as a specialised division of the High Court and clothed with unlimited jurisdiction to try any of the offences relating to, and named under Paragraph 6
15 (supra) which are committed within and outside the territory of Uganda. In other words, the ICD has both domestic and international jurisdiction over matters it is mandated to try.

Section 18 of the Prevention of Trafficking in Persons Act (supra) provides that that offences under the Act shall be tried in the geographical areas where they
20 were committed, as follows;

“A case under this Act shall be tried where the offence was committed, or where one of its components occurred, or where the trafficked person actually resided at the time of the commission of the offence.”

25 This provision appears under Part IV of the Act which is titled “Jurisdiction”. It invariably confers jurisdiction on the court within whose geographical jurisdiction the offences occurred or were committed to try the matter. Under Section 19, the Act also confers extra- territorial jurisdiction on the court over acts committed outside Uganda which would constitute offences if they had been
30 committed in Uganda. It provides as follows;

“19. Extra-Territorial Jurisdiction.

This Act shall apply to offences committed outside Uganda where—

5 ***(1) A person who, while being a citizen of, or permanently residing in Uganda, commits an act outside Uganda, which act would constitute an offence had it been committed in Uganda.***

(2) The victim was a citizen of Uganda at the time of commission of the offence.

10 ***(3) The offence was committed partly inside and partly outside Uganda.***

(4) A substantial proportion of the effects of the offence have occurred or taken place within the territory of Uganda.”

Counsel for the accused specifically asserted that Section 18 (supra) ousts the
15 jurisdiction of the ICD to try offences under the Prevention of Trafficking in
Persons Act, which are committed in other geographical jurisdictions within the
country. However, that argument is incorrect for two main reason. The first one
is that the Prevention of Trafficking in Persons Act is an Act of Parliament. Even
when it provides that offences under the Act shall be tried where they were
20 committed, or where any of their components occurred, or where the trafficked
person actually resided at the time of the commission of the offences, it is my
considered view that such provision does oust the jurisdiction of the ICD which
is conferred by the Constitution, except by way of constitutional amendment.
The constitutionality of the original and unlimited jurisdiction of the High Court
25 was emphatically pronounced in ***M/s. Rabo Enterprises (U) Ltd v. Commissioner General, Uganda Revenue Authority, C.A No. 51 of 2003***
where in his lead judgment (Okello, JA.) declared that;

“An Act of Parliament cannot oust the original jurisdiction of the High Court, except by an amendment of the Constitution...”

30 The reasoning in that case was upheld with by the Supreme Court on appeal.
Similarly, in the case of ***Uganda Projects Implementation and Management Centre v. Uganda Revenue Authority Const. Appeal No. 2 of 2009***, it was

5 held that the original jurisdiction of the High Court cannot be ousted by Parliament. The original jurisdiction of the High Court and cannot be taken away by any other law because it is conferred on it by the Constitution, which is the Supreme Law of the land. Further in **Commissioner General Uganda Revenue Authority vs. Meera Investments Ltd, SCCA No.22 of 2007**, the Supreme
10 Court agreed with the Court of Appeal that the unlimited original jurisdiction of the High Court cannot be ousted by an Act of Parliament because of the supremacy of the Constitution.

Applying the above principles to facts of the instant case, it would follow that the provisions of Section 18 of the Prevention of Trafficking in Persons Act, do not
15 amend Article 139 of the Constitution which vests the High Court; of which the ICD is a division, with unlimited original jurisdiction in all matters and such appellate and other jurisdiction conferred on it by the Constitution. It follows that the jurisdiction of the ICD to try offences under the Act is not limited because of the geographical locations where the offences occurred or were
20 committed from.

The second reason is that Section 19 of the Prevention of Trafficking in Persons Act, itself vests the ICD with the extra-territorial jurisdiction to try offences of the categories of persons specified thereunder, hence confirming the jurisdiction of the ICD as international in nature. Needless to add, that within the context of
25 the international principle of complementarity with the ICC, enshrined under Section 2(g) and (h) of the International Criminal Court Act, 2010, the ICD is also vested with international jurisdiction over the offences spelt out in the said Act; by which the Government of Uganda domesticated the Rome Statute and effectively became a State Party thereto.

30 In the present case, the accused person was indicted in the various counts of aggravated trafficking in children and defilement, under the Prevention of Trafficking in Persons Act (supra) and the Penal Code Act, respectively. These particular offences are included among those spelt out under Paragraph 6 of the

5 *Judicature (High Court) (International Crimes Division) Practice Directions, 2011;*
over which the ICD is specifically mandated and vested with the unlimited
jurisdiction to hear and determine, regardless of the punishment and where they
were committed within Uganda.

The third reason is that Paragraph 6 of the *Judicature (High Court) (International*
10 *Crimes Division) Practice Directions*, specifically vests the ICD with the necessary
jurisdiction to try offences relating to human trafficking; whether charged solely
or jointly with other offences “*under any other penal law*”, regardless of where
the offences were committed from within or outside Uganda. Therefore, the ICD
has the necessary and proper jurisdiction to hear and determine the instant
15 case. Issue No.1 is answered in the affirmative.

***Issue No.2: Whether the transfer of the case by the Principal Judge to the
ICD from the High Court at Kabale was procedurally and/or legally proper.***

This issue largely concerns the administrative powers of the Principal Judge to
supervise all High Court, derived from Article 141 of the Constitution as was
20 fully operationalised by Section 20(1) of the Judicature Act (supra). Article 141
provides, in the relevant part, as follows;

“141. Administrative functions of the Principal Judge.

***(1) Subject to the provisions of article 133 of this Constitution, the
Principal Judge shall—***

25 ***(a) be the head of the High Court, and shall, in that capacity,
assist the Chief Justice in the administration of the High Court
and subordinate courts; and***

***(b) perform such other functions as may be delegated or
assigned to him or her by the Chief Justice.”***

30 Section 20(1) of the Judicature Act, provides as follows;

5 ***“Subject to article 141 of the Constitution, the Principal Judge may determine the distribution of business before the High Court among the judges and may assign any judicial duty to any judge and shall, in doing so, consider Article 28 of the Constitution.”***

10 Article 141 which is referred to in Section 20 of the Judicature Act, provides for the administrative functions of the Principal Judge to be exercised subject to Article 133. The Principal Judge is thus vested with the constitutional and statutory administrative mandate, and can exercise it to determine the distribution of business before the High Court among the judges and may assign any judicial duty to any judge. The Principal Judge is only required to take into
15 consideration Article 28, as to a fair trial, in exercising the mandate.

 Counsel for the accused submitted that the instant case had been scheduled for hearing in the High Court at Kabale, and that instead of complying with the court order to file a formal application, the prosecution wrote to the Principal Judge who, in turn, also wrote a letter transferring the case to the ICD. To that end,
20 counsel asserted that prosecution was in contempt of court and that the entire process of transfer was an abuse of court process given that even no reasons were assigned for the transfer.

 At the risk of repetition, the position that the Principal Judge is properly vested with the necessary mandate to determine the distribution of business before the
25 High Court among the judges and may assign any judicial duty to any judge has. This has been clarified above. If it is taken that the determination of the distribution of business before the High Court among the judges includes transfer of cases from on court to another, then the issue whether the transfer of the instant case was proper or not would not arise in the circumstances. It
30 would follow then that this court cannot not issue an order reversing the decision to transfer the case by the Principal Judge in exercise of his constitutional and statutory mandate. That being the case, the orders of the High Court at Kabale to proceed with hearing the case are also overtaken by events and rendered moot.

5 The constitutionality, or otherwise, of a decision of the Principal Judge to move
a case already under hearing from one Judge to another Judge even without
assigning reasons thereof, falls within the domain of the Constitutional Court
under Article 137. It is not a question for this court to pronounce itself upon. In
the same vein, contempt of court and abuse of court process, would not arise
10 upon the decision of the Principal Judge to effect transfer of the case if it is within
the proper exercise of his mandate.

The case of ***Uganda vs. Hon. Kassiano Ezati Wadri & 32 O’rs*** (supra) which
counsel for the accused relied on, is distinguishable from the present case both
on facts and principle. In that case, the issue concerned the transfer of a case
15 from one Chief Magistrate’s Court to another as governed under Section 41 of
the Magistrate’s Court Act. The said Act does not confer power upon a magistrate
to transfer a case from one court to another without recourse to the High Court,
which is solely vested with the power to transfer cases under the cited provisions
of the MCA. For ease of reference, the provisions are quoted fully below.

20 ***“41. Power of High Court to change venue.***

(1) Whenever it is made to appear to the High Court—

***(a) that a fair and impartial trial or inquiry cannot be had in
any magistrate’s court;***

25 ***(b) that some question of law of unusual difficulty is likely to
arise;***

***(c) that a view of the place in or near which any offence has
been committed may be required for the satisfactory inquiry
into or***

trial of the offence;

30 ***(d) that an order under this section will tend to the general
convenience of the parties or witnesses; or***

5 ***(e) that such an order is expedient for the ends of justice or is required by any provision of this Act, it may order—***

(f) that any offence be tried or inquired into by any court not empowered under the preceding sections of this Part of this Act, but in other respects competent to inquire into or try that
10 ***offence;***

(g) that any particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other such criminal court of equal or superior jurisdiction;

15 ***(h) that an accused person be committed for trial to itself.”***

It is quite clear that the provisions of the law under consideration in the ***Hon Kassiano Ezati Wadri case*** (supra) were in respect of transfer by the High Court from a magistrate’s court to another magistrate’s court of equal jurisdiction. This is distinguishable from transfer of a case from one High Court
20 to another; which is not governed by the MCA.

As a matter of law and principle, transfer of cases can be effected by the High Court itself taking cognisance of the matter it is seized with and over which it has jurisdiction, to another High Court for reasons which should be assigned, which may include convenience and/or security of the parties and/or witnesses,
25 and judicial economy, among others. Transfer at another level could be initiated by an interested party moving court pursuant to Section 41MCA (supra) in the manner stated above. Also, the transfer could be by the invoking of the administrative intervention of either the Principal Judge (or Chief Justice) or persons properly exercising power on that behalf as already shown above.

30 In the instant case, the transfer of the case was effected under the above latter option by the Principal Judge. That distinguishes it from the ***Hon Kassiano Ezati Wadri case*** (supra). It would appear that for the Principal Judge to

- 5** transfer of a case in the exercise of his administrative power, reasons ought to be assigned because under Section 20(1) of the Judicature Act (supra) it is mandatory that Article 28 of the Constitution shall be considered. Therefore, it is prudent that reasons which form the basis of the consideration of the action taken should be known.
- 10** Concerning the right to a fair trial guaranteed under Article 28, which counsel for the accused submitted was being violated, it entails a fair, speedy, and public hearing before an independent and impartial court or tribunal established by law. Counsel for accused argued that the accused will be subjected to the Rules of Evidence and Procedure of the ICD, which require high international
- 15** standards of criminal trials, are lengthy, tedious and complex, and hence compromising the accused's right to a speedy trial, which he would have obtained in the High court at Kabale applying the usual ordinary rules of criminal procedures.

It needs to be underscored that pre-trial procedures in the ICD are meant to

20 ensure that all issues relating to the evidence to be adduced at the trial, exhibits, objections, propriety of indictments, status of witnesses and protection measures; are all sorted out before the charges are confirmed. This ensures an orderly speedy trial in the event that the charges are confirmed. If not confirmed, the accused is thereby discharged and set free at the earliest. Therefore, contrary

25 to the argument that pre-trial procedures impinge on a speedy trial, they actually facilitate a speedy and orderly trial. They ensure that materials or charges that should not proceed to the trial are eliminated at the earliest, including the trial itself if there is no sufficient evidence to establish substantial the grounds in the charges. Most importantly, the pre-trial procedures are established under the

30 authority of the law. Any person charged with an offence triable at the ICD is mandated to go through that process. A process that is duly established and mandated by the law, when properly adhered to, cannot be said to impinge on a right to fair hearing.

5 Issue No.3: What are the remedies available to the parties?

The objections are not sustainable and they are accordingly dismissed, and the case shall proceed for pre-trial proceedings.

BASHAIJA K. ANDREW

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JUDGE

22/11/2022.