THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

CRIMINAL SESSION CASE NO. 237 OF 2000

UGANDA versus ARINAITWE RICHARD

BEFORE: HON. MR. JUSTICE V. A. R. RWAMISAZI-KAGABA

RULING

On the 25/9/2002, the prosecution called PW8 - D/AIP Kasangaki John. This witness testified on how he conducted an identification parade on the 28/7/1998 at Kampala Central Police Station. The accused in the present case, Richard Arinaitwe, was one the nine volunteers who formed the parade.

The accused who had been represented by Mr. P. Ayigihugu was in court and so was his counsel. At the close of his (witness) evidence - in chief, Mr. Ayigihugu started cross-examining him. In the course of the said cross examination, counsel sought to cross-examine him on the contents of information which was supposed to be on Police Form 69 in another case of robbery but concerning the same accused.

The information in the document concerning that other case was not in court and was not in possession of the witness, the prosecuting counsel or the defence counsel. When the Judge asked counsel for the accused whether it was proper to cross examine a witness on the contents of a document which was not in his possession or which the defence counsel did not avail to him before formulating questions based on its contents, the defence counsel moved from his bench (without even seeking the permission of court) to the dock where the accused was positioned.

After counsel and his client had talked for a few minutes, I saw the accused raise his hand I asked him what he wanted to say. The accused then said the judge had been paraphrasing the questions put by his lawyer thereby obscuring the real sense of the questions. That this had led the accused to believe that justice was not being done. He then said he wanted to conduct his own defence without a counsel.

Mr. Ayigihugu, in response, said, as the accused had come to believe that the bench and the bar were working in collusion to effect injustice to the accused, and since the accused had on his own opted with discontinuing with his services, he (counsel) should be discharged from the case.

Mr. Okwang, Counsel for the state told court that what the accused had said were words of Mr. Ayigihugu who had avoided saying them himself but, instead, pushed his client to say them on his behalf. This could be seen from the time when the accused uttered them - that is after counsel and his client had consulted.

Mr. Okwang said this was a veiled application whereby Mr. Ayigihugu was accusing the Judge of being impartial. He insisted that Mr. Ayigihugu's application is made in bad faith and is surrounded with insinuations against the judge and his impartiality in the trial of the case. Counsel for the accused should not be discharged.

In response, Mr. Ayiguhugu denied being the author of the words spoken by the accused and that the accused has in effect withdrawn instructions from him.

This application raised two very serious issues of law, which are:
(a) The position of the judge in the conduct of cases.
(b) The accused's right to be defended by counsel - at his trial.
A judge in Uganda is appointed by the President on the advice of the Judicial Service Commission on the term and conditions laid out in the Constitution (see Article 142(1) of the Constitution.) His (Judge) Powers to hear cases and determine all issues before him are contained in Articles 126, 128 of the Constitution and the Judicature Statute (1996).

Article 126 (c) of the Constitution provides:

"In adjudicating cases of both a Civil and Criminal nature, the courts shall, subject to the law, apply the following principles:-

(a) Justice shall be done to all irrespective of their social or economic status.

Article 128(1) and (2) of the Constitution provides that in the exercise of their judicial powers, the courts shall be independent and shall not be subjected to the control or direction any person or authority - and that no person or authority shall interfere with the courts or

judicial officers in the exercise of their judicial functions: **see: also Article 28(1) of the Constitution. Section 16(2)(a) of the Judicature Statute provides that the High Court** shall exercise the jurisdiction conferred upon it in conformity with the written law, including any law in force immediately before the commencement of this Statute.

Finally, at the assumption of office the judge takes an oath under chapter 52 of the Laws of Uganda. He swears: -

"I ..... swear that I will well and truly exercise the judicial functions entrusted to me, and will do right to all manner of people in accordance with the Constitution of the Sovereign State (Republic) of Uganda as by law established and in accordance with the laws and usage of the Sovereign State of Uganda without fear or favour, affection or ill will. So help me God.'

I wish to add here, that the law which was very relevant and mainly considered in the conduct of the trial in this case is the Evidence Act, the Penal Code and the Criminal Procedure Code Act.

Having said so much on various aspects of the law, I will not turn to the issue of as that was raised by the accused and by his counsel under cover. The hearing of this case commenced. On the 28//5/2002 and has been heard on various dates with both the accused in court. Counsel for the accused has been allowed to consult with his client on several occasions during the hearing of the case without any interruption from the bench. The case was adjourned on a number of occasions to enable the accused's counsel to appear on behalf of his client. No suggestion of bias or injustice had been suggested between 28/5/2002 and 25/9/2002.

While a previous or former statements made by the witness may be proved to challenge his credit under section 153 of the Evidence Act, but under section 143 of the same Act, the document about which the witness is sought to be cross- examined must be put to him for purposes of impeaching his credit.

In Archbold - Criminal Pleading and Practice - paragraph 8 - 129 page 1034 the learned author has this to say:

'Although a witness may be cross-examined about a former written statement which is inconsistent with his testimony, without being shown the document, the cross-examiner must

have the document available even if he does not intend to contradict the witness with it'. **See R vs. Anderson -21 Criminal Appeal Reports 178 (C.A.) England.**

It is my considered view that the Judge has powers to ask any questions or refuse any question which he thinks is improper or irrelevant to the matter in issue **(see: Sections 143 and 163 of the Evidence Act.)** I cannot see anything suggesting any bias when the judge refuses a question, whether it is from the prosecution or defence that infringes the law of evidence.

I will quote two extracts from the book titled - "Judge" by David Pannick at page 41 - the learned author says: "Litigants should not be encouraged to treat judges like members of a jury whom they can challenge off the case with or without cause. "I am also mindful of the observation made by Jenkins LJ in the case of Grimshaw vs. Dumber - 1 Q.B 408 that "Justice must not be done, it must be seen to be done.

I entirely agree that the fair trial envisaged in Article 28 of the Constitution includes a Judge or Magistrate who must be impartial and independent. Every judge about whom the allegations of impartiality are made must in open court, clear him name in the proceedings he is conducting. His response to the allegations must be determined judicially and preferably in writing.

In this regard I will refer to the case of **Professor Isaac Newton Ojok vs. Uganda Supreme Court Criminal Appeal No. 33/1991** where their Lordships dealt with the aspect of bias labeled against a Judge in the following words: As concerned the second main issue on the appeal, namely bias, the appellant alleged that his family expressed concern, that the judge assigned to his case was a blood sister of Hon. Eriya Kategaya, First Deputy Prime Minister and National Political Commissar of the National Resistance Movement. His family members were concerned that since he had been indicted for allegedly fighting the N.R.M. Government of which the said Eriya Kategaya is a pillar stone, it would have been better if he was tried by another judge. The appellant instructed his counsel to raise the matter with the judge and ask her to disqualify herself as he was personally afraid that he would not get a fair trial.

The court would lay down a rule that an application of so serious a nature as this one must be placed on record. It is not right for counsel for whatever reason to ask to see a judge in

chambers to put forward an informal application, praying that a judge should remove herself. This procedure was probably adopted out of kindness to the judge, because counsel was at pains to save the judge as much embarrassment as possible but such a step is unwise and leads to confusion. Every judge, before whom an allegation of bias is made, must enter it upon the record for all to see. The proceedings should be clearly recorded, and the application must be determined judicially by the judge concerned, having in mind the proper legal approach to such a problem. It is not wise for the judge to consult a senior judge, to take part in the decision although of course a senior judge may have to be told the result of the application for the purpose of administration.

The English Courts have evolved two tests in matters relating to bias of Judicial officers. The first test was whether there was a real likelihood of bias, and the second whether there was a reasonable suspicion of bias.

It was the considered opinion of the court that although the two tests can be sometimes irreconcilable, they can also be complimentary and both should be adopted in this way. First, the real likelihood test should be used to ascertain whether the judicial officer laboured under an interest, pecuniary, proprietary or of kindred. Very often the judicial officer passes this test.

The second test is then employed, to verify whether the legalities of the first test meet the expectations of reasonable right-minded people. If there is reasonable suspicion neither fanciful nor flimsy that the judicial officer may have biased, the court must then pass to the test formulated by Lord Heward C. J **in R. V susses Justices Ex Parte McCarthy (1924) 1 KB 259.** Courts must so administer justice as to satisfy reasonable persons that the court was impartial and unbiased.

See also: Abdalla Nassur vs. Uganda S.C. Crim. Appeal 1/1982 (1992-3) HCB 4.

Such allegations of bias may be based on various interests and considerations, such as pecuniary, social, family or kindred or proprietary. The Judge must go at length to ensure his name remains straight and his record unstained. The fact that the allegations of bias are not backed by concrete evidence or facts does lessen the duty placed on the judge to rebut or explain those allegations so that no doubt is left about his impartiality in the proceedings before him.

In light of the law above quoted and the climate that has existed in court since 28/5/2002, I find the trial judge has not displayed any bias against the accused in the conduct of his case. His counsel has been given a free hand to defend his client in the manner pleasing to him. I therefore rule that the judge has not exhibited any bias in this case - and no such bias has been proved and substantiated. The objection is there overruled and dismissed.

The second leg of the matter is the termination of the defence counsel's services as the accused's counsel. Whether such decision was arrived at by the accused alone or with the advice of his counsel after consulting with each other, I cannot apprehend what it is intended to achieve except delay the quick disposal of this case.

Article 28 (1) of the Constitution provides that an accused person shall be afforded a fair trial, and the fair trial includes the right availed to him under the same Article in section 3(d) where it provided:
'Shall be permitted to appear before the court in person or at that person's own expense, by a lawyer of his or her choice.'

Section 53 of the Trial on Indictments Decree provides: "Any person accused of an offence before the High Court may of right be defended by an advocate at his own expense. Article 28(3) (e) provides: "in the case of any offence which carries a sentence of death or improvement for life, be entitled to legal representation at the expense of the State. Refer to: Kawoya vs. Uganda Supreme Court Criminal Appeal 50/1999.

On the 18/6/2002 - the accused, Richard Arinaitwe told court:
I employed Mr. Ayigihugu to defend me and I paid him, I had paid him for all my cases."
Whether the decision to terminate the representation of Mr. Ayigihugu was taken unilaterally by the accused or with mutual understanding between him and counsel, I cannot comment much beyond saying the decision was unfortunate for three reasons:-
a) the accused faces a capital charge in this trial
b) the trial has reached quite an advanced stage
c) the defence counsel according to the accused had been paid all his legal fees for defending the accused in this trial.

The Constitution of Uganda provides that a person shall not be subjected to forced labour except with his choice or under the provisions of some known law.
[See Article 25(2) of the Constitution].

The relationship between an accused person and his counsel is contractual and except under certain circumstances. I this particular case I do not know whether the contact was rescinded unilaterally or with mutual consent. I can only as a judge, accept what was in his mind or that of his counsel when that decision was arrived at. I will therefore treat Mr. Ayigihugu as discharged from this case though I would encourage both the accused and Mr. Ayigihugu to reconsider or revisit their decision.

With Mr. Ayigihugu out of the case, the accused person has three options:
a) to engage another lawyer at his own expense,
b) to be represented by a lawyer who will be assigned to him by the State at State expense,
c) to represent himself and conduct his own case.

I shall receive the accused's option after reading this ruling.

V. A. R. **RWAMISAZI-KAGABA**
JUDGE
18/10/2002