

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

**CIVIL DIVISION**

**MISC CAUSE NO. 3 OF 2018**

**NICKSON AGASIIRWE KARUHANGA.....APPLICANT**

5 **AND**

**ATTORNEY GENERAL.....RESPONDENT**

**BEFORE HON. LADY JUSTICE H. WOLAYO**

**RULING**

10 The applicant brought a motion under articles 50(1) and article 28(1) of the Constitution , sections 98 and 33 of the Judicature Act and order 52 rr 1 and 3 of the CPR for the following orders:

1. A declaration the UPDF unit Disciplinary Committee and General Court Martial (GCM) has no jurisdiction to try the applicant for the offence disclosed in the charge sheet for CR. Case . No. UPDF /GCM/MP/ 019/2017 AND 24 /17.
- 15 2. A permanent injunction restraining the respondent , its agents, servants and all those acting on behalf of the respondent from continuing with the prosecution of the applicant in any UPDF Tribunal for the offence disclosed in the charge sheet.
3. The applicant be released from remand forthwith.
4. Compensation be ordered for the violation of the applicant’s right to a fair hearing and  
20 freedom from personal liberty.
5. Costs be provided for.

The motion was supported by affidavits in support and rejoinder of the applicant.

The respondent opposed the motion and relied on an affidavit in reply of Allan Mukama.

Both counsel filed written submissions that I have carefully considered.

25 **The applicant’s case**

It was the applicant's case he was arrested on 24<sup>th</sup> October 2017 and detained at the Chieftaincy of Military Intelligence and on 27<sup>th</sup> October 2017, together with eight others, he was arraigned before a military tribunal in Makindye and charged .

5 It was further the applicant's case that the charge sheet is defective in form since it does not disclose that the applicant is a prudent member of the Uganda Police entitled to a firearm and other defense artillery . Furthermore, it was the applicant's case had it been disclosed that he possesses a firearm certificate for his armoury issued by the Chief licensing Officer , he would not fall within the jurisdiction of the GCM .Para 8a,b,c of his affidavit in support refers.

10 According to the applicant, his right to a fair hearing under article 28 is being violated on account of the misconceived charges and bias of the GCM .

Furthermore, that on 24.10.2017, the date he allegedly committed the offences, he had already reported to CMI yet it was alleged he was found in unlawful possession of ammunition to wit, 4 pieces of tortoise grenades.

15 That the charges preferred are unreasonable and brought in bad faith as the police force has not complained of the alleged unlawful possession of arms and related equipment.

Lastly, that he was out of the country prior to being charged in the GCM.

In summary, the applicant's case is that the charge of being in possession of tortoise grenade is misconceived and therefore his right to a fair hearing is being violated.

20 **The respondent's case**

It was the respondent's case is that the applicant was lawfully charged and detained by the GCM.

Three issues were agreed upon in the joint scheduling memorandum.

1. Whether this court has jurisdiction to hear the present application
- 25 2. Whether the GCM has jurisdiction to try the applicant.
3. Remedies.

**Whether this court has jurisdiction to hear the present application**

While counsel for the applicant submitted this court has jurisdiction as enforcement of human rights under article 50 is peculiar to the High Court, counsel for the respondent submitted that this court lacked jurisdiction because the charge sheet clearly states the applicant was found in possession of firearms and ammunitions.

- 5 I have previously considered this issue in **HCMC. No. 26 of 2017 Oola v AG** and I found that the Constitution confers jurisdiction on competent courts to enforce violations of fundamental human rights under article 50 and therefore this court has jurisdiction to hear and determine this application.

### **Whether the GCM has jurisdiction to try the applicant**

- 10 It is not disputed that the applicant, a police officer, was charged with eight others in the GCM with two counts :

**Count one:** Kidnapping c/s 242 of the Penal Code Act Cap 120

#### **Particulars of the offence**

- Joel Aguma, Nixon Agasirwe Karuhanga and seven others around 25<sup>th</sup> October 2013 at  
15 Kamengo in Mpigi district while in possession of firearms and grenades ordinarily a monopoly of the Defence Forces conveyed one Kalemera Mutabazi Joel without his consent to the Republic of Rwanda.

**Count two:** Kidnapping with intent c/s 242 of the Penal Code Act

- Particulars of the charge are the same as in count one save the person who was conveyed  
20 against his will is Kalemera Jackson alias Ndinga.

In their submissions, both counsel invoked section 119 of the UPDF Act 2005 in support of their respective positions.

- Counsel for the applicant submitted that I previously held **in Oola v AG HCMC. 26 of 2017** that section 119 applies to persons subject to military law and person not otherwise  
25 subject to military law. In Oola V AG, the applicant was not a military officer nor was he brought under the operation of section 119 for the reason that he had been charged alone with offences of Treachery c/s 129 of the UPDF Act and Murder c/s 188 of the Penal Code Act yet he could only be charged with these offences if he had been charged jointly with

persons subject to military law. In that case, I considered section 119 (1) (g) of the UPDF Act but I did not have to consider section 119(1) (h) which is a stand alone pre-requisite for a civilian to qualify to be charged in the GCM.

I agree with counsel for the applicant he is a police officer and therefore entitled to carry  
5 firearms as he is mandated under section 4 (f) of the Police Act cap. 303 to perform services of a military force but the thrust of counsel for the respondent's submissions is that the applicant was in possession of tortoise grenades during the commission of the offence of Kidnapping c/s 242 of the Penal Code Act which brings him within the ambit of section 119 (1) (h) of the UPDF Act.

10 The Supreme Court precedent of **Namugerwa Hadijah v AG SCCA No. 4 of 2012** is instructive in this regard. In that case, the person who was the subject of the appeal was a civilian and had been charged in the GCM with Robbery during which robbery he used a pistol ordinarily the monopoly of the UPDF. The Supreme Court held that the person was lawfully charged in the GCM because being in possession of a pistol while a civilian brought  
15 him within the ambit of section 119 (1) (h) of the UPDF.

Apart from the Supreme court precedent, counsel for the respondent relied on the dictionary meaning of 'grenade' as a small bomb which brings it within within the definition of 'war materials' in section 2 of the UPDF Act where in it is prescribed that 'explosives' are materials ordinarily reserved for Defence Forces.

20 I agree with the submission of counsel for the applicant that he was not subject to military law by virtue of section 119 (1) (g) but he was subject to military law by virtue of section 119(1) (h).

In summary, I find that while the applicant was entitled to bear arms as a police officer, he is charged with an offence during the commission of which he was allegedly in possession of  
25 four tortoise grenades, an explosive and therefore a war material ordinarily reserved for Defence Forces, a situation that brings him within the ambit of section 119 (1) (h) and therefore the jurisdiction of the GCM.

As the applicant has failed on the substantive issue, I need not go into remedies.

This application is dismissed with no order as to costs as the applicant is on remand and not in a position to pay costs.

**DATED AT KAMPALA THIS 18<sup>TH</sup> DAY OF DECEMBER 2018**

**HON. LADY JUSTICE H. WOLAYO**

**5 Legal representation**

**Joel Olweny & Co. Advocates for the applicant**

**Attorney General's chambers for the respondent**