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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0530 OF 2014
(Coram: Elizabeth Musoke, Hellen Obura & Ezekiel Muhanguzi JJA)

10 **RA/LFK 016 PTE ERUAGA MOSES :::::::::::::::::::::::::::::::::::APPELLANT**

VERSUS

UGANDA :::::::::::::::::::::::::::::::::::RESPONDENT

(An appeal from the decision of the Court Martial Appeal Court (Five-Man Panel) chaired by Hon. Elly Turyamubona (2013) in Criminal Appeal No. 005 of 2012)

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JUDGMENT OF THE COURT

Introduction

This appeal was preferred against the decision of the Court Martial Appeal Court (herein after called CMAC) which had in exercise of its appellate jurisdiction, dismissed the appellant's appeal against conviction for Murder contrary to *Sections 188 and 189* of the Penal Code Act (Cap. 120) but allowed that against sentence, substituting life imprisonment passed by the General Court Martial (herein after called GCM) with a sentence of 35 years imprisonment.

25 **Brief Background**

The appellant was arrested, charged with Murder and tried before the Fourth Division Field Court Martial (herein after called FCM) in Gulu. The particulars of the offence were that the appellant on or around the 24th day of August, 2004, at around 11:00hrs, while at Dzaipii in Adjumani District, with malice aforethought caused the death of one Druga Amacha John Bosco by shooting him using an SMG rifle No. 3301641.

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5 The appellant pleaded not guilty whereupon the prosecution adduced evidence to prove his
guilt. In his defence, the appellant made an unsworn statement in which he explicitly set up
the defence of self defence. He said that the deceased had tried to shoot him first but narrowly
missed him prompting him to shoot at him to defend himself. The FCM found that the
prosecution had proved its case against the appellant whereupon it convicted him as charged
10 and sentenced him to suffer death.

The appellant was aggrieved and appealed to the GCM which maintained the conviction but
reduced the sentence to life imprisonment. The appellant was also aggrieved by the decision
of the GCM and further appealed to the CMAC which made the decision indicated earlier.
15 Being dissatisfied with the decision of the CMAC, the appellant lodged the present appeal in
this Court on grounds set forth in a Supplementary Memorandum of appeal dated 22nd day of
March 2019, as follows:-

1. *That the honourable Chairman and honorable members erred in law and fact when they failed to
reevaluate the evidence in regard to the defence of self defence and intoxication which were raised
20 in favour of the appellant thus occasioning a miscarriage of justice.*
2. *That the honourable Chairman and honorable members erred in law and fact when they did not
reevaluate the evidence on the changing panels that sat and heard the case thereby occasioning a
miscarriage of Justice
In the alternative and without prejudice to the above,*
- 25 3. *That the learned trial Judge (sic) erred in law and fact when she sentenced the appellant to 35 years
imprisonment without considering the period spent on remand which is deemed to be illegal, harsh
and excessive in the circumstances.*

Representations

30 At the hearing of the appeal, the appellant was represented by *Ms. Susan Sylvia Wakabala*
learned Counsel on State Brief, while *Ms. Harriet Angom*, Senior State Attorney from the
Office of the Director Public Prosecutions represented the respondent. Court directed both



5 Counsel to file written submissions. It is on the basis of written submissions that this appeal has been determined.

Appellant's case

10 In respect of ground 1, it was submitted that, the appellant raised a defence of intoxication and self defence, however the said defences were not taken in account by the Fourth Division FCM which occasioned a miscarriage of justice. Counsel contended that, the evidence of PW1 and PW3 pointed to the fact the appellant was drunk at the time of the commission of the offence. She further contended that both the appellant and the deceased were in possession of guns and the appellant in his testimony stated that the deceased shot him first
15 and then he fired back in self defence. She submitted that, the appellant did not have the malice aforethought to kill the deceased.

In respect of ground 2, it was submitted that the continued changes in the quorum which heard and determined the trial violated the appellant's right to a fair and speedy hearing.
20 Counsel contended that the decision was made by some members who were not part of proceedings and as such changes in the quorum occasioned a miscarriage of justice to the appellant.

In respect of ground 3, it was contended that, the sentence imposed by the CMAC was illegal,
25 harsh and manifestly excessive in the circumstances of the case. Counsel submitted that, the CMAC erred in law when it failed to comply with the provisions of *Article 23 (8)* of the Constitution. She asked this Court to set aside the sentence and impose its own. She proposed a sentence of 20 years imprisonment from which the period the appellant spent on remand should be deducted.

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Respondent's reply

In response to ground 1, Counsel submitted that, the CMAC rightly rejected the defences raised by the appellant. The evidence on record indicated the deceased's gun did not discharge any bullet, and the number of bullets found in the deceased's body negated the
10 defence of self defence.

Counsel contended that under *Section 12(2)* of the Penal Code Act, intoxication per se is not a defence. It only becomes a defence when certain conditions are fulfilled. *Section 12* of the Penal Code Act shifts the burden upon the accused to adduce evidence when a defence of
15 intoxication is raised. The appellant did not adduce any evidence to discharge the burden imposed upon him.

On ground 2, it was argued that the appellant did not state any errors occasioned by the changes in the quorum nor did he mention any law prohibiting such changes. It was submitted
20 that although the quorum changed the record remained intact, the new members were able to follow and appreciate the proceedings of their predecessors and as such their decision did not occasion any miscarriage of justice.

On ground 3, it was submitted that the appellant was sentenced to death, the GCM substituted
25 the sentence with life imprisonment. On further appeal the CMAC reduced the sentence to 35 years imprisonment which is a lenient a sentence in the circumstances of the case.

Counsel asked this Court to dismiss the appeal, uphold the conviction and confirm the sentence.

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5 **Court's Resolution**

We have given due consideration to the submissions of counsel for both sides, the law applicable and the authorities cited. This appeal arises from the decision of the CMAC which is the final appellate Court in the Military Court system before that Court system converges with the Civilian Court System in the Court of Appeal. The facts of the case arose in 2004
10 when the UPDF Act (Cap 307) was still in force. Under that Act, the decisions of the CMAC were appealable to the Court of Appeal.

The Courts Martial are special Courts which handle matters concerning members of the Defence Forces and have a special status, which was considered in **Attorney General vs Joseph Tumushabe, Supreme Court Constitutional Appeal No. 003 of 2005** where
15 Mulenga, J.S.C observed:

"...First, the Constitution provides in Article 126 (1) –

*"Judicial Power is derived from the people and shall be exercised by the Courts established under this Constitution in the name of the people and in conformity with law and with the
20 values, norms and aspirations of the people." (Emphasis added)*

*This principle embraces all judicial power exercised by civilian and military courts. While Parliament established the courts martial as organs of the UPDF, the authority to vest them with judicial power must be construed as derived from this constitutional principle, for only "courts established under this
25 Constitution" have mandate to exercise judicial power. Therefore, although courts martial are a specialized system to administer justice in accordance with military law, they are part of the system of courts that are, or are deemed to be established under the Constitution to administer justice in the name of the people. In my view, they are not parallel but complementary to the civilian courts, hence the convergence at the Court of Appeal Level."*

30 From the onset we note that an appeal is a creature of statute and it cannot be presumed to exist, unless it is specifically provided for. In **Attorney General vs Shah, No. 4 [1971] EA P.50-** SPRY Ag. President stated that:-



5 *"Appellate jurisdiction springs only from statute. There is no such a thing as inherent appellate jurisdiction."*

The right of appeal cannot be prescribed by mere inference. See: Judgment of Tsekooko JSC in ***Baku Raphael Obudra and Obiga Kania vs The Attorney General, Supreme Court Constitution Appeal No.1 of 2005.***

10 In that same case B.J Odoki, CJ, also noted as follows:-

"It is trite law that there is no such a thing as an inherent appellate jurisdiction. Appellate jurisdiction must be specifically created by law. It cannot be inferred or implied."

See also: ***Herman Kalisa vs Gladys Nyangire & 2 others, Court of Appeal Civil Reference No. 116 of 2013.***

15 Regulation 20 of the *Uganda Peoples' Defence Forces (Court-Martial Appeal Court) Regulations S. I. 307— 7* stipulates as follows:-

"Appeals to be final

20 (1) *Except as provided in sub regulation (2) of this regulation, any determination by the court of any appeal or other matter which the court has power to determine under the provisions of the Act or of these Regulations shall be final, and no appeal shall lie from the court to any other court.*

25 (2) *In the case of an appeal against a conviction involving a sentence of death or of life imprisonment that has been upheld by the court, the appellant shall have a right of further appeal to the Court of Appeal."*

In light of the above clear position of the law, we agree that the appellant has no right of appeal against the decision of the CMAC as the conviction does not involve a sentence of death or life imprisonment as stipulated under *Regulation 20(2) of the Uganda Peoples' Defence Forces (Supra)*. For that reason, we find that this Court has no jurisdiction to entertain this appeal and it is hereby dismissed.

We so order.



5 **Dated at Kampala this** 15th day of **Jan** 2019.



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Elizabeth Musoke
Justice of Appeal

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Hellen Obura
Justice of Appeal



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Ezekiel Muhanguzi
Justice of Appeal

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