THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL REVISION No. 1 OF 2017

(ARISING FROM MAYUGE CRIMINAL CASE No. 389 OF 2016)

1. BARASA BERNARD ODIEMO

2. HUSSEIN JUMA MUGISHA :::::::::::::::::: APPLICANTS

Versus

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

BEFORE HON. JUSTICE MICHAEL ELUBU

RULING

The applicants, **BARASA BERNARD ODIEMO** and **HUSSEIN JUMA MUGISHA** filed this application for Criminal Revision under Sections 48 and 50 of the Criminal Procedure Code Act and sought prayers that:

1. The orders of the trial magistrate be revised and set aside in overruling a point of law that the consent of the Director of Public Prosecutions ought to be sought before the applicant can be charged and tried.

The grounds on which this application is based are that the trial magistrate illegally and wrongfully exercised his jurisdiction in overruling the point of law without giving his reasons thereby occasioning a miscarriage of justice; that the trial magistrate illegally and unlawfully exercised his jurisdiction to try the applicant on a defective and incurable charge; that the trial magistrate illegally and incorrectly exercised his discretion in trying the applicant without the consent of the DPP.

The application is supported by the affidavit of **BARASA BERNARD ODIEMO** who deposes that he is a court bailiff and received instructions from the Chief Magistrates Court Iganga to execute a decree in Civil Suit No 34 of 2013. That following the execution, the wife of the Judgment debtor reported a matter to police stating that the applicant and others had assaulted her. The applicant was consequently arrested and charged with assault occasioning actual bodily harm.

The applicant avers farther that at the commencement of his trial a preliminary point of law was raised on his behalf stating that the charge sheet was incurably defective as the consent of the DPP had not been obtained before he was charged. He was overruled but the trial magistrate did not give reasons why. He swears that the trial magistrate acted illegally to try him on a defective charge on which the DPP had not given his consent.

When this application came up for hearing, the Court directed that the Director of Public Prosecutions be given notice. The parties were then given leave to file written submissions. The applicant's submissions are on record but the DPP has not complied. The submissions are on record and shall not be reproduced here but the court will closely refer to them in determining this matter.

The background to these proceedings is that the applicants were charged on two counts of Malicious Damage and Doing Grievous Harm. At the trial, Counsel representing the applicants submitted that the charges against them were defective. That A1 was charged with the offences yet he was executing his judicial duties as a bailiff who is an officer of the court. As such **The Judicature (Court Bailiffs) Rules SI 13 – 6** were the right provisions to apply. These rules, according to Counsel, create offences against court bailiffs but more importantly no prosecution may be commenced before the prior consent of the Director of Public Prosecutions. He submitted that the charges arose out of the applicant carrying out his duties as a bailiff and secondly there was no consent of the DPP on the charge sheet. It was his prayer that the charge sheet was defective as a result and for that reason A1 ought to be discharged.

In reply the learned state attorney submitted that the two were charged under **the Penal Code Act** with offences that are well prescribed. He argued that the power to determine what or which offences to prefer lay entirely with the prosecution. He states that in the opinion of the prosecution, these are the offences committed in this case distinct from the one in the rules cited. The consent of the Director of Public Prosecutions was not required for the two offences charged.

The trial magistrate ruled that it was in the interest of justice to be done and seen to be done. That the prosecution of A1 would not occasion a miscarriage of justice as would happen if he were not prosecuted as shown in court from the victim (sic). He accordingly overruled the objection and ordered the trial proceeds.

What is evident is that this application is with regard to the charges faced by the 1st applicant alone. No mention is made, anywhere, of the second applicant. It will accordingly be determined as such.

The issue here is whether the applicant can maintain a claim to have the trial proceedings revised.

The first assertion by the applicant is that he was a court bailiff carrying out a judicial duty and as such should have been charged under **The Judicature (Court Bailiffs) Rules**.

In regard to that submission this court holds that it is trite that the entire prosecution process falls under the exclusive charge or mandate of the Director of Public Prosecutions. When exercising its functions the DPP shall have regard to the public interest, administration of justice and need to prevent abuse of the legal process. It should also be observed in particular that in the discharge of its duties, the DPP shall not be subject to the direction and control of any person or authority (see Art 120 of **The Constitution of The Republic of Uganda**).

It is therefore exclusively up to the DPP to determine what the appropriate charges against a suspect are. The accused cannot seek to choose, as appears to be the case here, what the suitable charges in the circumstances of his case would be. In the

discharge of this function, the DPP is not subject to the direction or control of any one, not least the accused.

In that regard therefore the submissions raised by counsel should have been reserved for the applicants defence to the charges preferred or put to the DPP (by complaint or otherwise) for his consideration.

Secondly, and more fundamentally, Revision in criminal cases is provided for under S. 48 of **the Criminal Procedure Code Act Cap 116** which states,

> *The High Court may call for and examine the record of any criminal proceedings before any magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the magistrate's court.*

It has been held by this court that remedy under this provision is not available to one making an application on an interlocutory order in a criminal trial. I entirely agree with this position. In **Uganda V Dalal 1970 EA 355** Justice Musoke held that it is obvious, as Jones, J., remarked in Cr. Rev. 81/63, Geresomu Musoke v. Uganda (unreported), on reading ss. 339 to 341 of **the Criminal Procedure Code** (which are partly the same as the current Sections 48 – 54 in **the Criminal Procedure Code Cap 116** on Revision) that only a final order can be the subject of a revisional order of this court.

In Chatalal Karsandas v R MB 46/62 a question arose in the course of trial as to the admissibility of evidence. The magistrate gave a ruling and a petition for revision was made before the final decision was reached. It was held that a petition for revision will be heard only from an order which is final. The magistrate should have recorded the objection and proceeded with the hearing of the case (see **pg 17 '*A Handbook for Magistrates' [Revised Edition]* LDC 2000**).

It is therefore clear that in the instant case as well, the applicant had no locus to bring this application, against the trial magistrate's order rejecting his preliminary objection, as that order was interlocutory in nature.

For these reasons this application is dismissed.

[signature]

Michael Elubu

Judge

1.11.17

7-11-17

1st Applicant present.
2nd Applicant and Opp/Respondent absent.

Mr. Betty Balyerume; applicant / Respondent.
Mr Omalla holding brief for counsel [illegible] for the applicant.
Mr. Mike: clerk.

Court: Ruling delivered in the presence of the above.

[signature]