THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCCT 00 – CR- CM – 0053- 2018

(ARISING FROM HCT 00 – CR- SC- 0564/2016)

5 **NSUBUGA ISMAIL -- APPLICANT**

VERSUS

UGANDA -- RESPONDENT

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

10 **<u>RULING</u>**

This application was made under Article 126 (2) (e) of the Constitution and Rule 2 of the Judicature (Criminal Procedure) (Applications) Rules S.I 13-8).

15 Seeking leave of court to allow the Applicant to re-open his defense case in Criminal case No. 564/2016.

The application is supported by the affidavit of the Applicant. Briefly the grounds are that:-

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1) The Applicant is the accused person in Cr. Case No. 564/2016, where it is alleged that he defiled one Nabakka Melisa.

2) He recorded a charge and caution statement where he claimed he
25 had wrangles with the mother of the victim, one Harriet Namuddu.

During its submissions, the prosecution alleged that the evidence of the grudge was an afterthought.

30 The Applicant intends to call the Police Officer who recorded the charge and caution statement so that it can be tendered in evidence.

The Applicant makes his application to be allowed to re-open his defense case to prove that the evidence of the grudge was not an after thought.

5 The court has wide and ample powers to allow the defense case to be reopened.

It is therefore just and equitable that the application be allowed.

10 There is an affidavit in reply deponed by Byansi George William an Ag. Senior Asst. Director of Public Prosecutions objecting to the application on the following grounds:-

- The application is bad in law, misconceived and has no merit.

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- The application and supporting affidavit do not disclose any right for the accused person to re-open his defence.

- While the Applicant refers to a charge and caution statement
20 recorded before DIC/ASP Dusabe Innocent, the court record indicates that he denied and disowned any kind of police statement and this is fatal to this application.

- The statement referred to by the Applicant is not on the record of
25 proceedings and therefore relying on its contents is not only erroneous but a misdirection.

- The affidavit in support paragraph 6 confirms that the evidence of the grudge came to the record of the court at defence hearing and this
30 qualifies it to be an afterthought.

The prosecution submissions were made by the State Attorney as an Officer of court but not as a witness and it is wrong for the defence to rely on them to bring his application in pursuit of evidence in rebuttal.

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The application has incurable defects and ought to be struck out.

The application was called for hearing on 23.05.18.

40 Counsel for the Applicant went through the provisions of law under which the application is made and the grounds thereof adding that the

evidence of the grudge mentioned in the charge and caution statement is corroborated by two witnesses.

It was then submitted that S.39 (1) Trial Indictment Act gives court ample powers to summon witnesses whose evidence appears essential for the just decision of the case.

Further that, this application being made after closure of defence and submissions is not prejudicial to the state but will assist the court to reach a just decision in the case.

If there is any prejudice, Counsel asserted, it will be readdressed under S.39 (2) Trial of Indictment Act where prosecution will get a chance to cross examine the witness after being adequately prepared.

It was the further submission of Counsel that the application is not misconceived. He relied on the case of **Stephen Karekona vs. Uganda Cr. App 10/98** where it was held that ***"the trial before High Court ends with summing up for assessors".***

That in the present case, the court had not yet reached that stage when this application was made.

And also that in the case of **Ihunde Jimmy vs. Uganda Cr. App. 17/2001**, it was held that S.37 (now 39) Trial Indictment Act ***"gives court wide discretionary powers to call or recall witnesses and such powers must be exercised judiciously and reasonably and not likely to prejudice the accused person".***

It was also the argument of Counsel that, the right to a fair trial under Article 28 of the Constitution is of paramount importance. Counsel then prayed court to allow the accused that right by allowing him to tender his charge and caution statement.

Referring to especially paragraph 5 and 6 of the affidavit in reply where it is contended that the right of accused to re-open defence is not disclosed, Counsel submitted that the accused has no duty to disclose anything but has a right to a fair hearing.

And that the charge and caution statement claimed to have been disowned was not presented to the accused. The statement he

disowned was the plain one Exhibit P_{4A}, recorded on 23.07.13 while the statement recorded by Detective Assistant Inspector of Police (DAIP) Dusabe Innocent on 25.07.13 was not shown to the Applicant at trial. It is in possession of the prosecution.

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That the Applicant closed his defence on assumption that it would not come into issue. Now that it is in issue, court should exercise its discretional powers and allow him to tender it. Failure to do so will be detrimental to the accused and will occasion a miscarriage of justice.

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It was prayed that the application be allowed.

In reply, Counsel for the State pointed out that the application was brought under the provisions of the law cited in the motion but Counsel
15 of the accused had also added S.39 (1) of the Trial Indictment Act.

At this point it was pointed out by court that citing wrong law or omitting to cite a provision is not fatal to an application as the proper provisions of the law can always be included.

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Counsel for the State then pointed out that Article 126 (2) (e) of the Constitution emphasizes substantive justice being administered without undue regard to technicalities. And that this article moves hand in hand with Article 28 of the Constitution which enjoins the right to a fair
25 hearing.

However that, the application was being objected to on the grounds set out in paragraphs 5,6,7,8 and 9 of the affidavit in reply, emphasizing that the Applicant had a chance to produce the statement he is now
30 applying to bring to court. Yet while on oath, he denied ever making a statement at police.

Also that, the Trial Indictment Act sets out the procedure of trials before the High Court. Commencement section- this law was enacted to
35 consolidate the law relating to the trial of criminal cases on indictment before court and for matters incidental thereto.

Under S.75 Trial Indictment Act- the accused shall be allowed to examine and witness in attendance but shall **not** be entitled as of right,
40 to summon a witness other than the witnesses named at the Magistrates Court committing him for trial.

But that not withstanding, Counsel argued, the accused in the present case at the close of the prosecution case was asked by court whether he would give his defence, how he was to do it and which witnesses he wanted to call- P.87 record of proceedings. He opted to give evidence on oath and named his witnesses who are on record.

On 17.01.08, court granted the accused the request to be re-examined on his HIV status and to call relevant witnesses.

Commenting about Applicant's claim that she submitted that the claim of a grudge is an afterthought, Counsel stated that, the statement was made by her as an Officer of Court and not as a witness. And that the statements are protected under the Advocates Procedure Rules.

And that since she was not a witness in the cases, it was erroneous for the Applicant to use the submissions to bring evidence in rebuttal. That the trend is an abuse and vicious assault on criminal practice.

Further that the Applicant claims he made a charge and caution statement at Police where he mentioned the grudge. The statement was allegedly recorded by DIC/ASP Dusabe Innocent. However that, nobody can confirm the statements of a document they did not author, record or witness.

Referring to P.90 of the record of proceedings, Counsel insisted that the Applicant took oath before he gave evidence in his defence. When asked if he made a statement at Police, he denied having made a statement- P.110. Asked if he wrote a statement at Police he said **"no"** and denied knowing how to read and write. The questions were geared towards tendering his statement, but the Applicant vehemently objected to and denied.

Counsel wondered how the Applicant who had opportunity to look at his statement at that time and denied it on oath or making any other statement could turn around and rely on the same statement he denied on oath.

Also that, the mother of the victim testified but no questions were put to her pertaining to the said grudge. Instead the accused told court at

P.93 that there were grudges at work between him and Harriet Namuddu. This is an after thought.

And that interpretation of S.39 Trial Indictments Act empowers the court on its own motion and initiative at any stage of the proceedings to re-summon and re-examine any witness. But it does not give a right to the accused person to summon another witness at that stage of proceedings.

Counsel argued that, there is a reason for the procedure otherwise court trials would never end if we kept on moving back and forth.

She expressed surprise that the one who should cherish the right to a speedy trial is the one dragging it.

Counsel pointed out that speedy trial under Article 28 of the Constitution is not only in favor of the accused person. That even the victim has a right to speedy justice delivery.

She pointed out that, this is an old case of 2013 and the victim's family has never missed a sitting since December, 2017 and the matter ought to be concluded.

That if the Applicant is the author of the charge and caution statement he can confirm what he recorded at Police. He had a chance to admit it as it was disclosed to him. Why should we waste time to call the Officer who recorded it, Counsel wondered.

It was then prayed that the application should not be granted as its misconceived and only intended to drag the proceedings of the case and amounts to an abuse of criminal procedure and practice and the Constitutional provisions relied upon by the Applicant.

But that, in case court finds it appropriate to allow the application, the statement should be tendered in by the accused who recorded it, in which case the prosecution would pray for:-

1) Right to cross examine under S.39 (2) Trial Indictment Act.

2) The Right to call evidence in reply under S.76 Trial Indictment Act.

However, it was emphasized that the defence got disclosures at the onset of this case and the statement was included. Therefore that, they had a chance to bring it out but they did not rely on it until submissions were made. The earlier prayer for dismissal of the application was reiterated.

In rejoinder, Counsel for the Applicant submitted that Article 28 of the Constitution which provides for the right to a fair trial does not put a speed limit to the trial and neither does it put a time limit. A fair trial is a fair trial and justice should not only be done but should be seen to be done.

He insisted that the application should succeed on all fours. And that all references to the record of proceedings were misconceived since the matter is not an appeal. And that, if the state seriously intended to oppose the application, they ought to have outlined the prejudice if any, to the State. But no single prejudice has been outlined that would be occasioned to the state if the Police Officer is called.

Without any prejudice to be occasioned to the State, Counsel asserted, the Applicant should be allowed to tender in his charge and caution statement.

As to the alleged denial by the Applicant to making the statement, Counsel stated that the statement is not on record and hence this application to place it on record by calling the Police Officer who recorded it.

Further that, the statement upon which the Applicant was cross-examined was tendered as prosecution Exhibit P4- And the circumstances under which the Applicant recorded the statement were set out. But that the charge and caution statement was never shown to him in court and he was never cross-examined on it.

Commenting about the submissions of the state regarding officers of court and their prosecution under the Advocates Act, Counsel stated that Officers of Court not only have rights but also have a duty to be honest to court.

And that while the state makes reference to the accused delaying trial, this is as a result of their dishonesty in denying the charge and caution statement.

5 It is the duty of Officers of Court, Counsel emphasized, to help court to reach a just decision. The statement tendered was different. And submissions also have a general bearing on the outcome. To say that the grudge was an afterthought has great bearing on the outcome of the trial and would cause miscarriage of justice.

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The case of **Uganda vs. Borespeyo Mpayo [1975] HCB 245** where **Archubolds 38th Edition paragraph 925** was cited with approval, was relied there in that ***"A miscarriage of justice occurs where by reason of a mistake or omission or irregularity in the trial, the***
15 ***Appellant loses a chance of acquittal which is fairly open to that Appellant".***

The submissions by an Officer of Court that evidence of a grudge was an after thought if not rebutted would amount to miscarriage of justice.

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That in the case of **Stephen Karekona (Supra)** their Lordships agreed with the decision of **R vs. Sidman [1923] IKB 47** where it was held that ***"witnesses were properly recalled even after Counsel for the prisoner had made his speech to the jury".***

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It was Counsel's view that, the above case supports the circumstances of the present case where an application has been made to re-open the defence after submissions.

30 The interpretation of S.39 should be disregarded; Counsel added contending that it is not binding.

The Applicant is applying to court to exercise its powers to summon the witness to tender the statement. And no prejudice will be occasioned to
35 the State by doing so.

As to S.75 Trial Indictment Act- it was Counsel for the Applicant's contention that it does not apply to prevent the application and therefore that its citation is misconceived.

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He pointed out that the accused are not represented at committal and therefore cannot tell the number of witnesses to call. And that the prosecution cannot object to this witness whom they chose not to call in bad faith to mislead the court.

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Reiterating that the Applicant was moving court to exercise its powers to call the witness, Counsel added that, the prayers of the state are not tenable. And that there are rules and procedures under which the statements are made and therefore it cannot be tendered by an accused who did not record it himself. It was recorded by DASP Dusabe, who it is prayed court summons.

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Reiterating earlier prayers, Counsel stated that the summons should be made through the Inspector General of Police to call the Police Officer who recorded the statement to come and tender it in court.

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After careful consideration of the submissions of both Counsel, I find that I am more persuaded by the submissions of Counsel for the Applicant.

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While the application for re-opening the defence case was made after the submissions of both Counsel, the summing up of assessors had not yet been done. Therefore, as established by decided cases, that trial had not yet ended, *"Trial on indictment ends with the summing up of Assessors "*– Refer to **Stephen Karekona vs. Uganda (Supra).**

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While the Applicant was given a chance to call witnesses and could have then called the witness he now seeks to call to tender in his statement, it would occasion a miscarriage of justice to deny him a chance to do so, when the trial has not yet closed; and yet he believes that the information is vital for beefing up his defence - See **Uganda vs. Borespeyo Mpayo (Supra)** to explanation as to *"when a miscarriage of justice occurs".*

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The Applicant not having personally recorded his own statement cannot be the one to tender it in as the manner and circumstances in which it was recorded have to be explained to court. It is accordingly necessary to call the Police Officer who recorded it to appear and put it.

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While the application was made under Article 126 (2) (e) Constitution interlia, there is nothing to prevent court from exercising its powers under S.39 Trial Indictments Act to call the witness needed by the defence, as a court witness.

As already indicated in this ruling, the section gives ***"the court discretion, at any stage of the trial to summon or call any person as a witness…. And the court*** ***<u>shall</u>*** ***summon and examine… any such person if he/her evidence appears to be essential for the just decision of the case"***

Provided the Advocate for the prosecution or the Defendant (Accused) or his Advocate shall have the right to cross examine any such person, and the court shall adjourn the case for such a time, if any, as it thinks necessary to enable such cross-examination to be adequately prepared,…

"Once the court decided that certain evidence was essential for the just determination of the case, then it is under a duty to call a witness or witnesses to give that evidence whatever its effect is likely to be".

Courts have emphasized that ***"the powers musty be exercised judicially and reasonably and not in a way likely to prejudice the accused".*** – Refer to **Ihunde Jimmy vs. Uganda (Supra).**

The statement in issue in the present case was not put on record by the prosecution and it is only fair and just that it be produced if the accused feels it will benefit his case.

The weight to be put on all the evidence will in the end be determined by court.

While the statement came into issue in submissions of Counsel, court cannot at this stage determine the weight to be placed upon it.

The effect of the alleged denials of the Applicant as to its existence can only be properly determined when considering the whole evidence.

No injustice will be occasioned to any of the parties since the law clearly provides the right to cross examine the witness.

"Justice is giving what is deserved" and ***"the right to a fair trial is one of the ways to prevent miscarriage of justice and it is an essential part of a just society"***.

5 Calling the Police Office who recorded the statement will assist the court in reaching a just decision in the matter.

The application is allowed for all those reasons.

10 Witness summons to issue to the Police Officer through the Inspector General of Police to appear and present the statement to court.

FLAVIA SENOGA ANGLIN
15 **JUDGE**
05.06.18