

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
INTERNATIONAL CRIMES DIVISION
CRIMINAL SESSION CASE No. 0001 OF 2010

(Arising from Nakawa Chief Magistrate's Court Crim. Case No. 574 of 2010)

UGANDA :: PROSECUTOR

VERSUS

- 1. HUSSEIN HASSAN AGAD**
- 2. IDRIS MAGONDU**
- 3. ISA AHMED LUYIMA**
- 4. HASSAN HARUNA LUYIMA**
- 5. MUZAFAR LUYIMA**
- 6. BATEMATYO ABUBAKARI :: ACCUSED**
- 7. YAHYA SULEIMAN MBUTHIA**
- 8. HABIB SULEIMAN NJOROGE**
- 9. OMAR AWAD OMAR**
- 10. MOHAMMAD HAMID SULAIMAN**
- 11. SELEMAN HIJAR NYAMADONDO**
- 12. MOHAMED ALI MOHAMED**

RULING

In a mini scheduling conference I conducted the day before this case was due to come up for hearing, in preparation for the commencement of the trial for which the case had earlier been fixed, Counsels for some of the Accused persons complained that their clients had endeavoured to have their affidavits commissioned from Luzira Prison where they are on remand, for the purposes of some application they wished to file in Court; but had been frustrated. The complaint was that the prison officials declined to commission the affidavits or to allow an external Commissioner of Oaths to do so. This, I found rather strange and unacceptable as it amounted to denying the Accused persons the right to access justice.

Furthermore, the reported ground for the refusal by the Prisons Officials to commission or have the affidavits commissioned, namely that they did not believe what were alleged in the affidavits, was wrong. It is not a requirement that Commissioners of Oaths must first believe the truth of the deposition a deponent wishes to make. The truth or otherwise, of what is contained in a deposition is a matter between the deponent and his or her God, and then the law. All that a Commissioner of Oath need do – and that is precisely the reason certain Prison Officials were, in recognition of the peculiar circumstance of a remand prisoner, appointed Justices of the Peace – is to bear witness that the deponent, on oath, stated what is contained in the affidavit.

I therefore directed that the Accused persons who wished to swear affidavits be allowed to do so; and this was executed from the Court precincts, first thing in the morning of the day the trial was fixed to commence. When the case was called, Peter Walubiri leading the defence team, notified Court that eight of the Accused persons had, vide Constitutional Court Petition No. 55 of 2011, filed that same day, petitioned the Constitutional Court challenging the legality of their trial, for contravention of various provisions of the 1995 Constitution of Uganda, and as well the legality of their being tried by the International Crimes Division of the High Court of Uganda.

Ordinarily, I would have shown my displeasure at the bringing of this application on the very day the case was slated for hearing, when there had been ample time between the date I last adjourned the matter, and this date of trial. I was however forced to adopt a softer stance and entertain the application owing to the revelation above that the Accused persons' endeavour to execute the commissioning of their affidavits, which it now became clear was for the petition giving rise to this application, had been thwarted. Counsel Duncan Ondimu also notified Court of an impending similar petition from three of the other Accused persons.

In their submissions, Counsels Peter Walubiri and John Francis Onyango then urged this Court to stay the trial, pending the determination of the questions raised before the Constitutional Court. Their argument, in essence, was that it would not serve the interest of justice for this Court to proceed with the trial, and yet the Constitutional Court could declare that the Petitioners' plea therein was well founded. In that event, they contended, any trial that would have been proceeded with, notwithstanding the petition, would have been a waste of resources and of Court's time, and subjected the Accused persons to avoidable stress; all of which this Court would do well to forestall by staying the trial.

The State Counsels, Joan Kagezi and Lino Anguzu, however vehemently opposed the application, contending that the Accused persons have not presented this Court with any order of stay from the Constitutional Court; hence there is no basis upon which this Court would stay the trial. They distinguished the petition before the Constitutional Court from a reference which would have originated from this Court; and in which case this Court would have had the powers to stay the trial without having to be ordered to do so by the Constitutional Court. Counsels urged me to be mindful of the circumstance of this trial, and the interest of the public and the Accused persons who all desire that justice is done.

Counsels on both sides cited a number of authorities in support of their contention; and were in agreement that the authorities were clear that in deciding whether or not to order stay of a trial, the Constitutional Court, is guided by three broad principles; namely proof: first, of a prima facie case with a likelihood of success of the petition, second, that irreparable damage would result to the Applicant if the order of stay were not granted, and then finally, where the balance of convenience would lie. I duly perused the authorities Counsels cited and gracefully availed me; which all offer useful guidance on the course of action a Court should take when, as is the case now, it is confronted with the plea for stay of trial.

It is true, the application before me is not seeking a reference to the Constitutional Court; hence the merit or otherwise of the Constitutional petition is not within my adjudicatory remit. Equally, I am not clothed with powers to dictate to the Constitutional Court the time frame within which the petition before it should be disposed of; or some directive which would guide this Court should be issued. Nonetheless, the fact of the petition raising issues of illegality, pending disposal by the Constitutional Court has been brought to my attention. I would be failing in my sworn duty to do justice if I looked the other way. I therefore think I am permitted, to resolve what the justice of the matter demands between staying the proceedings before me, or continuation therewith.

I should like to think the matter does not pose any major problem. While this Court is not competent to determine whether or not the petition by the applicants herein establishes a prima facie case, as the matter is not before me, I think basing on general principles and good sense, I can determine whether or not denial to stay the proceedings would occasion irreparable damage. All that I have to consider is what the effect of any trial ending in a conviction would be on the

Accused persons who still hope to alter their fate through the Constitutional petition. With regard to to the balance of convenience, I feel I am on sure grounds to decide where it lies.

On the issue that the Accused persons are being tried by the International Division of the High Court, I have to reiterate here what I pointed out to the Counsels for the Accused persons, that this trial is not being conducted under the international crimes regime for which the International Crimes Division of the High Court was set up. Right from the outset, upon my taking over the case from the Nakawa High Court, I clearly made this position well known to all Counsels that the Hon. The Principal Judge, in assigning me the conduct of the trial, was explicit that it was not under what was then the War Crimes Division, later renamed the International Crimes Division.

Indeed, an application by some of the defence Counsels to have this trial transferred to and conducted under the International Crimes Division met with outright rejection by the Hon Principal Judge who, in no uncertain language, clarified that the events for which the Accused were arraigned and are facing trial, notwithstanding that they involve alleged cross border offences, took place before the International Crimes Division was constituted. That should have settled the matter. If however, despite this clarification, the Accused persons still have issues with the International Crimes Division, they are at liberty to pursue it with the Constitutional Court.

True, proceeding with the trial would in a way assuage the public who are overly anxious, and desire to know whether or not the Accused persons in the dock were truly behind the horrendous bomb explosions for which they are facing trial. It would be a clear manifestation of the seriousness of our criminal justice system to ensure that the rule of law prevails through the due process. However, in view of the petition pending in the Constitutional Court, challenging inter alia, the legality of this trial, and it not being wholly impossible for the Constitutional Court to decide that this trial should cease altogether, I think the appropriate thing for me to do is to exercise caution.

Should the Constitutional Court order cessation of the trial, such applause and satisfaction as the public would have been made to receive the process with, would turn out be a very painful pyrrhic justice. I therefore liken the petition in the Constitutional Court to a kind of sword of Damocles hanging over the trial Court; hence the need to exercise caution and strike a fair balance between the competing demands for justice, by the public and the Accused persons. I think the balance of convenience lies in staying my hand other than proceeding with this trial, for

fear of the possible order directing a halt thereto, after much resources, time, and energy, which could have been more usefully applied elsewhere, have unfortunately been sunk in such a process.

In the event, I prefer to err on the side of caution; and to stay this trial while hoping that the Constitutional Court finds the time to expeditiously dispose of the petition before it; and give the trial Court direction on the course of action it should take. Accordingly, this trial is stayed until such further orders as shall come from the Constitutional Court in that regard. I so order.

Alfonse Chigamoy Owiny – Dollo

JUDGE

18 – 11 – 2011