THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF KAMPALA AT KAMPALA
(CRIMINAL DIVISION)

CRIMINAL MISC. APPL. No. 18 of 2022
(Arising From Buganda Road Criminal Court Case No 1559 of 2022)

KIZZA BESIGYE :::::::::::::::: **APPLICANT**

Versus

UGANDA :::::::::::::::: **RESPONDENT**

BEFORE: HON. MR. JUSTICE MICHAEL ELUBU

RULING

This application is commenced under Sections 48 and 50 of **The Criminal Procedure Code Act** and Brule 3 of **The Judicature (Criminal Procedure Applications) Rules SI 13-8.**

The applicant, **Kizza Besigye**, seeks orders that the decision and order of her worship Siena Owomugisha, the learned Magistrate Grade I of Buganda Road Chief Magistrates Court, of granting the Applicant a cash bail of a sum of UGX 30,000,000/- (Uganda Shillings thirty million only) be revised and set aside.

The grounds on which this application is based are stated in the Notice of Motion and particularised in the attached affidavit deposed by **Katumba Chrisestom**. It is stated and affirmed that the applicant was put under house detention from the 12th of May 2022 by the Uganda Police Force and military personnel. On the 24th of May 2022, he managed to move to town where he was blocked and arrested then eventually detained in Naggalama

police station. On the 25th of May 2022 he was charged at the Buganda Road Chief Magistrates Court with the offence of Incitement to Violence, contrary to Section 51 (1) (b) of **The Penal Code Act.** The applicant was arrested along with Samuel Walter Lubega Makaaku, Kato Fred and Kintu Yoweri. He sought and was granted a cash bail of UGX 30,000,000/- (Uganda Shillings Thirty Million). It is stated that the learned Magistrate unfairly exercised her discretion and/or jurisdiction when she imposed a manifestly excessive cash bail condition of UGX 30,000,000/- upon the applicant. That Samuel Lubega Makaaku and Kintu Yoweri were charged before a different magistrate, on a count of obstructing police officers on duty, and granted a non-cash bail. Kato Fred was on the other hand, charged with a traffic offence and produced before yet another magistrate. He was granted a cash bail of UGX 1,000,000/-. That in imposing a condition on the applicant which differed substantially from the terms set for the persons arrested with him, the trial magistrate exercised her jurisdiction with material irregularity and derogated from the applicants right to a fair hearing.

The Respondent opposed this application. In an affidavit in reply, deposed by **Amerit Timothy,** of the Office of the Director of Public Prosecutions, the respondent disputes the assertion that the applicant was under house detention from the 12th of May 2022. It is stated that on the 24th of May 2022, the applicant was merely arrested and detained at Central and Naggaalama Police Stations upon committing the offence here. That he bears constitutional and legal obligations, rights and duties which the court accorded him. That the trial magistrate exercised her discretion fairly and judiciously, duly granting the applicant bail, and setting the appropriate terms and conditions. Regarding the difference in bail conditions between the applicant and the persons he was arrested with, it was affirmed that the Magistrate acted regularly, independently and within the scope of her jurisdiction and to act otherwise would be a derogation of the independence of the judiciary. Additionally, that the other persons appeared before different magistrates and were charged with substantially different offences. Lastly that this application is not founded in the law on which it is raised.

Determination

The Respondent raised a preliminary objection.

It is submitted that the applicant was granted a cash bail of thirty million shillings (UGX 30,000,000/-).Thereafter this application was commenced under Sections 48 and 50 of **the Criminal Procedure Code Act.** The applicant seeks to invoke the Revisionary powers of this Court under these sections. The Respondent asserts Revision is only available when the proceedings from a Magistrates Court contain an error material to the merits of the case or where a miscarriage of justice has occurred. In those circumstances the High Court may enter a Revisional order, in case of a conviction, or in the case of any other order, other than an order of acquittal, to alter or reverse the order.

The respondent also argued that it is only a final order or judgment that can be the subject of a Revisional order. The relief is not available where, as in this case (a ruling on bail), where the order challenged is an interlocutory one. That Article 257 (1) of **The Constitution of The Republic of Uganda** defines judgment to include a decision, an order or decree of the court. The respondent also relies on the definition given in the Maryland Courts, Glossary of Court Terms where a judgement in a criminal case is stated to comprise the final order of the court. That in a criminal case, the conviction and sentence constitute the judgment, so there is no judgment until sentence is imposed.

The Respondent concludes with the contention that in this case the proceedings do not reveal any error material to the merits of the case. This application having been brought against an interlocutory and not a final order is illegal, incompetent and misconceived.

In reply, the applicant argues that a bail application is dispositive in nature and does not form part of the main trial proceedings. It emanates from different pleadings and ends in a final order.

That a reading of Sections 48 and 50 of **the Criminal Procedure Code Act** shows that the argument that the Revisional powers of The High Court in criminal matters are limited to the final judgements is untenable. That the section refers to 'any' and 'order' which gives

the Court wide discretionary powers to revise any decision or order of a lower court without limiting it to final judgments.

The respondent cited the Kenyan case of **Joseph Nduvi Mbuvi v Republic (2019) EKLR** where the High Court held,

> A strict reading of section 362 of the ***Criminal Procedure Code***, however, does not expressly limit the High Court's revisionary jurisdiction to final adjudication of the proceedings. The section talks of "any criminal proceedings". "Any criminal proceedings" in my view includes interlocutory proceedings…
>
> In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with.

Section 362 of the Kenyan Criminal Procedure Code Act is couched in substantially the same terms as Section 48 of the Ugandan **Criminal Procedure Code Act**. It stipulates,

> 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.

Section 50 (1) on the other hand, broadly lays down the orders that the court may make in Revision. It states as follows,

> In the case of any proceedings in a magistrate's court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, when it appears that in those proceedings an error material to the merits of any case or involving a miscarriage of justice has occurred, the High Court may—
>
> (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 34 and 41 and may enhance the sentence;

(b) in the case of any other order, other than an order of acquittal, alter or reverse the order.

Upon consideration of the submissions of the parties on this preliminary point, and the perusal of the authorities cited, this court takes the view that only final orders of a Magistrates Court can be the subject of a revisional order by the High Court. For that reason, and with respect, this court is not persuaded by the holding cited by the respondent in **Joseph Nduvi Mbuvi** (supra). It is a matter that has long been settled by Ugandan Courts, that only final orders can be the subject of revision. The provisions of Section 50 of **the Criminal Procedure Code Act** show that revisional powers given to the High Court are intended to ensure the propriety, and to correct mistakes in findings and orders made by subordinate courts.

For example Section 50 (3) gives the High Court the mandate to enhance a sentence imposed by trial court. Section 50 (4) bars the High Court from interfering with an acquittal but may itself acquit where a conviction has been entered. These are all final orders disposing of criminal proceedings. Therefore reference to 'any other order' made in Section 50 (1) (b) of **the Criminal Procedure Code Act** should be interpreted *ejusdem generis* to mean any other order finally disposing of criminal proceedings.

For this reason the exercise by the High Court of its powers in Section 50 (1) (a) and (b) of the Criminal Procedure Code Act should be construed as an examination of the record to determine legality and propriety of final orders and judgement. That is orders that are final and not amenable to the alteration by the court of first instance; orders that definitively determine the rights or obligations of the parties. (This is the definition for final orders that in given in **First Rand Bank Limited vs Modingwa Harry Makaleng [034/16] ZASCA 169** and the 8th Edition of Blacks Law Dictionary).

Orders made in a ruling on bail do not finally determine the rights of the applicant in a criminal trial. Such order is limited to a decision whether the accused person should be released or remanded during the pendency of his trial. In that regard therefore the decision cannot be the subject of a revision hearing because it is not a final order deciding the guilt

or innocence of the accused; or other order, such as a dismissal or discharge, determining criminal proceedings against him. In fact an accused person is at liberty to reapply to the very court that has previously made a ruling to deny him a release on bail farther illustrating that bail is not a final order. Ordinarily a court that enters judgment and sentence in a criminal matter cannot make any farther orders in the same case.

It is for this reason that a ruling on bail cannot be the subject of a revisional order.

That said, I have studied the orders sought. The applicant's complaint is that the amount of bail set was manifestly excessive. The import of the application is that the amount of bail set be revised. In his submissions, Counsel representing the applicant prayed that this court should alter the bail terms and release the applicant on fair and reasonable conditions. It was a mistake, in my view, for the applicant to proceed by way of revision. The law however gives the High Court the jurisdiction to consider applications for the adjustment of bail terms.

Section 75 (4) of **the Magistrates Court Act** stipulates,

> The High Court may, in any case where an accused person is appearing before a magistrate's court… direct that…the amount required for any bail bond be reduced;

In **Francis Bwengye vs Haki Bonera HCT-00-CV-CA-0033-2009** a civil case where the wrong law and procedure was relied on by an applicant seeking an order for leave to appear and defend, the Court held,

> The general rule is that where an application omits to cite any law at all or cites the wrong law, but the jurisdiction to grant the order sought exists, then the irregularity or omission can be ignored and the correct law inserted.
>
> If any authority were required for this, ***Tarlol Singh Saggu vs Roadmaster cycles (U) Ltd CACA No. 46/2000*** would suffice. The court observed in that case, citing with approval the decision of the former East African Court of Appeal in ***Nanjibhai Prabohusdas & Co. Ltd vs Standard Bank Ltd [1968] EA*** 670 that:

> *"The court should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature."*

The court also re-emphasized the Supreme Court observation in ***Re Christine Namatovu Tebajjukira [1992 – 93] HCB 85*** that:

> *"The administration of justice should normally require that the substance of disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights.*

I take the view that this finding is appropriate in the circumstances of the instant application. The applicant has relied on the wrong law and procedure. This court has the jurisdiction to entertain an application of this nature. It is therefore in the interest of justice that this court determines the application utilising the correct law and procedure.

I shall now turn to the merits of the application. It should be noted that the respondent did not make any arguments challenging the application to reduce the amount set for bail.

The position is that the applicant was released on bail. This application is limited to a prayer to alter the terms of that bail. I note that a release on bail is an exercise of the discretion by the court setting those terms. See **Yang Zheng Jun vs Uganda Court of Appeal of uganda Miscellaneous Application 99 of 2013** where it was held that,

> The granting of bail by court to one before court is essentially an act of the exercise by court of its discretionary powers. The court considers all that is before it regarding the application for bail and reaches a decision based on the rules of reason, justice and law. Judicial discretion is not private opinion, humour, arbitrariness, capriciousness or vague and fanciful considerations: See: **R V Board of Education [1990] 2 KB 165.**

Generally a court will not interfere with a discretionary finding unless the applicant has suffered prejudice which has led to an injustice, or where the court relied on an illegality or a wrong principle.

Indeed the East African Court of Appeal in **Mbogo vs Shah (1968) EA 93** stated it as follows: a court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.

In this case, the learned Trial Magistrate set the bail terms and conditions to include a cash deposit in the amount of UGX 30,000,000/-. That was well within her discretion to do. The question is whether this court should, in any way, interfere with those conditions? Whether the conditions were equitable, fair and just in the circumstances?

The applicant in this case was charged with the offence of Incitement to Violence contrary to Section 51 (1) (b) of **The Penal Code Act,** where the maximum term of imprisonment is set at three years. The offence does not attract a very severe punishment. I have also considered that if the Court were to impose a fine as a punishment, then it would apply **the Law Revision (Fines and other Financial Amounts in Criminal Matters) Act, 2008,** which stipulates in Section 3 that,

> …. where a fine is prescribed in relation to a term of imprisonment, the ratio of the fine to imprisonment shall be two currency points to each month of imprisonment.

Since the law sets three years as imprisonment, then the maximum amount payable as a fine, considering that each currency point is UGX 20,000/-, would be UGX 1,440,000/-.

The applicant has also cited the decision in **Charles Onyango Obbo and Anor vs Uganda HCMA No 145 of 1997** where is was held that a court should not impose such tough conditions that on the whole bail looks like a punishment to the accused. Bail is not a punishment but merely intended to secure the attendance of the accused for trial.

This court is in complete agreement with the holding in **Obbo.**

The trial Magistrate also correctly stated that bail terms imposed should be a safeguard that once released on bail the accused will return for his trial. That is as it should be.

However taking all the circumstances of the case into consideration, it is my considered opinion that the learned trial magistrate exercised her discretion with a material irregularity when she set the bail amount at UGX 30,000,000/-. This condition was manifestly harsh and excessive. It therefore occasioned a miscarriage of justice. In the case of **Obbo** (supra) bail had been set at 2,000,000/- which the court considered excessive at the time. That figure was reduced to 200,000/-.

It should also be noted that there were three other persons arrested with the applicant for offences arising out of the same event. The others were granted bail on different terms. Two were released on none cash bonds and the third on a cash bail of UGX 1,000,000/-. I am aware that each applicant's case is considered on its individual merits but there should also be equity in the orders given.

In the result, the amount set for bail in this matter should be adjusted. Bail terms or conditions must not be set so high as to be out of reach or appear punitive. They should not be so low as to be outrageous or ridiculous. They must fit the circumstances of the individual case. The primary consideration is whether they will oblige the accused to be in court for trial whenever required to appear.

In light of the above this court is persuaded to reduce the bail set from UGX 30,000,000/- to UGX 3,000,000/- cash. All other conditions set by the trial magistrate remain the same.

.....

Michael Elubu

Judge

3.6.2022

said yesterday.

Clearance of court orders by the police started in July 2009 after Mr Museveni arrested police officers at Nateete Police Station, accusing them of conniving with landlords to evict tenants at night in disregard of the court order.

Since then, bailiffs have been submitting court orders to the police legal services directorate, which would verify them and determine whether to forward them to the land unit in the Directorate of Criminal Investigations for officers to witness execution or not.

However, legal experts said such a process was illegal since court orders cannot be subjected to another examination outside the judicial system.

In a letter to Prime Minister Robinah Nabbanja, Mr Museveni said the land eviction must be cleared by the district security committees and if illegal evictions continue, the members of the district security committee, except the Uganda People's Defence Forces representatives, will all be held responsi-

carried out without the consent of the respective District Security Committees (DSC). In a letter dated February 28, 2022, addressed to the Prime Minister, Rt. Hon. Robinah Nabbanja, and using his powers under Article 98(1) and 99(1) of the Constitution that enjoins him to ensure good governance and protect the Constitution, the President directed that: "No eviction should be allowed to take place in a district without the consent and direct observation of the District Security Committee (DSC), chaired by the Resident District Commissioners/Resident City Commissioners (RDCs/ RCCs) and direct consultation with the Minister of Lands.

Faruk Kirunda, deputy presidential press secretary

the presidential directives, the police officers and RDCs, who sit on the security committees, haven't cleared any evictions.

"It was just hot air. The police officers are avoiding court bailiffs. They fear to clear the court orders. Many orders and warrants have been taken to Naguru, but the police officers aren't clearing them," Mr Rwamukaaga said.

He accused the police and RDCs' actions of being in total contravention of the laws of Uganda.

In November last year, the Attorney General, Mr Kiryowa Kiwanuka, wrote to the Inspector General of Police, Mr Martins Okoth-Ochola, warning the Police Force to desist from ignoring court orders since it will destroy the authority of the Judiciary.

"The purpose of this letter, therefore, is to advise you to direct your officers to comply with the said directives of the court and perform their duties and obligations as is required under the law as failure to do so many lead to contempt of court proceedings filed against the Inspector General of Police..." Mr Kiryowa said in the November 4 letter.

ers to witness execution of court orders.

IGP Ochola said he would abide by the advice of the Attorney General. Internally, the police tightened the issuance of clearance letters for land evictions.

In a May 17 letter, the Deputy Inspector General of Police, Maj Gen Katsigazi Tumusiime, wrote to the director of Criminal Investigations Directorate, Mr Tom Magambo, stopping the Land Police Protection Unit from issuing clearances to court orders related to land.

"The existence of two clearing centres creates unnecessary duplication and confusion. This serves to direct that clearance of execution of all court orders shall be [done] by the Director Human Rights and Legal Services forth with. You cease handling this task and transfer any unfinished business/files to the Director Human Rights and Legal Services," Maj Gen Katsigazi wrote to Mr Magambo.

Efforts to get a comment about the issue from the police spokesman Fred Enanga were futile. Earlier, he said he doesn't comment on internal communication within the police.

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party, and the Attorney General, Mr Kiryowa Kiwanuka, are hatching a plan to alter the Constitution and threaten the right to bail.

Another petition that could be considered is that of jailed lawyer Male Mabirizi Kiwanuka.

Mr Mabirizi is challenging the criminal proceedings instituted against jailed Kawempe North MP Muhammad Ssegirinya and his Makindye West counterpart Allan Ssewanyana over the Masaka killings in 2021.

Others include a petition challenging the Computer Misuse Act and the petition by a civil society organisation, Centre for Health, Human Rights and Development, seeking to compel the government to formulate and pass a law regulating termination of pregnancies.

The formulated panels comprises Deputy Chief Justice Richard Buteera, as the head, Justices Stephen Musota, Irene Mulyagonja, Muzamiru Mutangula Kibeed, and Monica Mugenyi, and Catherine Bamugemereire.

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Court rules on Besigye Shs30m bail tag today

BY ANTHONY WESAKA

KAMPALA. The High Court is today expected to rule on whether or not to quash the Shs30 million bail tag slapped against Opposition politician, Dr Kizza Besigye by a lower court.

The ruling is expected to be delivered by Justice Micheal Elubu, who had asked Besigye's lawyers and the office of the Director of Public Prosecutions (DPP), to file written submissions to base on his ruling.

Dr Besigye is challenging the May 25 ruling of Magistrate Siena Owomugisha of Buganda Road Chief Magistrates Court who imposed on him Shs30m to temporarily regain his freedom.

The four-time presidential candidate had a day earlier been arrested and slapped with charges of incitement to violence. He was arrested from downtown in Kampala after he beat security intelligence and showed up in the central business district protesting against the high cost of living.

Dr Besigye was later released on a Shs30m bail term, which condition he rejected, reasoning that it was on a very high side and instead opted to go to jail.

He went on to argue that paying the bail money would set a very dangerous precedent for future bail applicants.

Besigye's lawyers of Lukwago & Co. Advocates, in their written submissions before court, argue that the bail tag is excessive and want the same to be revised and set aside. "The learned magistrate of Buganda Road Chief Magistrate's Court unfairly and injudiciously exercised her discretion/ jurisdiction when she imposed upon the applicant (Dr Besigye), a cash bail condition of Shs30m, which is manifestly excessive," his lawyers stated.

"The learned Magistrate Grade One of Buganda Road Chief Magistrates Court in imposing an unconscionable condition for bail, which substantially differed from the terms set for other accused persons arrested with him, exercised her jurisdiction with material irregularity," they added.

The lawyers also argue that the decision by the magistrate in granting bail on such stringent terms derogated upon Dr Besigye's right to a fair hearing and civil liberties and that it's "just and equitable" that the said order be revised.

Govt position

The DPP has, however, asked the High Court to dismiss Dr Besigye's application for setting aside the bail condition, arguing that the same was intended to delay the main case.

"We pray that this honourable court finds that this application was intended to delay the course of justice by preventing the proceedings before the trial magistrate to continue to their final conclusions. It was also prematurely brought and in very bad taste. This application is not deserving of any revisional order," State Attorney Amy Grace stated in her submission on behalf of the DPP.

"We pray that the application be struck out and dismissed forthwith for being defective and the trial court proceedings to prepare and hear the case on its merits and to its logical conclusion."

The High Court has powers to alter or reverse the order if it is satisfied that in relation to an order or proceedings in the lower court, there was an error material to the merits of the case or involving a miscarriage of justice occurred.

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