THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(BEFORE: J.W.N. TSEKOOKO, JSC, SINGLE JUDGE)

CRIMINAL APPLICATION No. 3 OF 2003.

BETWEEN

CHARLES HARRY TWAGIRA.....APPLICANT

AND

UGANDA.....RESPONDENT

(APPLICATION ARISING FROM CRIMINAL APPLICATION NO. 2 OF 2003 PENDING)

RULING: I received this application yesterday afternoon with a request for it to be heard as a matter of urgency as a single judge. A practice is growing in this Court of hearing such applications by single judge. **See W. Mukiibi Vs J. Semusambwa.**

The applicant Charles Harry Twagira, was charged with the offences of (a) embezzlement, in the first count, and (b) stealing by an agent, in the second count, in Buganda Road Chief Magistrate's Court in Criminal Case No.1425/2000.

He appears to have first appeared in Court on 12/9/2000. Subsequently, the prosecution led evidence and closed its case. A submission of no case to answer was made. Both sides made

lengthy written submissions. On 24/6/2002, the Chief Magistrate, Mr. Frank Nigel Othembi, gave a rather detailed ruling, covering 13 pages, holding that the prosecution had established a prima facie case against the accused on both counts and therefore he should be put to his defence. The applicant was dissatisfied with the ruling and so he petitioned the High Court under sections 339 and 341 (1) (b) and (5) of the Criminal Procedure Code for an order to revise the ruling of the Chief Magistrate on the ground that the Chief Magistrate had misdirected himself on the law which led to his finding that there was a case to answer. On 16/9/2002, Bamwine, J., dismissed the petition holding that

> ***"There is nothing irregular about the procedure adopted by the trial Magistrate so far or any thing prejudicial to the petitioner on the face of the record to warrant a revisional order."***

The learned judge remitted the proceedings to the trial Court for the trial to continue from where it had stopped. The applicant was dissatisfied with that order and so he appealed to the Court of Appeal. In its judgment dated 19/8/2003, dismissing the appeal, that court held that (page 10): -

> ***"We entertain no doubt in this case, there was a prima facie case against the appellant and some explanations as a matter of common sense were required as observed by the Chief Magistrate"***

Still the appellant was dissatisfied with that judgment and so he lodged a notice of appeal intending to appeal to this Court.

By virtue of S.6 (5) of the Judicature Statute, 1996, the applicant can in this case only appeal against the judgment of the Court of Appeal either with leave and certificate from that Court or with leave of this Court. By virtue of Rule 40 (1) of the Rules of this Court, the applicant generally must first seek leave from the Court of Appeal and if the leave is refused, then he can apply to this Court. His application for certification by the former court is now pending in that court, and according to the affidavit of the applicant accompanying the present application, the Court of Appeal is unlikely to hear the application, for the necessary certificate, till some time next month. According to the same affidavit, the Chief Magistrate meantime intends to resume hearing the case by 22/9/2003. To pre-empt the continuation of the hearing of the case and because the application for certificate in the Court of Appeal

cannot be heard till next month, the applicant instituted in this Court Criminal Application No.2 of 2003 by which he seeks orders of this court that:

(a) Applicant's intended appeal.....be heard.

(b) A stay of proceedings in Buganda Road Criminal Case No.1423 of 2000....., be ordered pending the determination of this application.

As that Criminal Application (No.2 of 2003) was pending in this Court, the applicant institute in this Court Criminal Application No.3 of 2003 (the subject of this ruling) seeking for orders that;

> *"an interim order of stay of proceedings in Buganda Road Criminal Case No.1423 of 2000 Uganda Vs Charles Harry Twagira be ordered pending the final determination of Criminal Application No.2 of 2003"*

It is this last application which is the subject of this ruling. I found it necessary to give the foregoing background to appreciate the opinion, I will give in this application.

The application was brought under Rules 1 (3) and 41 of the Rules of this Court and Section 6 (5) of the Judicature Statute 1996. It was presented *exparted* because, according to Mr. Karugaba, counsel for the applicant, the matter is urgent. I asked counsel to satisfy me about the necessity for an exparte application. He referred me to his certificate of urgency which he signed. Although I was doubtful whether there was real urgency for this application, especially since there was a pending application in the Court of Appeal for certificate and another application in this Court, I decided to hear Mr. Karugaba.

The grounds in support of the application are set out in the Notice of Motion as follows: -

1. *The applicant has filed Criminal Application No.2 of 2003 seeking inter alia orders for stay of proceedings in Buganda Road Criminal Case No. 1423 of 2000* ***UGANDA -VS-CHARLES HARRY TWAGIRA.***

2. *The application has been served on the Respondents and is to be fixed for hearing;*

3. *The Trial Magistrate has ordered the Applicant to go on his defence in Buganda Road Criminal Case No.1423 of 2000* ***UGANDA-VS- CHARLES HARRY TWAGIRA*** *from which this appeal stems on 22nd September, 2003;*

4. *The said application will be rendered a nullity if the stay of proceedings is not granted.*

5. *There is a real likelihood that the Application will be wrongly convicted and a miscarriage of justice will be occasioned if the stay of proceedings is not ordered;*

6. *That in order to observe and maintain the applicant's constitutional right to a fair trial and his presumption of innocence under Article 28 of the Constitution, it is imperative that a stay be ordered halting the trial until the applicant has fully exhausted his right of appeal"*

The summary of the above listed five grounds upon which the application to stay the continuation of the trial is that the applicant should be allowed to exhaust his right of appeal.

Now the right of appeal of an accused person appearing in a magistrates Court is conferred by section 216 of the Magistrates Act, 1970 and section 6 (5) of Judicature Statute. The applicant is being tried by a Chief Magistrate. In so far as relevant the applicable provisions of section 216 state:

> ***"216 (1) subject to the provisions of any other written law and save as provided in this section, an appeal shall lie,***
>
> ***(a) to the High Court, by any person convicted on a trial by a court presided over by a Chief Magistrate.***
>
> ***(2) Any appeal under subsection (1) of this section may be on a matter of fact as well as on a matter of law."***

Clearly the above provisions do not confer a right of appeal to the High Court in respect of interlocutors matter, i.e., discretionary orders or rulings of the Chief Magistrate in criminal matters. This may explain why, after the Chief Magistrates ruling that the applicant had a case

to answer, the applicant chose to seek from High Court a revisional order rather than a decision in appeal. To me this course appears to affect his right of appeal to this Court.

The applicant has relied on S.6 (5) of the Judicature Statute, 1996 for the view that in these proceedings he has a right of appeal to this Court. I doubt it. The provision states in so far as relevant that-

> **"6 (5) where the appeal emanates from a judgment of a Chief Magistrate or Magistrate Grade I in exercise of their original jurisdiction and the accused person …has appealed to**
> **the High Court and the Court of Appeal, the accused, may lodge a third appeal to the Supreme Court with the certificate of the Court of Appeal that the matter raises a question or questions of law of great public or general importance, or if the Supreme Court in its overall duty to see that justice is done, considers that the appeal should be heard,**

In my view this provision is in line with the provisions of S.216 of MCA. The Statute does not define the word "Judgment". The above quoted S.6 (5) refers to a judgment of a Chief Magistrate. Article 257 (1) of the Constitution interprets the word "judgment". It interprets it this way-

"Judgment" includes a decision, an order or decree of a Court".

In my view, this interpretation means a final decision of a court, but not a discretionary order or ruling in an interlocutory matter such as a finding that there is a prima facie case as the Chief Magistrate did. Through my own research, I have found a number of decisions, e.g, by Lewis, J. in Criminal Appeal No. 397 of 1959 (Mohamed Taki Vs R.),Case No. 107 MB NO.7//60 where the judge held that the decision of the Magistrate in that case that there was no case to answer was one of law giving to the crown a right of appeal. However, that decision, like the others I quote latter in this ruling, is to be understood on the basis that the accused was acquitted by the trial magistrate at the closing of the prosecution case and therefore, the decision of the Magistrate was a final judgment. The reverse is not true. This remains the law even up to now.

The decision of Bamwine,J, and of the Court of Appeal are interlocutory decisions and not final decisions.

Mr. Karugaba contended that the applicant has, under Art. 28 of the Constitution, a right to a fair trial. So he should be enabled to persue his right of appeal to this Court before the trial in the Chief Magistrate's Court. He argued that it will be unjust for the applicant to suffer a full trial, conviction and sentence before he can challenge the propriety of the trial.

I am not, with respect, persuaded by these arguments. To me a fair trial, or a fair hearing, under Art.28, means that a party should be afforded opportunity to, inter alia, hear the witnesses of the other side testify openly; that he should, if he chooses, challenge those witnesses by way of cross-examination; that he should be given opportunity to give his own evidence in his defence; that he should, if he so wishes, call witnesses to support his case. In this case, the prosecution has called its witnesses who have been cross-examined on behalf of the applicant. The applicant has been asked to give his side of the story. Instead of giving his side of the story, he is challenging the ruling that says he should give his side of the case.
Article 28 upon which Mr. Karugaba relies requires the applicant to be afforded a fair and SPEEDY trial. In my view the steps taken so far appear to hinder speeding up the trial.

I am a little perplexed by the submission that it is unjust for the applicant to "suffer a full trial, conviction and sentence." Until the trial is concludes resulting in either acquittal or conviction of applicant, I do not think that it is reasonable for counsel for the applicant to anticipate conviction and sentence. If there is any good cause to suspect that the Chief Magistrates will not conduct the trial properly, there are better ways of challenging him. I do not think it would be promoting justice and speedy trial to stay proceedings in this case. The case must be brought to an end, one way or the other.

There are many decided cases which illustrate the practice to be followed in case an accused is dissatisfied with the trial courts' ruling on prima facie case. That is to appeal at the conclusion of the trial and include as many grounds as are relevant in the grounds of appeal any complaints about wrong finding that there was or there was no case to answer. **Example are *Jethwa and Another Vs Republic* (1969) EA 459 CA, Republic Vs Wachira (1975) EA 262, Republic Vs Kidasa (1973) EA 368 and Merali Vs Uganda (1963) EA 647.**

All these are appeals where the trial magistrates had concluded the trial at the close of prosecution case and had given final decisions. So there was a right of appeal as explained in each case. I have carefully studied the notice of motion inclusive of the supporting affidavits and the annextures thereto. I also have considered the submissions of counsel for the applicant. Having looked at the law cited in these proceedings I am of the frank opinion that even if I took the generous view that either the Court of Appeal or this Court will grant leave for an appeal to be filed in this Court so that the Court considers the issue raised by the applicant, I do not envisage the likelihood of this court acquitting this applicant before he makes his defence in the Chief Magistrates Court. If I had entertained that likelihood, there would have been justification for me to grant interim stay of proceedings.

For the foregoing reasons, I decline to grant an interim stay of proceedings in the Chief Magistrates Court. The application is dismissed. There is no justification.

The applicant will meet his costs.

In case I am wrong in my views on the matter, the applicant should pursue the substantive application before the full Court.

Delivered at Mengo this 19th day of September 2003.

J.W.N. TSEKOOKO

JUSTICE OF THE SUPREME COURT