THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Bamugemereire, Madrama, JJA)

CRIMINAL APPEAL NO 130 OF 2021

UGANDA} ..... APPELLANT

VERSUS

NKALUBO AUGUSTINE} ..... RESPONDENT

(Appeal from the decision of the High Court at Kampala before Hon. Mr. Justice Asiimwe Tadeo dated 18th March, 2020 in High Court Criminal Miscellaneous Application No. 27 of 2020, (Arising from Nakawa Criminal Case No. 295 of 2019))

JUDGMENT OF COURT

This appeal arises from the ruling and orders of the High Court in Criminal Miscellaneous Application No 027 of 2020 arising from Nakawa Criminal Case No 295 of 2019. In that application for revision, the respondent to this appeal filed and sought for revision under the provisions of section 17 of the Judicature Act, section 48 and 50 of the Criminal Procedure Code Act and the rules made thereunder to call for and examine the record of proceedings in Nakawa Criminal Case No 295 of 2019 pending before the Chief Magistrates Court at Nakawa so as to examine the propriety, legality and correctness of the entire proceedings and the order of the magistrate declining to entertain an application for stay of a criminal matter pending the determination of Civil Suit No 298 of 2017; formerly Nakawa HCCS No 180 of 2010 in the family court.

The applicant/the respondents to this appeal's case is that the criminal trial of the respondent at Nakawa court was in abuse of court process aimed at strangling an ongoing High Court matter so as to render them useless. She contended that if the criminal trial proceeded, it would occasion a

miscarriage of justice to the applicant since it is based on letters of administration which have never been challenged or cancelled by the High Court. The learned trial judge held that the issue for determination was whether it was improper or illegal for the magistrate to continue criminal proceedings when there is a pending civil matter between the same parties and on the same subject matter. The learned trial judge found that the criminal case and the civil case involved the same persons and arise from the same facts and allegations. That the authenticity of documents on which both cases are grounded are the subject of trial by the family court which will determine which of the grants of letters of administration was validly issued by the court. He found that before the determination is made, it remained doubtful as to which of the grants is a valid one in order to determine who of the parties faces the criminal trial. He held that the questions to be answered in the criminal matter are entirely dependent on the authenticity of the letters of administration and can be best answered by the issuing authority which is the High Court/Family Division before which a similar civil matter with the same question was pending. He held that in the circumstances, the criminal matter must be stayed even if it was filed before the civil matter in order to avoid abuse of court process and conflicting judgments bearing in mind that criminal proceedings have no time limitations. He granted a stay of proceedings in Criminal Case No 295 of 2019 pending the determination of HCCS No 298 of 2017 formerly Nakawa Civil Suit No 180 of 2010.

The State was dissatisfied with the decision and the DPP appealed to this court on the following grounds of appeal as reflected in the amended memorandum of appeal with the leave of court:

1. That the learned High Court judge erred in law and fact and grossly misdirected himself when he formulated a misconceived issue that was based on his opinion other than the applicable law and relevant facts during Revision Miscellaneous Application No 27 of 2020.

2. That the learned High Court judge erred in law and fact when he ruled that his perusal of the lower court record revealed that the respondent had been granted letters of administration in Administration Cause No 66 of 2010 which fact was not reflected on the trial court record of proceedings thereby reaching a wrong conclusion that occasioned a miscarriage of justice.

3. That the learned High Court judge erred in law and fact and grossly misdirected himself when he based his decision on conjecture that Criminal Case No 295 of 2019 and Civil Suit No 298 of 2017 are based on the same questions of law thereby exacerbating abuse of court process initiated by the respondent.

The appellant prays that this court be pleased to allow the appeal and set aside the order of stay of proceedings and substitute it with an order to refer back the matter to the trial court for continuation of the trial to its logical conclusion.

At the hearing of this appeal, the appellant was represented by the learned Senior Assistant DPP Ms Nabasa Caroline Hope while the respondent was represented by learned counsel Mr Derick Lutalo.

The court was addressed in written submissions. Further, at the hearing of the appeal, the court raised the issue of whether there is a right of appeal from a decision of the High Court revising a decision of a lower court under sections 48 and 50 the Criminal Procedure Code Act.

The appellants counsel submitted that there was an illegality brought to the attention of the court and that this court can hear the appeal. She relied on section 10 of the Judicature Act as well as article 134 (2) of the Constitution of the Republic of Uganda.

In the written submissions of the respondent, the respondent contends that the appeal was brought under Rule 2 (2) of the Judicature Court of Appeal Rules. However, an appeal is a creature of statute and one must cite the proper provision of the statute that empowers them to file an appeal. He

submitted that rule 2 (2) of the Judicature Court of Appeal Rules does not give the appellant a right of appeal but confers on this court general powers to give an appropriate remedy for only applications or appeals that are properly filed before it.

We have carefully considered the matter. The question of whether there is a right of appeal determines whether this court has jurisdiction to entertain the appeal at all.

An appeal is a creature of statute as held by the East African Court of Appeal in **Attorney General v Shah (No. 4) [1971] EA, 50**. The facts of the appeal in that judgment were that the High Court of Uganda issued an order of mandamus against officers of Government and the Attorney General appealed against the order. The respondent to the appeal objected to the appeal on the ground that the appellate Court had no jurisdiction to entertain an appeal in the matter. Spry Ag P held that:

> It has long been established and we think there is ample authority for saying that appellate jurisdiction springs only from statute. There is no such thing as inherent appellate jurisdiction.

Spry Ag P held that the appellate jurisdiction of the defunct East African Court of Appeal sprung from Article 89 of the Constitution of the Republic of Uganda 1967 (since repealed) and the Judicature Act 1967 (since repealed) which provided that the East African Court of Appeal had only such jurisdiction as conferred on it by Parliament.

The proposition that appellate jurisdiction springs only from statute is grounded in the constitutional provision that confers jurisdiction on the Court of Appeal among other things. Article 134 (2) of the Constitution of the Republic of Uganda provides that:

> **134. Court of Appeal of Uganda.**
>
> (1) The Court of Appeal of Uganda shall consist of—
>
> ...

(2) An appeal shall lie to the Court of Appeal from such decisions of the High Court as may be prescribed by law.

A clear understanding of article 134 (2) is that the Court of Appeal can entertain an appeal from decisions of the High Court as may be prescribed by law. Mandatory language is used. An appeal shall lie to the Court of Appeal from such decisions of the High Court as may be prescribed by law. What are such decisions? Clearly they are only those decisions prescribed by law from which the law states that an appeal shall lie to the Court of Appeal. It can therefore be concluded that an appeal may not lie from all decisions of the High Court but only such decisions of the High Court as may be prescribed by law which law would provide that an appeal shall lie to the Court of Appeal.

Learned counsel for the appellant also relied on section 10 of the Judicature Act which provides that:

> 10. Jurisdiction of the Court of Appeal.
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> An appeal shall lie to the Court of Appeal from decisions of the High Court prescribed by the Constitution, this Act or any other law.

Clearly the Judicature Act provides that an appeal shall lie to the Court of Appeal from decisions of the High Court prescribed by the Constitution, the Judicature Act or any other law. Though it is couched in slightly different words, it supports article 134 (2) of the Constitution in that an appeal lies from decisions of the High Court which are prescribed by statute. Those statutes which prescribe the right of appeal from decisions of the High Court have to be the Constitution, the Judicature Act, or any other law. For instance, Article 86 (2) of the Constitution provides that a person aggrieved by a decision of the High Court under article 86 (1) of the Constitution on an issue about membership of Parliament may appeal to the High Court. This is a specific right of appeal from the decision of the High Court prescribed by the Constitution. In summary an appeal shall lie to the Court of Appeal from decisions of the High Court as prescribed by the Constitution, the Judicature Act or any other Act of Parliament. Such jurisdiction cannot be

found in a statutory instrument unless Parliament prescribes that an Authority or Minister may prescribe the right of appeal to the Court of Appeal from the decisions of the High Court in any other matter prescribed. There is no inherent right of appeal. We therefore have to consider the provisions of the Criminal Procedure Code Act under which revisions fall. Section 45 of the Criminal Procedure Code Act (CPC) deals with second appeals and seems to envisage under subsection (7) thereof a right of appeal from revision proceedings. Section 45 of the CPC provides that:

> 45. Second appeals.
>
> (1) Either party to an appeal from a Magistrates court may appeal against the decision of the High Court in its appellate jurisdiction to the Court of Appeal on a matter of law, not including severity of sentence, but not on a matter of fact or of mixed fact and law.
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> (2) On any such appeal, the Court of Appeal may, if it thinks that the judgment of the Magistrates court or of the High Court should be set aside or varied, make any order which the Magistrates court or the High Court could have made, or may remit the case, together with its judgment or order on it, to the High Court or to the Magistrates court for determination, whether or not by way of rehearing, with such directions as the Court of Appeal may think necessary.
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> (3) Notwithstanding subsection (2), in the case of an appeal against conviction, if the Court of Appeal dismisses the appeal and confirms the conviction appealed against, it shall not, except as provided in subsection (4), increase, reduce or alter the nature of the sentence imposed in respect of that conviction, whether by the Magistrates court or by the High Court, unless the Court of Appeal thinks that the sentence was an unlawful one, in which case it may impose such sentence in substitution for it as it thinks proper.
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> (4) If it appears to the Court of Appeal that a party to an appeal, though not properly convicted on some count, has been properly convicted on some other count, the Court of Appeal may, in respect of the count on which the court considers that the appellant has been properly convicted, either affirm the sentence passed by the Magistrates court or by the High Court, or pass such other sentence, whether more or less severe, in substitution for it as it thinks proper.
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> (5) Where a party to an appeal has been convicted of an offence and the magistrates court or the High Court could lawfully have found him or her guilty

of some other offence and, on the finding of the Magistrates court or of the High Court, it appears to the Court of Appeal that the court must have been satisfied of facts which proved him or her guilty of that other offence, the Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the conviction entered by the Magistrates court or by the High Court a conviction of that other offence, and pass such sentence in substitution for the sentence passed by the Magistrates court or by the High Court as may be warranted in law for that other offence.

(6) On any appeal brought under this section the Court of Appeal may, notwithstanding that it may be of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

(7) For the purposes of this section, the proceedings of the High Court on revision shall be deemed to be an appeal.

(8) The provisions of section 40 other than subsection (2) of that section shall apply to a convicted appellant appealing under this section.

Section 45 (7) of the Criminal Procedure Code Act provides that for purposes of second appeals, the proceedings of the High Court on revision shall be deemed to be an appeal. It presupposes that there is a right of appeal from a revision and envisages a second appeal to the Court of Appeal from the decision of the High Court on revision. What is peculiar about section 45 (7) of the Criminal Procedure Code Act is that it deals with proceedings on revision of the High Court. It does not refer to an order of the High Court. To consider the matter fully, regard should be had to the provisions of sections 48 and 50 of the Criminal Procedure Code Act which deal with revision by the High Court.

There are two case scenarios provided for by the Criminal Procedure Code Act (the CPC) in terms of how the High Court may move to conduct revision. The High Court may on its own motion call for and examine the record of any criminal proceedings before any Magistrates court under the provisions of section 48 of the Criminal Procedure Code Act. Such a ground may be reported to the High Court. Section 48 of the CPC is reproduced for ease of reference and it provides that:

48. Power of courts to call for records.

The High Court may call for and examine the record of any criminal proceedings before any Magistrates 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 Magistrates court.

Irrespective of how the High Court may be moved, it stipulates that the High Court may call for and examine the record of any criminal proceedings before any Magistrates court to satisfy 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 Magistrates court. To break it down further, the High Court may call the record to satisfy itself as to the correctness and legality or propriety of certain categories of factors that may be broken down as follows; any finding, sentence or order recorded or passed. In the above circumstances, the jurisdiction is exercised only where there is any finding, sentence or order recorded or passed. Thereafter, there is a conjunctive "and" which stipulates that the High Court may when it calls the record deal with the issue of regularity of any proceedings of the Magistrates court. Because of the use of the conjunctive "and", dealing with the regularity of the proceedings is not an alternative basis for the High Court to call the record but only comes to play where there is any finding, sentence or order recorded or passed. Legislature deliberately used the conjunctive "and" and not the disjunctive "or". Had it used the disjunctive "or", then the satisfaction as to the regularity of any proceedings of the Magistrates court would be in the alternative to the earlier basis for the court moving to call the record on the basis of any finding, sentence or order recorded or passed.

The second case scenario is when the High Court is petitioned under section 50 (5) of the CPC. Under what circumstances can the court to be petitioned by any person aggrieved? For purposes of clarity and context, we would set out section 50 of the CPC in full and it provides that:

50. Power of High Court on revision.

(1) In the case of any proceedings in a Magistrates 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.

(2) No order under this section shall be made unless the Director of Public Prosecutions has had an opportunity of being heard, and no order shall be made to the prejudice of an accused person unless he or she has had an opportunity of being heard either personally or by an advocate in his or her own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrates court, the High Court may inflict a greater punishment for the offence, which in the opinion of the High Court the accused has committed, than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorise the High Court to convert a finding of acquittal into one of conviction; except that when any person is acquitted of the offence with which he or she was charged but is convicted of another offence, whether charged with that other offence or not, the High Court may, if it reverses the finding of conviction, itself convert the finding of acquittal into one of conviction.

(5) Any person aggrieved by any finding, sentence or order made or imposed by a Magistrates court may petition the High Court to exercise its powers of revision under this section; but no such petition shall be entertained where the petitioner could have appealed against the finding, sentence or order and has not appealed.

(6) In dealing with a case under this section, the High Court may pending the final determination of the case release any convicted person on bail; but if the convicted person is ultimately sentenced to imprisonment, the time he or she has spent on bail shall be excluded in computing the period for which he or she is sentenced.

(7) In dealing with a case under this section, the High Court may, if it thinks fit, call for and receive from the Magistrates court before which the case was heard a report on any matter connected with the case.

(8) Where an application is made by the Director of Public Prosecutions under subsection (1) to make an order to the prejudice of an accused person, the application shall be lodged with the registrar within thirty days of the imposition of the sentence unless, for good cause shown, the High Court extends the time.

Starting with section 50 (1) of the CPC, the section deals with a scenario where the record has been called for which had been reported for orders which otherwise came to the knowledge of the court, the High Court may in the case of a conviction, exercise powers conferred on it as a Court of Appeal and may enhance the sentence. In the case of any other order, other than an order of acquittal, alter or reverse the order. Clearly there has to be an order of the court for section 50 (1) to come into operation. Section 50 (2), (3), (4) of the CPC are subsequent questions that deal with such orders when the record has been called in the instances mentioned under section 48 of the CPC. Section 55 (5) of the CPC deals with a different case scenario where there is a petition by any person aggrieved by any finding, sentence or order made or imposed. To be clearer, it deals with a petition by a person aggrieved by any finding, sentence or order imposed by the Magistrates court. However, there is no right to petition where the petitioner could have appealed against the finding, sentence or order but has not appealed. Section 55 (6) and (7) deal with what the High Court may do upon such a petition being filed by an aggrieved person and we do not need to dwell on that for the moment.

Coming to the facts of this appeal, the record indicates that the applicant in the High Court who is now the respondent in this appeal petitioned the High Court by notice of motion for orders that the court calls for and examines the record of the criminal proceedings in the Magistrates court Nakawa in Nakawa Criminal Case No 295 of 2019 for purposes of satisfying itself as to;

(a) the regularity of the entire proceedings and the manner in which the evidence in the entire proceedings has been taken/admitted.

(b) the correctness, legality or propriety of the order of the presiding learned magistrate made on 5th November 2020 declining to entertain an application for stay of this criminal matter pending the determination of High Court Civil Suit No 298 of 2017 formally Nakawa HCCS No 180 of 2011 pending before the High Court Family Division dealing with the same letters of administration.

(c) the legality of the order by the trial magistrate directing the defence counsel to disclose to the prosecution all material evidence before closing the prosecution case and before establishment of a prima facie case.

(d) the correctness, legality, or propriety of the order of the presiding learned magistrate dismissing the applicant's prayer to recall the prosecution witness for further cross examination.

(e) the regularity of the entire proceedings and the manner in which the evidence in the entire proceedings has been taken/admitted.

The record does not have the proceedings of the Magistrates court but the application does allege that there were orders made in the proceedings which were prejudicial to the conduct of a fair trial. The was therefore a right to petition the High Court as stipulated by section 50 (5) of the CPC.

Lastly, the question is whether in terms of section 45 (7) of the CPC, there is a right of appeal from an order made in a revision proceeding. As stated earlier, appellate jurisdiction is a creature of statute. Appeals from decisions of a Magistrates court are governed by section 204 of the Magistrates Courts Act cap 16 laws of Uganda (MCA). Section 204 of the MCA is very explicit. Before setting it out, we need to point out that section 204 of the MCA has to be read together with section 45 (7) of the CPA to determine whether there is a right of appeal in the circumstances of the appellant's case.

Section 204 of the MCA provides that:

> 204. Criminal appeals.

(1) Subject to any other written law and except 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 or a magistrate grade I;

(b) to a court presided over by a chief magistrate, by any person convicted on a trial by a magistrate grade II or grade III.

(2) Any appeal under subsection (1) may be on a matter of fact as well as on a matter of law.

(3) No appeal shall be allowed in the case of any person who has pleaded guilty and has been convicted on that plea by a Magistrates court except as to the legality of the plea or to the extent or legality of the sentence.

(4) No appeal shall be allowed in a case where a court presided over by a chief magistrate or a magistrate grade I has passed a sentence of imprisonment not exceeding one month only, or a fine not exceeding one hundred shillings only.

(5) Where an accused person has been acquitted by a Magistrates court, the Director of Public Prosecutions may appeal (or sanction an appeal in such manner as may be prescribed by the Minister by statutory instrument) on the ground that the acquittal is erroneous in law—

(a) to the High Court, where the accused person has been acquitted by a court presided over by a chief magistrate or a magistrate grade I;

(b) to a court presided over by a chief magistrate, where the accused person has been acquitted by a magistrate grade II or III.

(6) Any party to an appeal determined by a chief magistrate under subsection (1)(b) may appeal against the decision of the chief magistrate to the High Court on a matter of law (not including severity of sentence) but not on a matter of fact.

(7) The Director of Public Prosecutions may appeal to the High Court from the decision of a chief magistrate on an appeal under subsection (5)(b) on the ground that it is erroneous in law.

Section 204 of the MCA confers a right of appeal to the High Court by any person convicted on a trial by a court presided over by a chief magistrate or a magistrate grade 1. In other words, section 204 (1) (a) of the MCA clearly

provides that there has to be a conviction on a trial by court presided over by a chief magistrate or a Magistrates grade 1 for there to be an appeal to the High Court. Secondly, section 204 (5) of the MCA allows the Director of Public Prosecutions to appeal to the High Court on the ground that the acquittal is erroneous in law. It follows that before a conviction or acquittal, there is no right of appeal under section 204 of the MCA. Further section 45 (1) of the CPC which deals with second appeals and gives a right of appeal from the decision of the High Court in the exercise of its appellate jurisdiction to the Court of Appeal on a matter of law, not including severity of sentence, and not on a matter of fact or of mixed fact and law. Before taking leave of the matter, section 45 (7) of the CPC provides that for purposes of section 45, proceedings of the High Court on revision shall be deemed to be an appeal. In other words, where there has been a conviction or an acquittal and the High Court exercises powers of revision, those proceedings would be taken as proceedings in a first appeal.

Proceedings of the High Court on revision can only be deemed to be an appeal where there has been a conviction or an acquittal and the High Court on revision exercises its powers to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of the proceedings of the Magistrates court where the conviction or acquittal proceedings took place. It applies in a scenario where the High Court exercises its powers under section 48 of the CPC to call for and examine the record of any criminal proceedings. That means that, upon examination of the record, the High Court proceeds to revise the order of conviction, sentence or acquittal, that is when the right of appeal accrues to the aggrieved party and is considered a second appeal only on points of law. On the other hand, where there is a petition by an aggrieved party under section 50 (5) of the CPC, the High Court would not entertain the petition if there is a right of appeal and no such right of appeal had been exercised. In other words, where the petitioner is aggrieved by any order of the Magistrates court and petitions the High Court, he has no right of appeal under section 204 of the MCA and the High Court may entertain the petition and make any appropriate orders. Because there was no conviction, or

acquittal, there is no right of appeal from the decision of the High Court on revision. In any case, a petition for calling the record filed in the High Court by an aggrieved person is barred by section 50 (5) of the CPC, where that person has a right of appeal. Right of appeal only accruals under section 204 of the MCA where there has been a conviction or acquittal. Finally, a right of second appeal only arises where there are questions of law in a case where there has been a conviction or an acquittal and the High Court has exercised its powers under section 48 of the CPC to call for and revise the record and make appropriate orders. That is the only instance where any aggrieved party, aggrieved by the decision of the High Court on revision may appeal to the Court of Appeal.

In the circumstances of this appeal, the High Court was moved pursuant to a petition of an aggrieved person before a conviction or sentence from which there is no right of appeal under section 204 of the MCA. In the premises, there is no right of appeal from the decision of the High Court in this matter and the appellants appeal is incompetent for want of jurisdiction of this court. The appellant's appeal is accordingly struck out. We so order.

Dated at Kampala the 13th day of September 2021

Fredrick Egonda – Ntende

Justice of Appeal

Catherine Bamugemereire

Justice of Appeal

Christopher Madrama

Justice of Appeal