



The Prosecution in Uganda's Courts of the Offences of Murder and Robbery Committed Abroad and the Right to be Tried before a Competent Court: A Comment on *Bakubye & Anor v Uganda* (Criminal Appeal No.56 of 2015.) [2018] UGSC 5 (17 January 2018)

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Abstract

Although there are circumstances in which Ugandan courts have jurisdiction over Ugandans who commit offences abroad, Ugandan law is silent on the issue of whether a Ugandan who commits the offences of murder or robbery can be tried in Uganda. In *Bakubye & Anor v Uganda* the High Court convicted the appellants for the offences of murder and robbery which were committed in Tanzania. Their conviction was confirmed by the Court of Appeal although they argued that, since the offences were committed in Tanzania, the Ugandan High Court did not have jurisdiction to try them. Their appeal to the Supreme Court was dismissed and the Supreme Court did not deal with the issue of whether the High Court had jurisdiction to try the appellants. In this article, it is argued that the High Court did not have jurisdiction over the offences of murder and robbery that the accused committed in Tanzania. The result, based on case law from different courts in Uganda, is that the accused's right to a fair trial and in particular the right to be tried by a court of competent jurisdiction was violated.

Keywords: Uganda; murder and robbery; abroad; prosecution; competent court; extradition

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1 INTRODUCTION

Unlike the International Covenant on Civil and Political Rights (ICCPR) which expressly provides that one of the elements of the right to a fair hearing is that the tribunal or court before which the accused appears should be competent;¹ article 28 of the Ugandan constitution, which guarantees the right to a fair hearing, does not expressly state that one of the components of the right to a fair hearing is for an accused to be tried before a competent court or tribunal. However, the fact that the Constitution is silent on this right does not mean that it is not guaranteed. Article 45 of the Constitution provides that “[t]he rights... specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned.” The High Court held that article 45 “relates to emerging rights that may not be explicitly listed in the Constitution of the Republic of Uganda 1995.”² Likewise, the Constitutional Court held that article 45 “relates to emergence of rights not enumerated in Chapter 4 of the Constitution.”³ In *Uganda Law Society & Anor v The Attorney General*⁴ the Constitutional Court referred to article 45 of the Constitution and held that “[t]his clearly means that there are many other aspects of the right to a fair hearing that were not covered in article 28 of the Constitution.”⁵ There are several constitutional provisions which support the argument that for an accused’s right to a fair trial to be guaranteed, it has to take place before a court with competent jurisdiction. For example, article 22(1) of the Constitution provides that “[n]o person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.” Article 28(9) guarantees the right against double jeopardy if the trial or acquittal was before a competent court. Article 50 provides that a competent court may be approached for the protection of any of the rights in the Bill of Rights. A person does not qualify to be elected as a member of parliament if he/she “is under a sentence of death or a sentence of imprisonment exceeding nine months imposed by any competent court without the option of a fine.”⁶ Finally, one of the functions of the Director of Public Prosecutions is “to institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial.”⁷ The Constitution does not define or describe what a court of competent jurisdiction is. The drafting history of the Ugandan constitution shows that during the Constituent Assembly debates on the right to a fair hearing, the issue of a trial being conducted before a court of competent jurisdiction was raised and one delegate “wanted to know whether we have in this country courts which are not of competent jurisdiction.”⁸ However, this question was never answered by other delegates. Section 2(v) of the Interpretation Act defines a court to mean “a court of competent jurisdiction in Uganda.”⁹ The Human Rights Committee’s General Comment on Article 14 of the ICCPR does not define or describe a court of competent jurisdiction.¹⁰ The importance of the right to be tried before a competent court is also underlined by the fact that this is one of the non-derogable rights in the Ugandan constitution.¹¹ This means that this right is “absolutely guaranteed” and its violation “cannot be justified under whatever circumstances.”¹² In other words, as the High Court put it, a non-derogable right is “a sacrosanct” right.¹³ The lack of a definition or description of a court of competent jurisdiction requires one to study Ugandan

1 Article 14(1).

2 *Legal Brians Trust Ltd v Attorney General & Anor* (Miscellaneous Application No.638 of 2014) [2014] UGHCCD 171 (5 December 2014) 2.

3 *Behangana and Anor v Attorney General* (Constitutional Petition No. 53 of 2010) [2015] UGCA 6 (12 October 2015) 9.

4 *Uganda Law Society & Anor v The Attorney General* (Constitutional Petitions No.2 & 8 of 2002) [2009] UGCC 1 (4 February 2009).

5 *Uganda Law Society & Anor v The Attorney General* (Constitutional Petitions No.2 & 8 of 2002) [2009] UGCC 1 (4 February 2009).

6 Article 80(2)(e).

7 Article 120(3)(b).

8 Proceedings of the Constituent Assembly (Official Report) (submission by Mr Kaggwa Ssozi, 22 September 1994) 1886.

9 Interpretation Act 1976.

10 General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial), CCPR/C/GC/32, 23 August 2007.

11 See Article 44(c) of the Constitution.

12 *Issa Wazembe v Attorney General* (Civil Suit No. 154 of 2016) [2019] UGHCCD 181 (19 August 2019) 6.

13 *Yali v Uganda* (Miscellaneous Criminal Application No. 0004 of 2017) [2017] UGHCCRD 107 (15 June 2017) 2.

case law to have an idea of the courts' understanding of this concept. A close examination of Ugandan case law shows, *inter alia*, that a court can only have competent jurisdiction if that jurisdiction is expressly confirmed upon it by a statute. As the High Court held in *Edoku v Okwii*,¹⁴ "jurisdiction of Courts of law is a creature of statute."¹⁵ Likewise, in *Luyimbuzi & Anor v Bazigatirawo & Anor*¹⁶ the High Court held that:

In my view, 'a competent court', invariably, refers to one vested with the necessary jurisdiction to hear and determine a matter before it; bearing in mind that jurisdiction is conferred on any particular court by the express provisions of a statute/Act, and that a court cannot assume or exercise jurisdiction by implication.¹⁷

In *Uganda Law Society v Attorney General of the Republic of Uganda*¹⁸ the Constitutional Court held that "where the law excludes jurisdiction from a particular court [with regards to a particular offence], it is not competent to try it"¹⁹ and that "[t]here can be no fair trial within the meaning of Article 28(1) of the Constitution where the court is not competent to try the case."²⁰ In cases where courts have exercised jurisdiction which is not conferred upon them by statute, their decisions have been set aside either on review²¹ or appeal on the grounds that they were not courts of competent jurisdiction. Decisions or orders by a court without competent jurisdiction are "illegal."²² Courts have declined to set aside orders made by courts of competent jurisdiction.²³ Naluwairo has argued that the right to a competent tribunal includes three major aspects: the tribunal must be established by law; it must have jurisdiction over the accused and the offence; and the people who preside over the tribunal must be competent, that is, they must have the necessary training and be people of integrity.²⁴ The focus of this article is on the second aspect of the features of a competent tribunal: the court's jurisdiction over the accused and the offence. As the Nigerian Court of Appeal held:

Jurisdiction is a radical and crucial question of competence, hence, any defect in the competence of a court to entertain a matter is fatal and the defect is extrinsic to the adjudication... Once a court is satisfied that it has no jurisdiction to make any pronouncement other than to say it has no jurisdiction over a matter, the proper orders is [*sic*] to either strike out the case or transfer it to a court with the requisite jurisdiction for hearing.²⁵

The Nigerian Court of Appeal also held that a court without jurisdiction over a subject matter is not competent to hear the case.²⁶

In *Bakubye & Anor v Uganda*²⁷ the High Court convicted the appellants for the offences of murder and robbery which were committed in Tanzania. Their conviction was confirmed by the Court of Appeal although they argued that, in light of the fact that the offence of murder was committed in Tanzania, the Ugandan High Court did not have jurisdiction to try them. Their appeal to the Supreme Court was dismissed and the Supreme Court did not deal with

14 *Edoku v Okwii* (HCT-09-CV-Revision Order CR. NO. 004/2012) [2012] UGHC 125 (9 July 2012).

15 *Edoku v Okwii* 2.

16 *Luyimbuzi & Anor v Bazigatirawo & Anor* (HCT-00-CV-EP-0044 OF 2011) [2011] UGHCCD 10 (21 July 2011).

17 *Luyimbuzi & Anor v Bazigatirawo & Anor* 4-5.

18 *Uganda Law Society v Attorney General of the Republic of Uganda* (Constitutional Petition No. 18 of 2005) [2006] UGCC 10 (30 January 2006).

19 *Uganda Law Society v Attorney General of the Republic of Uganda* [2006] 24.

20 *Uganda Law Society v Attorney General of the Republic of Uganda* [2006] 25.

21 In *Edoku v Okwii* the High Court held that a Local Council Court did not have jurisdiction over land disputes.

22 *Mafabi v Bulafu* (HCT-04-CV-CR-0011-2012) [2013] UGHCFD 2 (24 January 2013), the High Court held that the magistrate had no jurisdiction to deal with land disputes and therefore the decisions were illegal.

23 In *Nabawanuka v Makumbi* (Divorce Cause No. 39 of 2011) [2013] UGHCFD 3 (13 February 2013), the High Court held that a sharia court is a court of competent jurisdiction to handle Muslim divorce cases.

24 Naluwairo "Uganda's Military Courts and the Right to a Competent Tribunal: Some Reflections" 2011 *Malawi LJ* 161-177, 164-168.

25 *Jolly Tevoru Nyame v Federal Republic of Nigeria* (2009) LPELR-8872(CA) 12.

26 In *Chief Tony Nwankwo v Wema Bank PLC & ORS* (2012) LPELR-9798(CA) 7: "It is settled that a court is competent when the court is properly constituted as regards number and qualifications of the members of the bench and no member is disqualified for one reason or the other; the subject matter of the case is within its jurisdiction, and there is not feature in the case which prevents the court from exercising its jurisdiction; and the case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction. All the requirements must co-exist conjunctively before jurisdiction can be exercised by the court. It therefore means that where a court has no jurisdiction to hear and determine a case but goes ahead to do so, it becomes an exercise in futility as the decision arrived at in such a case amounts in law to a nullity irrespective of how well the proceedings was conducted."

27 *Bakubye & Anor v Uganda* (Criminal Appeal No.56 of 2015) [2018] UGSC 5 (17 January 2018).

the issue of whether the High Court had jurisdiction to try the appellants. In this article, it is argued that the High Court did not have jurisdiction over the offence of murder that the accused committed in Tanzania. The result is that the accused's right to a fair trial and, in particular, the right to be tried by a court of competent jurisdiction was violated. This argument is supported by the fact that Ugandan legislation does not expressly allow Ugandan courts to try offences which are wholly committed abroad. The author argues that there may be a need for legislation to be introduced in Uganda to expressly confer jurisdiction on Ugandan courts over the offences of murder and robbery committed abroad. The author starts by discussing the issue of the jurisdiction of Ugandan courts over offences committed abroad.

2 JURISDICTION OF UGANDAN COURTS OVER OFFENCES COMMITTED ABROAD

The general rule is that Ugandan criminal law is territorial.²⁸ In other words, it does not apply to offences committed outside Uganda. Thus, section 4(1) of the Penal Code Act provides that "[t]he jurisdiction of the courts of Uganda for the purposes of this Code extends to every place within Uganda." However, section 4(2) of the same Act provides for some exceptions. It is to the effect that Ugandan courts have jurisdiction to try the following offences if they are "committed outside Uganda by a Ugandan citizen or person ordinarily resident in Uganda": terrorism; treason; acts intended to alarm, annoy or ridicule the president; concealment of treason; and promoting war on chiefs. Section 4(3) of the Penal Code provides that: "[f]or the avoidance of doubt, the offences referred to in subsection (2) committed outside Uganda by a Ugandan citizen or a person ordinarily resident in Uganda shall be dealt with as if they had been committed in Uganda." Section 5 of the Penal Code provides that:

When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction.

Section 390 of the Penal Code provides for circumstances in which Ugandan courts have jurisdiction over a felony committed outside Uganda.²⁹ It is to the effect that:

Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Uganda would be a felony and which is an offence under the laws in force in the place where it is proposed to be done, commits a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to such lesser punishment.

In *Okemoto & 3 Others v Uganda*³⁰ the Court held that "[t]he essential ingredients under this section are the following: 1. There must be two persons or more. 2. The persons act in unison or agreement to commit a felony either in Uganda or outside Uganda. 3. Engagement in acts towards fulfilling the commission of a felony."³¹ In *Angodua v Uganda*³² the High Court referred to section 390 of the Penal Code Act and held that:

Under section 390 of The Penal Code Act, the offence of conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. The offence is complete the moment such an agreement is made. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. It is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. The offence is complete as soon as there is meeting of minds and unity of purpose between the conspirators to do that illegal act or legal act by illegal means... Not only is the prosecution required to prove the intention but also that there was an agreement to carry out the object of the intention, which is an offence. The offence

²⁸ However, the International Criminal Court Act, 2010 provides that Uganda has jurisdiction over international crimes which are committed abroad. These include murder if committed as a war crime, genocide or a crime against humanity. See also section 2 of the Anti-Money Laundering Act, 2013 (the Ugandan High Court has jurisdiction over Ugandans or stateless persons who have their habitual residence in Uganda who have committed an offence of money laundering abroad).

²⁹ Section 2(e) of the Penal Code Act defines a "felony", as "an offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with death or with imprisonment for three years or more."

³⁰ *Okemoto & 3 Others v Uganda* (HCT -02-CR-CN-0021-2014) [2015] UGHCCRD 13 (30 June 2015).

³¹ *Okemoto & 3 Others v Uganda* 4.

³² *Angodua v Uganda* (Criminal Appeal No. 0013 of 2016) [2017] UGHCCRD 18 (9 February 2017).

of conspiracy has three elements: (1) an agreement, (2) which must be between two or more persons by whom the agreement is effected and (3) a criminal objective which may be either the ultimate aim of the agreement or may constitute the means or one of the means by which the aim is to be accomplished.³³

Ugandan courts also have jurisdiction over conspiracy to commit a misdemeanour anywhere in the world,³⁴ and sedition committed from outside Uganda.³⁵ Apart from the Penal Code Act, Ugandan courts also have jurisdiction over other offences committed outside Uganda such as torture³⁶ and offensive communication.³⁷ On the basis of the International Criminal Court Act³⁸ Ugandan courts also have universal jurisdiction over international crimes such as war crimes, genocide and crimes against humanity which are committed outside Uganda. It is against that background that the Ugandan government has established a special High Court division to deal with international crimes.³⁹ It is now necessary to highlight the facts and holdings in *Bakubye & Anor v Uganda*. In order to put the discussion in context, it is essential to reproduce the relevant parts of all the three judgments: the High Court, the Court of Appeal and the Supreme Court judgments. Unlike the Supreme Court judgment, both the High Court and the Court of Appeal judgments disclose the places where the offences were committed and the judges' reasoning on the issue of jurisdiction.

3 THE FACTS AND HOLDINGS IN BAKUBYE & ANOR V UGANDA

The accused murdered the deceased in Tanzania and robbed him of his vehicles. The High Court found that "[i]t is also common ground in both confessions that a plan was hatched between the 2 [two] accused persons to kill the deceased and take his property, and the said plan was executed in Tanzania."⁴⁰ While dealing with the issue of whether the accused's confessions were admissible, the High Court observed that:

In the present case both confessions were corroborated by the evidence on record in several material aspects, of which I shall highlight but a few. To begin with, the fact that A1 [accused one] and the deceased travelled together from South Africa to Tanzania is borne out by the entries in each of their passports. Page 9 of the deceased's passport bore immigration stamps that illustrated that he departed the South Africa North Western border point on 3rd April 2008; entered Botswana on the same day and departed that country on 7th April 2008; was at the Zambia Kafungula border post on 7th April 2008 and departed Zambia at the Nakonde border post on 10th April 2008, and entered Tanzania on 10th April 2008 via the Tunduma border post. Identical stamps were observed at pages 7 and 9 of A1's passport. However, in addition to the foregoing stamps, A1's passport bore 2 [two] additional entries – an exit from Tanzania via Kyaka border post on 14th April 2008 and an entry at Mutukula border post in Uganda on the same day. Therefore, while the deceased's journey terminated between Tunduma and Kyaka border posts in Tanzania, A1's journey proceeded with an entry into Uganda. This evidence thus corroborates the confessions of both accused persons that the deceased travelled with A1 from South Africa to Tanzania where he met his death.⁴¹

The High Court concluded that

I therefore find that the prosecution has proved beyond reasonable doubt that the accused persons travelled with the deceased up to Tanzania where he met his death; that a plan was hatched between the 2 accused persons to kill the deceased and take his property, and that the said plan was executed in Tanzania.⁴²

At sentencing, the High Court observed that:

[T]he convicts do stand convicted of terminating the life of a 36 year old man who was also at the prime of his life; had a 4 year old child... and was on his way to visit his family in Uganda.

33 *Angodua v Uganda* 5.

34 Section 391 of the Penal Code.

35 Sections 40 and 43(1)(a) of the Penal Code.

36 Section 17 of the Prevention and Prohibition of Torture Act, 2012.

37 Section 25 of the Computer Misuse Act, 2011.

38 International Criminal Court Act, 2010.

39 Jurisprudence emanating from this court include, *His Majesty Omusinga Mumbere v Uganda* (Criminal Misc. App No. 075 of 2016) [2017] UGHCCRD 12 (12 January 2017); *Thomas Kwoyelo alias Latoni v Uganda* (Const. Pet. No. 036 of 2011(reference)) [2011] UGCC 10 (22 September 2011).

40 *Uganda v Bakubye Muzamir & Anor* 4.

41 *Uganda v Bakubye Muzamir & Anor* 6.

42 *Uganda v Bakubye Muzamir & Anor* 7.

Further, the convicts were found to have been motivated by monetary gain to commit such a heinous crime. Furthermore, the proven murder was committed in a very wicked manner. Hitting another human being to a point of smashing his head beyond recognition and crashing [sic] his skull; not to mention abandoning his body in a bush in a foreign country is despicable and inhuman conduct.⁴³

It is therefore clear that the deceased was murdered in Tanzania. The accused transferred the deceased's vehicles to Uganda. This was also confirmed by the spokesperson of the Ugandan police in a newspaper interview.⁴⁴ The High Court found them guilty of murder and robbery although it found that they had committed the offences in Tanzania.

On appeal to the Court of Appeal, the appellants argued, *inter alia*, that the High Court judge erred "in law and fact when she adjudicated over a case in which she clearly had no jurisdiction to entertain."⁴⁵ The appellants added that the High Court judgment clearly showed that the offences of murder and robbery had been committed in Tanzania and that the accused moved with the deceased's items to Uganda.⁴⁶ The appellants added that the "offence of robbery was completely committed in the geographical boundaries of Tanzania."⁴⁷ The state argued that the Court had jurisdiction as "it was because of the commission of the offence of aggravated robbery that the murder was committed" and that "the robbery and murder were committed in both countries by virtue of section 5 of the Penal Code Act."⁴⁸ The prosecution added that "[t]here was theft; the taking of the deceased's property from one place to another. The act of transportation continued from Tanzania into Uganda. Some items stolen were recovered in Uganda."⁴⁹

The Court of Appeal referred to sections 4 and 5 of the Penal Code Act and observed that the issue to be resolved was whether the offences of murder and robbery "were committed wholly within the geographical boundaries of the Republic of Tanzania or were committed partly within the geographical boundaries of the Republic of Tanzania and Uganda."⁵⁰ The Court reviewed the evidence before it⁵¹ and held that

[T]he witnesses... established that the murder was committed in Tanzania which murder culminated into aggravated robbery. The robbery which was facilitated by the murder continued or spilled over to Uganda where the stolen properties were taken and/or removed from the deceased and found in possession of the appellants in Uganda. The actions of the appellants show that they had the intention to deprive the deceased of his ownership.⁵²

The Court added that the confessions of the appellants "show without any doubt that the robbery continued into the Republic of Uganda. The evidence of recent possession was overwhelming that the offences were committed partly within and partly beyond the jurisdiction of Uganda. And so section 5 of the Penal Code Act was applicable."⁵³ The Court referred to section 5 of the Penal Code Act and concluded that:

So to answer the first issue, whether the offences were committed whole or partly within the geographical boundaries of Uganda or Tanzania, the answer is that the offences were committed partly within the Republic of Tanzania and partly within the Republic of Uganda so that the trial judge was seized of jurisdiction... It would have been a different matter if the appellants after murdering the deceased and after clearing the goods handed them over to the relatives of the deceased. The definition of theft would not have fitted the facts.⁵⁴

On the question of whether the accused should have been extradited to Tanzania for their prosecution, the Court held that:

The offence of murder was committed fully in Tanzania to facilitate the commission of aggravated robbery. So we are satisfied that the two offences were committed partly in

43 *Uganda v Bakubye Muzamir & Anor* 14–15.

44 Bagala "Calls He Made to Relatives Helped Police Trace Victim's Body" (31 May 2015) *Daily Monitor* <http://www.monitor.co.ug/SpecialReports/688342-2734604-tr0buk/index.html> (accessed 17-04-2020).

45 *Bakubye & Anor v Uganda* (Criminal Appeal No. 102 of 2012 of 30 July 2015) 2.

46 *Bakubye & Anor v Uganda* 4.

47 *Bakubye & Anor v Uganda* 7.

48 *Bakubye & Anor v Uganda* 6.

49 *Bakubye & Anor v Uganda* 6.

50 *Bakubye & Anor v Uganda* 9.

51 *Bakubye & Anor v Uganda* 10–12.

52 *Bakubye & Anor v Uganda* 13.

53 *Bakubye & Anor v Uganda* 13–14.

54 *Bakubye & Anor v Uganda* 14.

Tanzania and partly in Uganda. There was no need for extradition and no need of the trial court to inquire into the circumstances under which the accused were tried in Uganda and brought before court.⁵⁵

On appeal to the Supreme Court, the Supreme Court observed that on the issue of jurisdiction, “the Court of Appeal held that the offences were committed partly within Tanzania and partly within Uganda and that therefore, the trial Judge was seized with jurisdiction in accordance with Section 5 of the Penal Code Act.”⁵⁶ However, the issue of jurisdiction was not raised before the Supreme Court.

4 ANALYSING THE JUDGMENTS

The High Court and the Court of Appeal found that the offence of murder was committed in Tanzania and that the offence of robbery was committed in Tanzania but continued in Uganda when the stolen property was transferred to Uganda. The issue of jurisdiction did not arise before the Supreme Court. It is argued that the Supreme Court could have used its inherent jurisdiction to correct this mistake by the Court of Appeal⁵⁷ and deal with the issue of whether section 5 of the Penal Code Act conferred jurisdiction on the High Court to try the offences that the accused had committed in Tanzania. This is important in light of the fact that courts are under the impression that section 5 of the Penal Code Act is applicable to all offences partly committed abroad. For example, in *Ddumba Muwawu v Uganda*⁵⁸ the Ugandan High Court referred to section 5 of the Penal Code Act and held that:

The territorial jurisdiction of the courts of judicature in criminal cases is prescribed in sections 4 and 5 of the Penal Code Act. Section 4(1) limits courts’ jurisdiction to ‘every place within Uganda.’ Section 5, on the other hand, extends the courts’ territorial jurisdiction to include offences partially committed within Uganda.⁵⁹

Courts in jurisdictions with legislation worded in the same manner as section 5 of the Penal Code Act have also come to the same conclusion. For example, *Roble & Ors v R*⁶⁰ the Seychellois Court of Appeal referred to section 7 of the Penal Code which is worded in exactly the same way as section 5 of the Ugandan Penal Code and held that it had jurisdiction over the offence of piracy partly committed in Seychelles and partly committed outside Seychelles.⁶¹ In his dissenting judgment, Justice Fernando held that:

Thus in respect of acts declared as offences under the Penal Code and committed partly within and partly beyond the jurisdiction of Seychelles, it is only those persons who within Seychelles does or makes [*sic*] any part of such act, who may be tried and punished under the Penal Code in the same manner as if such act had been done wholly within the Seychelles.⁶²

In *R v Dubignon*,⁶³ the Supreme Court of Seychelles held that section 7 of the Penal Code is of “extra-territorial operation.”⁶⁴ Likewise, the Supreme Court of Fiji held that section 6 of the Penal Code,⁶⁵ which is worded in the same way as section 5 of the Ugandan Penal Code

55 *Bakubye & Anor v Uganda* 16.

56 *Bakubye & Anor v Uganda* 2.

57 Rule 2(2) of the Supreme Court Rules provides that “[n]othing in these Rules shall be taken to limit or otherwise affect the inherent power of the Court, and the Court of Appeal to make such orders as may be necessary for achieving the ends of justice or prevent abuse of the process of any such Court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay.” For a detailed discussion of Rule 2(2) see, *Insingoma v Rubinga* (Civil Application No. 26 of 2014) [2015] UGSC 18 (15 October 2015). In *Nserenko & Ors v Bank of Uganda* (Civil Application No. 13 of 2009) [2011] UGSC 17 (21 November 2011), the Court observed that: “While it is true that this rule preserves the inherent jurisdiction of this court to make such orders as may be necessary for achieving the ends of justice, the applicants must demonstrate how they fall under the ambit of this rule.”

58 *Ddumba Muwawu v Uganda* (HCT-00-CR-SC- 169 of 2012) [2013] UGHCCRD 12 (28 March 2013).

59 *Ddumba Muwawu v Uganda* 5.

60 *Roble & Ors v R* (SCA CR 19/2013) [2015] SCCA 24 (28 August 2015).

61 *Roble & Ors v R* para 26.

62 *Roble & Ors v R*, dissenting Judgment of Justice A. Fernando, para 8.

63 *R v Dubignon* (CO 3/1998) [1998] SCSC 17 (27 October 1998).

64 *R v Dubignon* 4.

65 Section 6 provides that: “When an act which, if wholly done within the jurisdiction of the court, would be offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction.”

Act, is applicable to an offence which is partly committed in Fiji and partly committed in New Zealand.⁶⁶ The Court observed that:

As to the meaning of Section 6 of the Penal Code two constructions have been suggested, the first being that the section is limited to a person who is within the jurisdiction at the time he does or makes any part of such act, the second being that a person is covered by the section regardless of his whereabouts if he does or makes any part of such act within the jurisdiction. I am satisfied that the proper meaning of the section, applying the ordinary rules of syntax and the normal canons of construction is the second, and that the section may be paraphrased as follows: Every person who does or makes any part of an act within the jurisdiction of the court which is done partly beyond the jurisdiction and which if wholly done within the jurisdiction would be an offence against this Code may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction.⁶⁷

The Supreme Court of Belize also referred to a statutory provision which is worded as section 5 of the Ugandan Penal Code Act and held that it has jurisdiction over an offence of theft which is partly committed in Belize and party committed in a foreign country.⁶⁸ The Court agreed with the Director of Public Prosecution's submission that:

Section 5 of the Indictable Procedure Act enables the trial and punishment of a person who has done any part of any act, which if done in Belize, would be a crime under the Criminal Code in circumstances where the crime was committed by acts done partly within and partly outside of Belize.⁶⁹

The Court also held that "section 5 caters for inchoate criminal actions such as conspiracies, attempts and abetting which often form a prelude or part of a substantive nominate offence."⁷⁰ Kenyan courts have held that in terms of section 6 of the Penal Code,⁷¹ they have jurisdiction over offences committed partly in Kenya and partly outside Kenya.⁷² Likewise, the High Court of Malawi held that on the basis of section 5 of the Penal Code,⁷³ a Malawian court had jurisdiction over the offences of theft which "have their origin in Kenya but were purportedly completed in Malawi" because they were "partially committed in Kenya and partially in Malawi."⁷⁴ It is therefore clear that in many commonwealth countries with penal legislation which is similar to that of the Ugandan Penal Code Act, courts have held that they have jurisdiction over offences which are partly committed abroad.

66 *Regina v Marshall* [1973] FJLawRp 20; [1973] 19 FLR 98 (1 November 1973). The accused was convicted of criminal intimidation because "the threats to which the first count and the third count relate were contained in letters sent from New Zealand to Fiji and that the threat to which the second count relates was made in the course of a telephone call from New Zealand to Fiji." See also *In re Helmut Kasper Paul Rutten* [1992] FJHC 6 (24 August 1992), where the High Court also held that section 6 is on extra-territorial application.

67 *Regina v Marshall* 4.

68 The Indictable Procedure Act provides that:

4. The jurisdiction of the court for the purposes of the Code or any other law creating a crime extends to every place within Belize, or within any island or territory over which the Government exercises authority for the time being or within three miles of the coast of Belize, or of any coast of any such island or territory aforesaid.

5. When an act, which if wholly done within the jurisdiction of the court would be a crime against the Code or other law, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does, or abets any part of such act, may be tried and punished under the Code or other law, in the same manner as if such act had been done wholly within the jurisdiction.

69 *Said Musa and Earl Jones Magistrate for the Belmopan Court in the Cayo Judicial District 1 - Supreme Court Claim No. 155 of 2009* [2009] BZSC 39 (8 June 2009) para 50.

70 *Said Musa and Earl Jones Magistrate para 52.*

71 Section 6 provides that: "When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within jurisdiction."

72 See *Republic v Chief Magistrate's Court, Mombasa Ex-parte Mohamud Mohamed Hashi & 8 Others* [2010] eKLR; *George Wabwire Arende v Republic of Kenya* [2013] eKLR.

73 Section 5 provides that: "When an act which, if wholly done within the jurisdiction of the court, would be offence against this Code is done partly within and partly beyond the jurisdiction every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction."

74 *Republic v Masai and Another* (112 of 2005) (112 of 2005) [2006] MWHC 84 (16 March 2006) 6.

Leaving the issue of the application of section 5 to the offences partly committed in Uganda and in the other country, it is argued that the Ugandan court did not have jurisdiction over the offences of murder and robbery. This is because the facts were very clear that these offences were committed in Tanzania. The courts do not explain how murder was partly committed in Uganda and in Tanzania. Murder is not one of the offences referred to in section 4(2) of the Penal Code Act. As early as 1975 the Ugandan High Court held expressly that:

Whereas the state is competent to prosecute its nationals for offences committed abroad on the basis of nationality, however exercise of jurisdiction on the basis of nationality is not automatic, but municipal courts must be enabled to do so by legislation.⁷⁵

The accused in this case should have been extradited to Tanzania to be prosecuted for murder. However, the question of whether the court had the jurisdiction over the offence of aggravated robbery also raises an important issue. Section 285 of the Penal Code defines the offence of robbery in the following terms:

Any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained commits the felony termed robbery.

Section 286(2) of the Penal Code Act provides that

[W]here at the time of, or immediately before, or immediately after the time of the robbery, an offender uses or threatens to use a deadly weapon or causes death or grievous harm to any person, such offender and any other person jointly concerned in committing such robbery shall, on conviction by the High Court, be sentenced to death.⁷⁶

In *Uganda v Bakubye Muzamir & Anor*⁷⁷ the High Court held that:

I now revert to the offence of aggravated robbery. The prosecution is required to prove the following ingredients of aggravated robbery, as well as the participation of the accused persons beyond reasonable doubt: first, the incidence of theft; secondly, the use or threat of violence in the course of the theft, and finally for present purposes, causing death at, immediately before or immediately after the said theft.⁷⁸

In other words, as the High Court held in *Uganda v Kakembo*⁷⁹ the ingredients of the offence of aggravated robbery are the following: "1. Theft of property; 2. Use or threat to use a deadly weapon during immediately before or immediately after the theft or robbery or causing death or grievous harm; 3 Participation of the accused."⁸⁰ Like the offence of murder, the offence of robbery also took place in Tanzania. However, after the robbery was committed, the accused travelled to Uganda with the deceased's property and at the time of their arrest they were in possession of the property. Could the fact that they were found in possession of the property in Uganda be sufficient for the Court to have jurisdiction? The answer to this question lies not in invoking section 5 of the Penal Code Act – for the simple reason given above that the offence was wholly committed in Tanzania, but by resolving the issue of whether robbery is a continuing offence. The Court of Appeal seems to have held that robbery is a continuing offence when it stated that:

[T]he witnesses... established that the murder was committed in Tanzania which murder culminated into aggravated robbery. The robbery which was facilitated by the murder continued or spilled over to Uganda where the stolen properties were taken and/or removed from the deceased and found in possession of the appellants in Uganda. The actions of the appellants show that they had the intention to deprive the deceased of his ownership.⁸¹

75 See *Uganda v Etima Mustafa* [1975] HCB 253. In this case, which is also referred to in *Bakubye & Anor v Uganda* (Criminal Appeal No. 102 of 2012 of 30 July 2015, 4), the High Court held that Ugandan courts did not have jurisdiction over a Ugandan who committed the offence of obtaining money by false pretences in the Ugandan embassy in the then Zaire (now Democratic Republic of Congo).

76 It is important to note that the mandatory death sentence for, *inter alia*, murder, was declared unconstitutional by the Ugandan Supreme Court. See *Attorney General v Susan Kigula & 417 Ors* (Constitutional Appeal No. 03 of 2006) [2009] UGSC 6 (21 January 2009).

77 *Uganda v Bakubye Muzamir & Anor*.

78 *Uganda v Bakubye Muzamir & Anor*¹⁰.

79 *Uganda v Kakembo* (HCT-06-CR-SC-0076 of 2013) [2016] UGHCCRD 23 (27 April 2016).

80 *Uganda v Kakembo 2*.

81 *Uganda v Bakubye Muzamir & Anor* 13.

In the absence of legislation conferring upon courts jurisdiction over offences committed abroad, courts in different African countries such as South Africa, Namibia,⁸² Swaziland,⁸³ and Lesotho⁸⁴ have held that they have jurisdiction over the offence of theft which is committed abroad because theft is a continuing offence. As the South African High Court observed in *Shange and Others v S*⁸⁵ "[t]he rule that theft is a continuing crime means that theft continues to be committed as long as the stolen property remains in the possession of the thief or someone who has participated in the theft or someone who acts on behalf of such a person."⁸⁶ The question of whether robbery is also a continuing offence has been answered in the negative by the Court of Appeal of Lesotho and by courts in South Africa and Zimbabwe. In *R v Gogo*⁸⁷ the accused committed robbery in South Africa (Transkei) and was prosecuted in Lesotho and

The Crown conceded that the accused had no intention to kill but argued that the killing was unlawful because the police officers who arrested the deceased at Central Hotel did not have reasonable grounds for believing that he had committed any of the offences mentioned in Part II of the First Schedule of the Act. I agree with that submission because they were ordered by W/O Maluke who had formed the opinion that the deceased was involved in a robbery in Transkei. He was under the impression that robbery is a continuing offence. Robbery consists of the application of force – assault – and the taking of the thing from the victim – theft. I think it is the second element of robbery which is a continuing offence if the accused is from [sic] in possessing of the thing he took from his victim. In the instant case if the deceased was found in possession of the money stolen in Transkei here in Lesotho he could be arrested and be charged with theft. There was evidence that one of the robbers who was arrested in Transkei had told the police that the deceased was one of them. There was the motor car used as a getaway car which was found at the border between Lesotho and Transkei. That was an indication that one or some of the robbers came to Lesotho. W/O Maluke's belief was based on reasonable grounds. I am of the view that he had a right to order any of this [sic] men to go and arrest the deceased.⁸⁸

Likewise, in Zimbabwe⁸⁹ and South Africa,⁹⁰ courts have held that robbery is not a continuing offence. In light of the above discussion, it could be argued that if robbery is committed outside Uganda and the robbers move to Uganda with the stolen property, they would have to be prosecuted for theft as a continuing offence as opposed to being prosecuted for robbery. Otherwise, they should be extradited to the relevant country for prosecution. This is because Ugandan legislation as it stands today does not give Ugandan courts jurisdiction over the offence of robbery committed abroad. In light of the above discussion, it is argued that the accused's right to a fair trial was violated because the High Court did not have jurisdiction over the offences of murder and robbery.

5 CONCLUSION

In *Bakubye & Anor v Uganda* the High Court convicted the appellants for the offences of murder and robbery which were committed in Tanzania. Their conviction was confirmed by the Court of Appeal although they argued that, since the offences were committed in Tanzania, the Ugandan High Court did not have jurisdiction to try them. Their appeal to the Supreme Court was dismissed and the Supreme Court did not deal with the issue of whether the High Court had jurisdiction to try the appellants. In this article, it was argued that the High Court did not have jurisdiction over the offences of murder and robbery that the accused committed in Tanzania. The result, based on case law from different courts in Uganda, was that the accused's right to a fair trial and in particular the right to be tried by a court of competent jurisdiction was violated. Put differently, the appellants did not have a fair trial and should have been extradited to Tanzania to stand trial. Although Article 126(2)(e) of the Ugandan Constitution requires courts to administer justice without undue regard to technicalities, case law from

82 *S v Chanda* (CA9/05) [2005] NAHC 17 (23 June 2005).

83 *Dlamini v Rex* (04/13) [2013] SZSC 1 (21 February 2013).

84 *R v Koaesa* (CRI/A/28/82) (CRI/A/28/82) [1982] LSCA 69 (30 September 1982); *R v Badela* (CRI/A/49/91 CR 166/89) (CRI/A/49/91) [1994] LSCA 146 (19 August 1994).

85 *Shange and Others v S* [2017] 3 All SA 289 (KZP).

86 *Shange and Others v S* para 20.

87 *R v Gogo* (CRI/T\44\91) [1992] LSCA 100 (26 August 1992).

88 *R v Gogo* para 24.

89 *S v Ncube and Another* (B 160 1/2002) [2002] ZWBHC 126 (23 October 2002).

90 *S v Makhuta* 1969 (2) SA 490 (O) at 493A-B.

Ugandan courts shows that the provision is applicable to rules of procedure and not to issues of jurisdiction.⁹¹ As the Supreme Court held in *Mulindwa v Kisubika*,⁹² Article 126(2)(e) “is no license for ignoring existing law.”⁹³ In other words, as the Court of Appeal held, Article 126(2) (e) cannot be relied on to disregard substantive law.⁹⁴ Jurisdiction is an issue of substantive law. It is not a procedural issue. International law allows a country to establish jurisdiction over its nationals or residents over offences committed abroad.⁹⁵ It is recommended that Uganda may have to amend its law to specifically provide that Ugandan courts have jurisdiction over Ugandan nationals or residents who, while abroad, commit offences which are not crimes under international law such as murder and robbery. This would enable the prosecution of such nationals and residents in Uganda should the countries in which the offences were committed not seek their extradition or should Uganda decline to extradite them.⁹⁶ Amending the law to give Ugandan courts jurisdiction over offences such as murder and robbery which are committed abroad, would ensure that Ugandans who commit such offences abroad and cannot be extradited, for whatever reason, are prosecuted in Uganda. This is so especially since the Ugandan Extradition Act does not prohibit the government from extraditing its nationals and Uganda has extradited some of its nationals.⁹⁷ Case law also shows that Uganda has an active extradition programme with some countries and some murder suspects have been extradited from countries such as Tanzania to be prosecuted in Uganda.⁹⁸ Case law also shows that where a Ugandan committed murder and robbery and fled to Tanzania with the vehicle he had stolen from the deceased, he was arrested in Tanzania and extradited to Uganda where he was prosecuted, convicted and sentenced for those offences.⁹⁹ However, it is important that Uganda makes extradition arrangements with as many countries as possible because without such arrangement, for example, the relevant legislation or treaty, Uganda cannot extradite from or to a given country.¹⁰⁰ Ugandan law-enforcement authorities have to follow the correct extradition procedures to bring suspects to Uganda because Ugandan courts have held that they will not exercise jurisdiction over a person who has been brought to Uganda in violation of international law, for example, through abduction from a foreign state.¹⁰¹

91 See for example, *DFCU Leasing Co Ltd v Nasolo Faridah* ((HCT-00-CC-MA-0074-2007)) [2007] UGCOMMC 25 (22 March 2007); *Megha Industries (U) Ltd v Comform Uganda Limited* (Miscellaneous Cause No.21 of 2014) [2014] UGCOMMC 109 (20 August 2014).

92 *Mulindwa v Kisubika* (Civil Appeal No. 12 of 2014) [2018] UGSC 38 (2 August 2018).

93 *Mulindwa v Kisubika* 11.

94 *Nahurira v Baguma & 2 Others* (Civil Suit No 392 of 2014) [2015] UGCOMMC 76 (30 April 2015).

95 *Shaw International Law* (2010) 652–673.

96 Section 3 of the Extradition Act 1964 provides for circumstances in which Uganda may refuse to extradite a person.

97 Bagala “Ugandan to be Extradited to US Over Rape Case” (26 May 2017) *Daily Monitor* Available at <https://www.monitor.co.ug/News/National/Ugandan-to-be-extradited-to-US-over-rape-case/688334-3942504-crtqmh/index.html> (17 April 2020); Vision Reporter “Extradition” (19 June 2002) *The New Vision* https://www.newvision.co.ug/new_vision/news/1054894/extradition (accessed 17-04-2020) (Ugandan extradited to the United States of America to face trial for fraud and money laundering).

98 *Omar Awadh & 10 Ors v Attorney General* (Consolidated Constitutional Petition Numbers 55 and 56 of 2011) [2014] UGCC 18 (22 October 2014). In *Kakooza Godfrey v Uganda* (Crim. Appeal No. 03 of 2008) [2010] UGSC 11 (18 October 2010), the accused were extradited from Kenya to Uganda where they were prosecuted and convicted of robbery. See also *Uganda v Marunda* (Criminal Session Case No. 45 of 2014) [2016] UGHCCRD 17 (29 July 2016).

99 *Mukwaya Manasse v Uganda* (Criminal Appeal No. 7 of 1994) [1994] UGSC 14 (20 December 1994).

100 *Uganda v Kashaka & 5 Ors* (HCT-00-AC-SC 0047-2012) [2014] UGHCCAD 7 (17 July 2014) fn 50.

101 *Omar Awadh & 10 Ors v Attorney General* (Consolidated Constitutional Petition Numbers 55 and 56 of 2011) [2014] UGCC 18 (22 October 2014); *Altaff Hussein & 2 Ors Vs Eguma Blasio T.A Zebra Hotel Arua* (Miscellaneous Application No. 0047 of 2017) [2017] UGHCCD 152 (27 November 2017).