

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 3 OF 1999

CORAM: HON. MR. JUSTICE C.M. KATO, JA. ✓  
 HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA..  
 HON. MR. JUSTICE J.P. BERKO, JA.  
 HON. MR. JUSTICE S.G. ENGWAU, JA.  
 HON. MR. JUSTICE A. TWINOMUJUNI, JA.

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- 1. PAUL K. SSEMWOGERERE]
- 2. ZACHARY OLUM ].....PETITIONERS

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

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JUDGMENT OF HON. J.P. BERKO, JA.

My Lords, I have had the advantage of reading, in draft, the judgment prepared by my learned friend Twinomujuni in which he sets out the facts and discusses fully the question which arise in this petition. I will therefore not weary your Lordships by repeating them. I agree with him that the petition should succeed. I wish, however, to comment on a few aspects of the petition

*[Handwritten signature]*  
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The first relates to the supplementary affidavit of Hon. Rebecca Kadaga sworn to on 12/6/2000 and filed in this Court on the same day. The relevant part of the affidavit reads:-

- “(2) That on 6<sup>th</sup> June 2000, I swore an affidavit in support of the Attorney General’s answer to the petition.
- (3) That in the said affidavit, I stated that I was present in Parliament and there was quorum.
- 10 (4) That I can remember most of the members of Parliament who were present in the House on that day and particularly in the afternoon when the Referendum and Other Provisions Act 1999 was passed.
- (5) .....
- (6) That I have talked to the following and they have confirmed that they were present.”

20 This was followed by the names of some 102 members of Parliament including the names of Hon. Apollo Nsibambi, the prime Minister of the Country. The affidavit continues.-

“7. That it is clear that there was quorum in the House when the said act was debated and passed on 1/7/1999.

8. That what is stated herein above is true and correct to the best of my knowledge and belief save for paragraph 6 which is from information the source

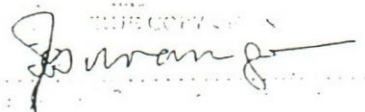
*Swearing*  
Referred to: \_\_\_\_\_

whereof is therein disclosed and which information I verily believe to be true".

The law with regard to the contents of affidavit is contained in Order 17(3) the Civil Procedure Rules. The marginal note reads: "~~Matters to which affidavits shall be confined~~". The rule provides:

10 "3(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, provided the grounds thereof are stated."

It is clear from the above that except in purely interlocutory matters affidavits must be restricted to matters within the personal knowledge of the deponent. They must not be based on information or be expression of opinion. Affidavits should be strictly confined to such facts as the deponent is able of his own  
20 knowledge to prove. Affidavits by persons having no personal knowledge of the facts and merely echoing the statement of claim cannot be used at the hearing. It is only in interlocutory applications that statement as to belief are permitted. This is clearly illustrated by the two authorities referred to by Mr. Cheborion Barishaki, the leading Counsel for the respondent. The case of *Nassanand & Sons (Uganda) Ltd. v East African Records Ltd (1959) EA 360* concerned an application for leave to serve summons outside the jurisdiction of the court. That was obviously an interlocutory application. The case of *Standard*



*Goods Corporation Ltd v Harakhachand Nathu & Co.* (1950) 17 E A 99 relied upon in *Nassanand & Sons (Uganda) Ltd* (supra) was an interlocutory application for security of costs. The case of *Aristella Kabwinukya<sup>m</sup> v John Kasiggwa*, (1978) HCB was about an application for leave to appeal out of time. That was also an interlocutory application. ~~A constitutional petition is not an interlocutory application. Therefore an affidavit in support of it must be restricted to facts the deponent is able of his own knowledge to prove and not facts based on information and belief.~~

10 The rule is so strict that even evidence on information and belief is not admissible on a proceeding which, though interlocutory in form, finally decides the rights of the parties (See *Gilbert v Endean* 9 Ch. 259 cited at page 1404 in Sarkar's Law of Evidence 13<sup>th</sup> Edition.) As the supplementary affidavit of Hon. Rebecca Kadaga was based on information given to her by some members of Parliament, it is hearsay and inadmissible to support the petition.

*Affidavit  
inadmissible*

20 The second point relates to the affidavit which has been described as "*Omnibus Affidavit*". The affidavit starts with the word "*We*". This is followed by the names of the alleged deponents. It then continues: "*do hereby solemnly swear and state as follows:*

(1) *That we are adult citizens of Uganda.*

(2) *That we are Members of the 6<sup>th</sup> Parliament of Uganda.*

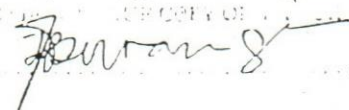
*Burundi*

(3) *That we attended Parliament on the 1<sup>st</sup> July, 1999 in the afternoon and participated in the proceedings relating to the enactment of the Referendum and Other Provisions Act 1999.*

(4) *That when the Referendum and Other Provisions Act was passed, there was quorum.*

10 (5) *That therefore what is stated in the affidavits of Hon. Zachary Olum, Omara Atubo and Reiner Kafiire is not true".*

The list of the alleged deponents was attached. It is not disputed that two or more persons may join in an affidavit. The commencement of the affidavit shows that the deponents joined in the affidavit. But a close look at the list of the alleged deponents attached reveals a rather disturbing situation. Since the deponents joined in the affidavit one would have expected the list to follow a chronological order. That was not so in this case. What we have  
20 is that some names have been erased. The erasures have not been authenticated by the initials of the officer who commissioned the affidavits. If the erasures were made before the commissioning, then the Commissioner for Oaths ought to have authenticated them by his initials. As he did not do so, the affidavit cannot be used in court. On the other hand, if the erasures were made after the affidavit was commissioned, it cannot be used as the alterations have not been so authenticated.

  
REINER KAFIIRE

Apart from the form of the affidavit, the impression one gets, when one looks at the affidavit, is that it was prepared by somebody and commissioned. A list of possible deponents was typed and taken round. Those who were available and were willing <sup>and</sup> ready to sign did so. Those who were not available, or were available but unwilling to sign refused to append their signatures. The names of those who did not sign were then erased. The affidavit therefore leaves a lot to be desired and cannot be regarded as a document coming from Honourable members of Parliament of Uganda. It was a futile attempt to defend what was indefensible. That attempt failed miserably as the reality of the situation, as revealed in the Hansard, could never be changed irrespective of the "wisdom" brought to bear on it.

I find it unnecessary to go into the merits of the petition as they have been handled ably by my Lords. I would grant the declarations and remedies sought in the petition. The petitioners will have costs of the petition with a certificate for two advocates.

20 Dated at Kampala this 10<sup>th</sup> day of Aug. 2000.

~~J.P. Berka~~

Justice of Appeal.

ORIGINAL TRUE COPY OF THE AFFIDAVIT  
*[Signature]*

THE REPUBLIC OF UGANDA  
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CORAM: HON. LADY JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ.  
HON. MR. JUSTICE C.M. KATO, JA.  
HON. LADY JUSTICE E.A.N. MPAGI-BAHIGEINE, JA.  
HON. MR. JUSTICE J.P. BERKO, JA.  
HON. LADY JUSTICE C.N.B. KITUMBA, JA.

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CONSTITUTIONAL PETITION NO. 1 OF 2001

CHARLES MUBIRU.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

RULING OF THE COURT:

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This Constitutional Petition is brought by one Charles Mubiru said to be a remand prisoner at Luzira Government Prison. It is brought under article 137 of the Constitution and the provisions of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992 as modified by the Directions, 1996, Legal Notice No. 4 of 1996.

The petition seeks the following declarations:

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- (a) that S. 14(A)(1) of the Trial on Indictments Decree as amended by Act 9 of 1996 and as interpreted by the Principal Judge, are inconsistent with article 23(6)(a) of the Constitution;
- (b) in the alternative but without prejudice to prayer (a), grant a declaration that S. 14(A)(1) of the Trial on Indictments Decree as amended by act 9 of 1998, is permissive,
- (c) that the decision of the Principal Judge rejecting the applicant's application, without being heard, is inconsistent with article 28(1) of the Constitution;

- (d) that the decision of the Principal Judge rejecting the applicant's application on the basis of S. 14 (A) (1) of the Trial on Indictments Decree as amended by Act 9 of 1998, whereas he and/or other Judges of the Court have granted bail to applicants charged with the same category of offences as the applicant is charged without proof to the satisfaction of the court of special circumstances, is inconsistent with article 21 of the Constitution.

The petitioner, in the circumstances, prays that the court exercises its discretion under article 137(3)(b) of the Constitution and grant bail to the petitioner or refers the application to the High Court to consider and grant bail to the petitioner on conditions the court considers reasonable. The petitioner also prays for costs of the petition. The petition is supported by the affidavit of the petitioner.

In answer to the petition the Attorney general has contended:-

- (1) that the petition does not disclosed a cause of action, is misconceived and incompetent as it raises no questions as to interpretation of the Constitution. It is therefore incompetent and improperly before the court and should be dismissed,
- (2) that S.14 (A)(1) of the Trial on Indictments Decree as amended by Act 9 of 1998 is not inconsistent with and does not contravene or infringe article 23(6)(a) of the Constitution,
- (3) that S. 14(A)(1) of the Trial on Indictments Decree as amended by Act 9 of 1998 does not contravene article 28 (1) of the Constitution.
- (4) that the Attorney General is not liable for acts of judicial officers in the exercise of their judicial powers and functions;
- (5) that the petition seeks to challenge the ruling of the Principal Judge for which this court has no jurisdiction;
- (6) that the petition does not call for the interpretation of article 21 of the Constitution and
- (7) that there is no evidence supporting the petition.



The answer ended with a prayer that the petition be struck out summarily and/or dismissed with costs. The answer is supported by an affidavit deponed by one Alfred Okello – Oryem, a State Attorney in the Attorney General's chambers.

At the hearing of the petition, Mr. Cheborion Barishaki, Director of Civil Litigation, who appeared for the Attorney General with M/s. Angela Kiryabwire raised three preliminary objections. The first challenged the affidavit in support of the petition on the ground that it is defective; the second is that the petition does not disclose a cause of action against the Attorney General and the third is that this court lacks jurisdiction to entertain the petition as the petition does not raise any matter for the interpretation of the Constitution.

After hearing the arguments from learned counsel for the Attorney General and the petitioner, we adjourned to consider our ruling which was to be given on Notice. Before the ruling could be delivered the petitioner was released on bail. The petitioner, having realised that he had got what he had hoped to achieve by the petition, instructed his advocate to withdraw the petition. Learned counsel duly filed a Notice of withdrawal on 15<sup>th</sup> March 2001. This ruling has as result, become an academic exercise to set the record straight.

On the first point of objection, Mr. Cheborion contended that the affidavit in support of the petition offends Order 17, rule 3(1) of the Civil Procedure Rules which provides:

*"17(3)(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory application, on which statements of his belief may be admitted, provided the grounds thereof are stated."*

According to him, the affidavit contains matters on information and advice. Such affidavit can only be used in interlocutory applications. A constitutional petition is not an interlocutory application. Therefore it is wrong and improper to support it with an affidavit on information and belief. He relied on constitutional Petition No. 3 of 1999 *Paul K. Ssemogerere and Another v Attorney General*. (unreported).

The offending parts of the petitioner's affidavit read:-

10 "8. That I was produced at the High Court but I was surprised when my Advocate found me in cells and informed me that the Principal Judge had rejected my Application without giving me a hearing because it did not disclose special circumstance to warrant my release on bail,

9. That I have been advised by my Advocate, Mr. Blaze Babigumira and I verily believe the same to be true that the decision of the Principal Judge to reject my bail Application without giving me a hearing, infringed my right of not to be condemned to indefinite remand without a hearing,

20 10. That when I instructed my lawyer to appeal to Court of Appeal he advised me that such a decision is not appealable hence this petition for declarations and/or redress sought.

11. That I am advised by lawyer Mr. Blaze Babigumira that in fact the Principal Judge and/or other Judges of the Court have released Applicants charged with offences under S. 14(A)(2) of the Trial on Indictments Decree as amended by act 9 of 1998, without proof of any special circumstances. This violates my right to be treated equally before the law.

30 12. That I have been advised by my advocate Mr. Babigumira Blaze, that S. 14(a)(1) Trial on Indictments Decree as amended by the Act

4 of 1998 and as interpreted by the Principal Judge, infringes on my rights to have my bail heard and granted on terms and conditions as the court may consider reasonable.

13.....

14. That what is stated herein is true and correct to the best of my knowledge and information/advise the source of which are herein above disclosed".

It is clear that the matters deponed in the affidavit are not within the personal knowledge of the deponent. He was merely echoing the information given to him by his legal advisor. Such an affidavit cannot be relied upon in a constitutional petition. See *Constitutional Petition No. 3 of 1999; Paul K. Ssemogerere and Another v Attorney General (supra)*.

Rule 12(1) of the Constitutional Court (Petitions for Declarations under article 137 of the Constitution) Directions, 1996 Legal Notice No. 4 of 1996 requires all evidence at the trial in favour of or against a constitutional petition to be by affidavit read in open court. The only affidavit in support of the instant petition is the affidavit of the petitioner. If that affidavit cannot be relied upon, then there is no evidence in support of the petition. The petition is therefore incompetent.

This ground alone should have been enough to dispose of the petition. We wish, however, to deal briefly with the two remaining objections. The second objection relates to cause of action against the Attorney General. The petitioner complains against the action of the Principal Judge in refusing his bail application without hearing him. In his view the action of the Principal Judge infringed his constitutional rights under article 28 of the Constitution.

The Attorney General can be held vicariously liable for anything done or omitted to be done by a servant of the government, if that servant can be held liable for his acts. Article 128(4) of the Constitution provides:

*"A person exercising judicial power shall not be liable to any action or suit for any act or omission by that person in the exercise of judicial power."*

10 Under the above provision a judicial officer cannot be sued for "any act or omission" by him in the exercise of his judicial powers. Also under S. 4(5) of the Government Proceedings Act, Cap. 69, no proceedings can be instituted against the Government in respect of anything done or omitted to be done "*by a judicial officer whilst discharging any responsibilities of a judicial nature or any responsibilities or connection with the execution of Judicial process*". The Hon. Principal Judge refused the petitioner's application for bail when he was discharging a judicial function. Therefore the petitioner cannot sue the Attorney General for the alleged act or omission of Principal Judge. As a result, the second preliminary objection also should have succeeded.

20 As regards the third point of objection, it is now beyond dispute that for this court to have jurisdiction, the petition must show on the face of it, that interpretation of the Constitution is required. It is not enough to allege merely that a constitutional provision has been violated. See *Ismail Serugo v Kampala City Council and Another, Constitutional Appeal No. 2 of 1998*.

30 The petitioner's complaint is that the Principal Judge rejected his bail application without giving him a hearing. This, according to him, contravenes *article 28(1) of the Constitution*. In our view there is nothing put in issue which requires the interpretation of article 28( c) of the Constitution. The complaint is about a right which is alleged to have been violated. That right is enforceable *under article 50 of the Constitution* by any competent court.

The petitioner also complains that the requirement of proof of special circumstance under S. 14(A)(1) of Trial on Indictment Decree as amended by Act 9 of 1998 is inconsistent with article 23(6)(a) of the Constitution which provides:

"23(6) where a person is arrested in respect of a criminal offence –

- (a) the person is entitled to apply to the court to be released on bail and the court may grant that person bail on such conditions as the court considers reasonable".

Clearly on the face of it, the provisions of S. 14(A)(1) of the T.I.D. as amended appear to be in conflict with article 23(6)(a) of the Constitution. This court therefore would have had jurisdiction in this aspect of the petition if the petition was supported by evidence. As we have found that the petition lacked evidence, it could not be entertained.

Accordingly the preliminary objections, would have been upheld and the petition would have been struck out.

Dated at Kampala this 23<sup>rd</sup> day of March 2001.

*L.E.M. Mukasa-Kikonyogo*  
L.E.M. Mukasa-Kikonyogo  
Deputy Chief Justice.

*C.M. Kato*  
C.M. Kato  
Justice of Appeal.

*A.E.N. Mpagi-Bahigeine*  
A.E.N. Mpagi-Bahigeine  
Justice of Appeal.

*J.P. Berko*  
J.P. Berko  
Justice of Appeal.

*C.N.B. Kitumba*  
C.N.B. Kitumba  
Justice of Appeal.

